XIV. Torts

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A. Introduction

While the survey period saw a relatively large number of appellate opinions in the tort area, a rather small proportion of these opinions was significant in enunciating new law. The most significant single development in the survey period was the passage of the Indiana Comparative Fault Act, effective January 1, 1985.[1] Inasmuch as the Act and its significance have been exhaustively discussed in a symposium in a recent issue of this publication,[2] the reader is referred to that issue for analysis of the Act.

B. Negligence

1. Duty to Anticipate Negligence of Others.—In *Pilkington v. Hendricks County Rural Electric Membership Corp.*,[3] the Indiana Court of Appeals considered several instructional issues relating to the duty to anticipate the negligence of others. The case arose when a nine-year-old girl received electrical burns while watching races at the Indianapolis Raceway Park. The girl was seated on temporary metal bleachers, and another spectator at the top of the bleachers somehow contacted a 7200 volt uninsulated power line belonging to the defendant. The current passed through the spectator, the metal bleachers, and then the girl. The bleachers had been installed under the supervision of the Indianapolis Raceway Park. Although such bleachers had been erected in past years, at the time of the accident, additional taller bleachers had been installed to accommodate an expected larger crowd, and the additional bleachers brought the top of the stands within two feet of the uninsulated line. It was undisputed that the defendant utility company was not notified about the expansion of the bleachers.

In affirming a verdict for the defendant, the Indiana Court of Appeals concluded that the utility company was not under a duty to anticipate negligence on the part of the race track. The court held that in the absence of knowledge or notice to the contrary, a person has no duty to anticipate negligence on the part of others, and is entitled to assume that others will exercise ordinary care and to act on that assumption.[4]

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[1] IND. CODE § 34-4-33-1 to -13 (Supp. 1984).

[2] *See Symposium on the Indiana Comparative Fault Act*, 17 IND. L. REV. 687 (1984).

[3] 460 N.E.2d 1000 (Ind. Ct. App. 1984).

[4] *Id.* at 1004.

The standard of care applied to the utility was an objective one, based on whether the utility knew or should have known of the hazard and anticipated the danger. Absent knowledge or notice, there is no liability.

Consistent with this principle, the court held that the electric utility did not have to constantly monitor or police its power lines in order to make sure that nothing was in dangerous proximity to them.[5] In this case, a representative of the utility had inspected the raceway premises only a few days before the accident. At that time, however, the temporary bleachers were not yet in place. Presumably, if a representative of the utility had visited the site once the temporary stands had been erected, knowledge or notice would be imputed, and it would have been possible to hold the utility liable. In the absence of such proof, however, no duty was found.

2. Borrowing Standards of Care.—In some areas, Indiana law extends liability at least as far as, or perhaps farther than, most other jurisdictions.[6] This is particularly apparent in cases where courts employ borrowed standards of care. Two interesting instances of this borrowing occurred during the survey period.

In the first instance, *Elsperman v. Plump*,[7] the Indiana Court of Appeals reaffirmed the developing line of authority that holds that a provider of alcoholic beverages may be liable for injuries inflicted by an intoxicated person as a result of the intoxication, where the result is reasonably foreseeable and the provision of the liquor is in violation of statute.[8] In *Elsperman*, an infant's parents brought a wrongful death action against a bartender and his employer, a Moose Lodge, alleging that a patron was served liquor after he had become noticeably intoxicated. Refusing the offer of another patron to drive him home, the intoxicated individual drove away from the lodge and only seconds later was involved in a head-on collision with the car in which plaintiffs' decedent was a passenger. After the intoxicated driver had settled, the case against the bartender and the lodge went to a jury on the theory that the defendants had been negligent in serving alcoholic beverages to an individual who was to their knowledge intoxicated, in violation of an Indiana statute which makes it unlawful to sell, barter, deliver, or give away an alcoholic beverage to an intoxicated person if the provider knows that the person is intoxicated.[9]

The jury in *Elsperman* found the lodge and the bartender negligent

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[5]*Id.* at 1006.

[6]*See generally* Vargo, *Torts, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 341 (1984).

[7]446 N.E.2d 1027 (Ind. Ct. App. 1983).

[8]*See, e.g.*, Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Parrett v. Lebamoff, 408 N.E.2d 1344 (Ind. Ct. App. 1980); Brattain v. Herron, 159 Ind. App. 663, 309 N.E.2d 150 (1974).

[9]IND. CODE § 7.1-5-10-15 (1982).

and rendered a verdict against them. The trial court granted a judgment notwithstanding the verdict, but the court of appeals, upon examination of the record, concluded that there was ample evidence to show a violation of the statute and reinstated the jury verdict.[10]

Thus, Indiana courts have employed a seemingly unimportant criminal statute to create a civil standard of negligence. Although the penalty imposed under the criminal statute is relatively inconsequential, the potential for large jury verdicts in civil actions exists. Moreover, the borrowed standard of care may be imposed upon categories of defendants previously thought to be immune from liability.

For example, a recent New Jersey case[11] attracted national attention when that state's supreme court held that a social host who provides intoxicating liquor to a guest knowing the guest to be intoxicated and knowing that the guest will soon drive is liable for injuries inflicted on a third party as a result of the negligent operation of a motor vehicle by the guest, if the negligence is caused by the intoxication. Nothing in Indiana law, other than the strong policy considerations set forth in the dissent in the New Jersey case,[12] prevents Indiana from reaching the same result, since under *Brattain v. Herron*[13] there is no legal distinction between an ordinary social provider of liquor and a tavern keeper.[14]

Indiana, like many other states, once had a Dram Shop Act which directly imposed civil liability upon tavern keepers for damage caused by intoxicated patrons. Although that statute has long since been repealed by the legislature, it has effectively been reenacted, perhaps upon a broader scale, by the judiciary.

Another interesting use of a borrowed standard of care is illustrated in *Duke's GMC, Inc. v. Erskine.*[15] The plaintiff, Erskine, lost sight in one eye while playing golf when he was struck by a golf ball hit by a player in the foursome behind him. The plaintiff requested, and the court gave, an instruction which stated, in effect, that all people playing golf are entitled to assume that their fellow players will observe the rules and regulations of the game. Duke's GMC, appealing a jury verdict in favor of the injured golfer, argued that this instruction effectively elevated the rules of golf to the same level as law.

While denying that the instruction had this effect, the court of appeals effectively indicated that even the rules of a sport may serve as the source of an implied standard of care. As the court put it:

> The recognized rules of a sport are at least an indicia of the standard of care which the players owe each other. While

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[10]446 N.E.2d at 1032.

[11]Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984).

[12]*Id.* at 560-70, 476 A.2d at 1230-36 (Garibaldi, J., dissenting).

[13]159 Ind. App. 663, 309 N.E.2d 150 (1974).

[14]*Id.* at 674, 309 N.E.2d at 156.

[15]447 N.E.2d 1118 (Ind. Ct. App. 1983).

> a violation of those rules may not be negligence per se, it may well be evidence of negligence. Neither player in this instance was a novice golfer and both parties were aware of the rules and etiquette of the game. Yet there was evidence presented that [the defendant] violated one or more of those rules; the result of which was [the plaintiff's] injury. Therefore, [the plaintiff] was entitled to such an instruction.[16]

3. Contributory Negligence as a Matter of Law.—The Indiana Court of Appeals considered several cases in which defendants argued that plaintiffs were contributorily negligent as a matter of law. While contributory negligence will soon be relegated to very limited factual situations by the new Comparative Fault Act, an examination of these decisions is, nonetheless, instructive because they serve to emphasize the great difficulty of proving contributory negligence as a matter of law. Of the four cases where the argument was made in the court of appeals, only in one case did it succeed. That case was *Gasich v. Chesapeake & Ohio Railroad*.[17]

Gasich was a wrongful death action against the railroad, its engineer, and its conductor which arose out of a fatal auto-train collision. After the plaintiff's case had been presented, the defendants moved for judgment on the evidence, and the trial court granted the motion on the ground that the plaintiff's decedent had been contributorily negligent as a matter of law. The court of appeals affirmed the trial court after an exhaustive review of the facts.[18]

The evidence at trial indicated that Gasich drove his vehicle past two witnesses sitting in a station wagon. He did not look to either side, but approached the railroad crossing in ignorance of the oncoming train. The crossing was marked with a standard crossbuck warning sign, and there were neither visual obstructions nor inclement weather to impair visibility. The train, with its headlight on as it approached the crossing, sounded its horn at a distance of approximately 1300 feet from the crossing, and its bell tolled continuously as it approached the intersection. The plaintiff's argument that her husband did not hear the train was effectively vitiated by the fact that the train had been clearly audible and visible to the witnesses in the station wagon. Gasich proceeded into the crossing and died as a result of the collision. The court of appeals found that Gasich's failure to pay attention to the oncoming train, when by looking he could have seen it and by listening he could have heard it in time to avoid the collision, rendered him contributorily negligent as a matter of law.[19]

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[16]*Id.* at 1124.

[17]453 N.E.2d 371 (Ind. Ct. App. 1983).

[18]*Id.* at 379.

[19]*Id.* at 376.

An interesting contrast with this point of view is found in *Jones v. Gleim*,[20] which originated in the same district of the court of appeals as the *Gasich* opinion. In *Jones*, the plaintiff crossed a street in the middle of a block after looking both ways and seeing no cars approaching. Because it was dusk at the time and raining very hard, visibility was poor. As she ran across the street, Jones was hit by the defendant's car. As in *Gasich*, the trial court granted the defendant's motion for judgment on the evidence at the close of the plaintiff's case.

On appeal, the defendant argued that Jones was guilty of contributory negligence as a matter of law because she did not yield the right of way to the defendant's car as required by statute and she failed to keep a lookout as she was running across the street. The court of appeals majority conceded that Jones had violated a statute but held that this merely shifted the burden to the violating party to come forward with evidence that compliance was "impossible or excusable."[21] The court reversed and remanded the issue of contributory negligence as one for the jury. The majority emphasized that Jones' violation of the traffic statute would be excused and, therefore, would not constitute negligence if the jury disbelieved the defendant's testimony that his headlights were on and instead inferred that Jones did not see the approaching car because its lights were off.[22]

Judge Hoffman, in a persuasive dissent, argued that the majority had engaged in a weighing of the facts and credibility of the trial testimony. While Judge Hoffman agreed that the jury might well have chosen to disbelieve the defendant's testimony that his lights were on, there was no evidence in the record to contradict that testimony, and it therefore had to be considered as a fact that the defendant's lights were on. Marshalling the other evidence in the record, Judge Hoffman concluded:

> As stated by the majority Jones' conduct, crossing the street at the center of the block, violated a traffic statute and constituted prima facie evidence of Jones' negligence. This coupled with the uncontroverted evidence . . . clearly establishes that no question exists as to Jones' contributory negligence. An individual whose vision is impaired by the weather and is deaf in one ear does not act reasonably in crossing a street at the center of a block on a dark, rainy and foggy night. This is especially so when the relative safety of a crosswalk is near at hand and known to the party.[23]

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[20]460 N.E.2d 1017 (Ind. Ct. App. 1984), *vacated*, 468 N.E.2d 205 (Ind. 1984).

[21]460 N.E.2d at 1018.

[22]*Id.* at 1019.

[23]*Id.* at 1020-21 (Hoffman, J., dissenting). Since this survey Article was written, the Indiana Supreme Court granted transfer and vacated the decision of the court of appeals for the reasons stated by Judge Hoffman. Jones v. Gliem, 468 N.E.2d 205 (Ind. 1984).

Gasich and *Jones* illustrate the difficulties of the contributory negligence doctrine. The *Jones* case in particular reveals that courts may go to considerable lengths in order to avert the harsh results that must ensue if a plaintiff is found contributorily negligent.

In the same vein as *Jones* is the result in *Brock v. Walton*.[24] The plaintiff, Brock, was traveling south on a highway when a car traveling in the other direction swerved across the center line, briefly returned to its own lane, and then swerved again directly toward Brock. Brock's vehicle left over sixty feet of skid marks leading toward the right-hand berm, but a head-on collision nonetheless resulted in which Brock was injured. The case went to a jury, which found Brock guilty of contributory negligence. Brock challenged the verdict on the theory that it was not supported by the evidence. The court of appeals, in a two-to-one decision, reversed and remanded for a new trial on the theory that the skid marks demonstrated that Brock was at least aware of a threatening emergency and attempted some sort of evasive action, despite his testimony that he never saw the other car coming across the center line.[25]

Once again, the dissent, this time by Chief Judge Buchanan, seems more persuasive. The dissenting opinion emphasized that under the rules of appellate review, where the claim is a lack of sufficiency of the evidence, the court "must affirm unless there is a *total* lack of evidence supporting the jury verdict."[26] In Chief Judge Buchanan's reasoning, there were many possible factors that may have informed the jury's verdict in *Brock v. Walton*. For one, Brock's admission that he never saw the oncoming car before the impact constituted "devastating" evidence of failure to keep a lookout, and consequently provided adequate support for the jury's finding of contributory negligence.

A more typical holding in the area of contributory negligence as a matter of law was enunciated in *Public Service Co. of Indiana v. Gibbs*.[27] In *Gibbs*, the court affirmed a judgment for the plaintiff who had suffered electrical injuries when a fertilizer hopper truck he was operating came into contact with an uninsulated power line. The defendant argued that the plaintiff had been contributorily negligent as a matter of law because of his testimony that he had observed the power lines for approximately nine years and knew of their general location. The court found that the plaintiff's testimony that he had looked up and did not see the wires created a conflict in the evidence. Thus, as the court reasonably concluded, any reversal based on contributory negligence as a matter of law could only result from a reweighing of the conflicting evidence and could not be reached under the applicable standard of review relating to negative judgments.[28]

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[24]456 N.E.2d 1087 (Ind. Ct. App. 1983).

[25]*Id.* at 1092.

[26]*Id.* at 1094 (Buchanan, C.J., dissenting) (citation omitted).

[27]460 N.E.2d 992 (Ind. Ct. App. 1984).

[28]*Id.* at 995.

4. Open and Obvious Danger Rule Expanded to Negligence.—The so-called "open and obvious" doctrine was first clearly announced in Indiana jurisprudence in the 1980 case, *Bemis Co. v. Rubush.*[29] The doctrine, applicable in products liability cases, operates to preclude liability where the defect in a product was apparent or should have been apparent to the ordinary user or consumer of the product.[30] From a defendant's standpoint, the "open and obvious" doctrine has proved invaluable in the products liability context, because the rule creates an objective standard rather than a subjective standard.[31] Moreover, the focus of the "open and obvious" doctrine is attractive to defendants. Analysis under this doctrine focuses upon the nature of the danger and whether it should be obvious to the ordinary user. In a contributory negligence analysis, on the other hand, the focus is on the behavior of the plaintiff and whether he exercised due care for his own safety.[32] Because of this difference in focus, it is inherently easier for a court to decide, as a matter of law, that the nature of a danger was such that it should have been apparent to the person who encountered it than it is for a court to conclude that a plaintiff did not exercise reasonable care for his own safety. Typically, it is not difficult for a plaintiff to create an issue of fact, and therefore get to the jury against a contributory negligence defense, by stating facts which would support the hypothesis that he exercised due care for his own safety. However, it is another matter for a plaintiff to create a genuine issue of fact with respect to whether a particular danger is or should have been open and obvious.

During this survey period, the Indiana Court of Appeals made the benefits of the "open and obvious" doctrine accessible to defendants in cases involving negligence outside the products liability context. In *Law v. Yukon Delta, Inc.*,[33] the court concluded that it is logical to apply the "open and obvious" rule in *all* negligence actions, not merely those involving products.[34]

Law arose when the plaintiff, a business invitee on a service call, slipped and fell on Yukon's business premises. The trial court granted

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[29]401 N.E.2d 48 (Ind. Ct. App. 1980), *vacated on other grounds*, 427 N.E.2d 1058 (Ind. 1981), *cert. denied*, 459 U.S. 825 (1982).

[30]401 N.E.2d at 56. *See also* Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977); Burton v. L.O. Smith Foundry Prods. Co., 529 F.2d 108 (7th Cir. 1976); Posey v. Clark Equip. Co., 409 F.2d 560 (7th Cir. 1969); Cates v. Jolley, 268 Ind. 74, 373 N.E.2d 877 (1978).

[31]To illustrate, a defendant attempting to prove the ordinary incurred risk defense to products liability must show that the plaintiff had actual subjective knowledge of the risk, yet nonetheless proceeded unreasonably to use the product. Such actual knowledge need not be proven under the open and obvious rule; if the danger presented by the product merely "should have been" apparent to the user, recovery is precluded.

[32]*See supra* notes 17-28 and accompanying text.

[33]458 N.E.2d 677 (Ind. Ct. App. 1984).

[34]*Id.* at 679.

the defendant's motion for summary judgment, and the appellate court affirmed. The court of appeals noted that Justice Pivarnik's enunciation of the "open and obvious" rule in *Bemis* included products liability actions based upon *negligence* as well as those based upon strict liability. The court determined that an expansion of the "open and obvious" doctrine to the facts of the case before it was appropriate:

> First, all negligence actions involve the same closed set of prima facie elements as a basis of recovery whether they sound in products liability or otherwise. Further, the "open and obvious danger" rule is a consistent and logical factor to consider when determining whether a person has acted in an ordinary and reasonable fashion. A person that engages in activity with the knowledge that he is exposing himself to an open and obvious danger can hardly be regarded reasonable or prudent.[35]

The court then reviewed the evidence, noting that the plaintiff had proceeded through an area of the defendant's plant containing numerous obstacles. As the plaintiff continued, he became aware that the floor was wet and slippery. He asked no one for help, but proceeded until the fall occurred.

Arguably, *Law* does not represent a true extension of the "open and obvious" doctrine. The court depended very heavily upon the fact that the plaintiff was actually aware of the wet and slippery condition of the floor. Thus, the analysis in the majority opinion in *Law* did not focus upon the nature of the danger and whether it *should have been* apparent to the plaintiff; instead, it focused upon the plaintiff's subjective state of awareness as evidenced in his deposition, and the reasonableness of his course of action subsequent to becoming aware of the danger. There is nothing in *Law* that would preclude sustaining a motion for summary judgment on either contributory negligence or incurred risk grounds. Therefore, because the analysis did not transcend traditional contributory negligence or incurred risk analyses, it remains to be seen whether or not *Law* actually portends an expansion of the "open and obvious" doctrine.

C. Premises Liability

1. Trap Theory.—In *Gaboury v. Ireland Road Grace Brethren, Inc.*,[36] the Supreme Court of Indiana, in a divided opinion, provided a thoughtful analysis of the duty of a landowner in respect to a possible trap or pitfall on his land. The plaintiff in *Gaboury* was riding his motorcycle at approximately one o'clock in the morning. When he drove past the

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[35] *Id.*

[36] 446 N.E.2d 1310 (Ind. 1983).

intersection where he had intended to turn, the plaintiff decided to turn around in a church parking lot at the end of the road. The plaintiff headed for the driveway to the church parking lot. This progress was abruptly halted, however, with resulting physical injuries, by a steel cable which had been stretched across the driveway by the church in order to prevent public use when church was not in session. The state of the plaintiff's knowledge was somewhat unclear, because the plaintiff made significantly different statements in an affidavit and in a deposition.[37] In the deposition, the plaintiff claimed awareness of the area and everything about it except for the fact that the cable was present across the church driveway. In the affidavit, however, the plaintiff stated that he could not be sure where the end of the road was located, and was not aware that he had entered church property.

The plaintiff also sued the City of South Bend. The plaintiff's case against the city was premised on the theory that the city had a duty to light its streets in order to illuminate the church property, including the cable in question. All justices, except Justice Hunter,[38] agreed that the city had absolutely no duty to light its streets in such a way as to illuminate adjacent private property and disclose traps or pitfalls on such property.[39]

In addition to sustaining the city's motion for summary judgment, the supreme court also sustained a summary judgment in favor of the landowner, Ireland Road Grace Brethren. Implicitly concluding that the plaintiff in this case was a licensee, the court rejected the argument that the cable was a trap or hidden danger, constituting an exception to the rule that a licensee takes the land as he finds it.[40] The court adopted the following definition of a trap: "a danger which a person who does not know the premises could not avoid by reasonable care and skill; or . . . a hidden danger lurking on the premises which may be avoided if [known]."[41] Measured against these standards, the court found that

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[37]The *Gaboury* case is significant from a procedural standpoint alone, in that it holds that an affidavit which contradicts prior sworn statements in a deposition, without further explanation, does not suffice to create issues of fact that will defeat a summary judgment motion. *Id.* at 1314.

[38]Justice Hunter maintained that evidence before the trial court disclosed an alternative theory of negligent design or construction of the city street, and he appears to say that the complaint was sufficient to withstand a summary judgment for that reason. Justice Hunter did not comment directly on the majority's holding that there is no duty on the part of a municipality to illuminate adjacent private property. *Id.* at 1316-17 (Hunter, J., dissenting).

[39]*Id.* at 1314.

[40]Swanson v. Shroat, 169 Ind. App. 80, 345 N.E.2d 872 (1976).

[41]446 N.E.2d at 1315 (citing Bischel v. Blumhost, 429 S.W.2d 301, 304 (Mo. Ct. App. 1968)). The alteration in this quote reflects the correct form, used by the *Bischel*

the closing of a driveway by stretching a cable across it is not "so unusual a situation" that it may be considered dangerous or hazardous. The court concluded the plaintiff could have avoided injury through the use of ordinary and reasonable care.[42] The court was not specific about precisely what steps could be taken by a licensee, in the exercise of ordinary and reasonable care, to discover such a cable stretched across a driveway in time to stop.

In dissent, Justice DeBruler followed the reasoning of the court of appeals[43] and concluded that the church had, at least at some point, invited the public onto the property. The cable was stretched across the driveway in order to withdraw the invitation. Despite the conflicting versions given by the plaintiff, he was consistent about one thing, and that was that he did not know that the cable was there. Justice DeBruler, joined by Justice Hunter, would have imposed a limited duty on landowners who wish to take steps to temporarily close their properties to the public to use "such means and measures under the circumstances as are perceivable and understandable by one actually about to enter, so that the mind can come to an appreciation that the owner does not want him to do so, and thus command the body to turn about and go another way."[44] While this dissent raises significant questions about the opinion on its facts, the case is important, nonetheless, because of its effort to define what constitutes a "trap" or "pitfall."

2. Landowner's Duty to Protect Invitee from Acts of Third Parties.— In *Bearman v. University of Notre Dame*,[45] the court of appeals liberally interpreted the duty of the operator of a place of public entertainment to keep the premises safe for invitees. The case arose when the Bearmans, husband and wife, attended a football game at Notre Dame. As they were walking through the parking lot toward their car, the couple observed two men who were apparently drunk. In the process of passing Mrs. Bearman, one of the men fell into her from behind, knocking her to the ground and causing her to sustain a broken leg. Mrs. Bearman argued that as she was a business invitee of Notre Dame, the university had a duty to protect her from injury caused by the acts of others on the premises. Notre Dame's position was that it did not have notice of the particular danger posed to the plaintiff; and in the absence of such notice, it had no duty to protect Mrs. Bearman.

The trial court granted summary judgment to the university on the

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court. 429 S.W.2d at 304 (quoting 65 C.J.S. *Negligence* § 63 (1966)). The *Gabourg* court's opinion used "unknown" where the term "known" should have been used. *See* 446 N.E.2d at 1315 (citing *Bischel*, 429 S.W.2d at 304).

[42]*Id.*

[43]Gaboury v. Ireland Road Grace Brethren, Inc., 441 N.E.2d 227 (Ind. Ct. App. 1982), *vacated*, 446 N.E.2d 1310 (Ind. 1983).

[44]446 N.E.2d at 1316 (DeBruler, J., dissenting).

[45]453 N.E.2d 1196 (Ind. Ct. App. 1983).

theory that it did not have actual or constructive knowledge of the danger. The appellate court agreed that although a landowner has a duty to exercise ordinary and reasonable care to protect a patron at a place of public entertainment from injury caused by third persons, the landowner must first have actual or constructive knowledge of the danger.[46] However, the court of appeals reversed and remanded on the theory that Notre Dame had reason to know, from past experience, that there was a likelihood that alcoholic beverages would be consumed on the premises before and during the football games and that tailgate parties would be held in the parking areas around the stadium. The court quoted the following passage from section 344 of the Restatement (Second) of Torts:

> "If the place or character of [the landowner's] business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection."[47]

Based on this duty, the court found that it was a jury question whether or not Notre Dame had employed adequate protective measures, given its knowledge of the presence of tailgate parties and intoxicated fans in the parking areas around the stadium.[48]

3. Statutory Protection for Landowners Allowing Free Use of Land.— In *Schwartz v. Zent*,[49] the court of appeals considered a plaintiff's action against landowners for damages resulting from a hunting accident. The accident occurred when Zent, who had permission to hunt on the landowner's property, fired a shot which escaped the boundaries of that property and injured Schwartz, who was trapping on the land of a neighbor. The trial court directed a verdict in favor of the landowners, relying upon Indiana Code section 14-2-6-3, which exempts a landowner from liability for "any injury to person or property" caused by an act or omission of other persons using his premises.[50] Schwartz argued that since he himself was not within the landowners' property when the injury occurred, the statute did not apply to him. The court, however, held that the phrase "any injury to person or property" employed in the statute rendered Schwartz' location when injured of no relevance.[51]

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[46] *Id.* at 1198.

[47] *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 344 comment f (1965)).

[48] 453 N.E.2d at 1198.

[49] 448 N.E.2d 38 (Ind. Ct. App. 1983).

[50] IND. CODE § 14-2-6-3 (Supp. 1984).

[51] 448 N.E.2d at 40.

D. Miscellaneous Torts and Defenses

1. False Imprisonment.—In a case of first impression, the Indiana Court of Appeals established a "good faith" test as a defense to an action for false imprisonment. In *Barnes v. Wilson*,[52] police officers arrested Tony Barnes, Jr. when the warrant should have been issued for a Tony Barnes, Sr. The warrant in question simply read "Tony R. Barnes." According to the plaintiff, he repeatedly told the arresting officers that he was the wrong man, and asked them to "check it out." However, the police took him to jail and kept him there over the weekend. The plaintiff was released when the court discovered the mistake on the following Monday morning.

Judge Ratliff reviewed the law concerning the civil liability of police officers for false imprisonment arising from the mistaken service of a warrant on a person with a similar name. While some jurisdictions hold that a police officer acts at his peril in serving a warrant, the court of appeals adopted a more moderate view. The court decided that "where an officer executes a warrant, and believes in good faith that the person taken into custody is the person named in the warrant, the officer will not be civilly liable in an action for false imprisonment absent circumstances tending to suggest that the wrong person has been arrested."[53] The court of appeals found that the trial court had essentially applied the good faith test, but that it was mistaken in granting summary judgment for the police.[54] The plaintiff's repeated protestations over being arrested and his requests to "check it out" clearly created a genuine issue of material fact as to whether or not information was presented to the police officers tending to negate their belief that they had arrested the right man.

2. Guest Statute Inapplicable to Watercraft.—In *Clipp v. Weaver*,[55] the Indiana Supreme Court considered the possible application of the motor vehicle guest statute[56] in a novel factual context. The plaintiff's decedent was a passenger in a motorboat driven by Weaver. Weaver's boat collided with another and the plaintiff's decedent was killed. One argument asserted by the defendant was that Indiana's motor vehicle guest statute ought to apply in cases involving accidents between water-

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[52]450 N.E.2d 1030 (Ind. Ct. App. 1983).

[53]*Id.* at 1033.

[54]*Id.*

[55]451 N.E.2d 1092 (Ind. 1983).

[56]The court considered the possible application of IND. CODE § 9-3-3-1 (1980) (current version at IND. CODE § 9-3-3-1 (Supp. 1984)). Since the decision in *Clipp* was rendered, the guest statute has been amended. The term "guest" has been limited to hitchhikers or members of the operator's family. IND. CODE § 9-3-3-1 (Supp. 1984). The amended version of the guest statute would have been clearly inapplicable to the facts in *Clipp*. For a more extensive discussion of the guest statute's amendments, see Arthur, *Insurance, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 265, 287-88 (1985).

craft. Obviously, plaintiffs in such cases would be in a much more difficult position if the guest statute applied, because the legal standard that must be proven is that the defendant acted with willful and wanton disregard of the safety of his passenger. If the guest statute does not apply, however, only the ordinary negligence standard of a lack of reasonable care need be proven.

In refusing to extend the reach of the guest statute to watercraft, the supreme court noted that the legislature had specifically applied the willful and wanton standard to aircraft.[57] Because the legislature had not specifically applied the standard to boats, the court saw no reason to extend the statute judicially to cover boats.[58] The court observed that boat operators are normally far more aware of the potential dangers associated with boats than are their passengers. Further, the court focused on the language of the watercraft statute requiring that all boats shall be operated "in a careful and prudent manner."[59] According to the court, this language and similar references in other sections of the watercraft statute indicated a legislative intent that an ordinary care standard, not a willful and wanton standard, ought to be applied in all accidents involving watercraft, whether the victims may be passengers or others.[60]

3. Governmental Immunity: Scope of Defense for Firefighters.—In *City of Hammond v. Cataldi*,[61] two restaurant owners sued the City of Hammond on the theory that the city's negligence in fighting a fire at the restaurant resulted in its complete destruction. Although city firefighters did attempt to contain the blaze, the plaintiffs alleged that the fire department failed to control the fire due to negligent training, supervision, and administration of the department by the officials in charge; failed to allocate men properly to the equipment on hand; and failed to have enough equipment or manpower. Additionally, the plaintiffs accused the city of spreading the fire through negligent firefighting methods.

The city moved for summary judgment on the theory that all the actions taken by the fire department in fighting the fire were discretionary and that the city was therefore immune from suit under the Indiana Tort Claims Act,[62] which provides in part that governmental entities or their employees acting within the scope of their employment are not liable if a loss results from the performance of a discretionary function.[63] The trial court denied summary judgment.

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[57]*See* IND. CODE § 8-21-5-1 (Supp. 1984).
[58]451 N.E.2d at 1094.
[59]IND. CODE § 14-1-1-16 (1982).
[60]451 N.E.2d at 1094.
[61]449 N.E.2d 1184 (Ind. Ct. App. 1983).
[62]IND. CODE § 34-4-16.5-1 to -19 (1982 & Supp. 1984).
[63]*Id.* § 34-4-16.5-3(6) (Supp. 1984).

In an unusual procedural move, the court of appeals agreed to review the trial court's denial of summary judgment on interlocutory appeal. The decision of the trial court was reversed, and summary judgment was granted. The appellate court relied upon prior law establishing a distinction between "discretionary" and "ministerial" acts.[64] A duty is discretionary if it involves judgment as to whether or not to perform a certain act. In contrast, a duty is ministerial if it is performed without the exercise of judgment as to the propriety of the act being done. The court concluded that the plaintiff's allegations failed to show on their face that the actions complained of were ministerial and not discretionary.[65]

The analysis of the court of appeals, resulting in the grant of a summary judgment, is questionable. Admittedly, the complaint in this matter was not drafted as carefully as it might have been. However, the requirements of notice pleading were met by the allegation of "erroneous and negligent fire fighting methods."[66] There was at least some possibility, based upon the facial allegations of the complaint, that ministerial actions took place. Moreover, the court of appeals seemingly allocated the burden of proof improperly. The governmental immunity doctrine and its variations constitute an affirmative defense, and the mere possibility that ministerial actions could have occurred in the course of fighting the fire should have sufficed to preserve the complaint from a motion for summary judgment based on these governmental immunity grounds.

E. Proximate Causation

While there were no sharp departures from existing precedent in the area of proximate causation, there were several opinions in this area which cogently restated the law in a tort context. Perhaps the most comprehensive of these was *Colaw v. Nicholson*,[67] where Judge Neal authored a thoughtful and scholarly exposition on the proximate cause issue. In *Colaw*, a head-on collision occurred between two cars on a two-lane highway. The plaintiff's decedent was thrown from his vehicle; he fell into the westbound lane of the highway, still alive but badly injured. A few minutes later, defendant Nicholson, traveling in the eastbound lane toward the scene of the accident, saw one victim walking in the middle of the road and swerved into the westbound lane to miss

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[64]From a policy standpoint, this distinction does not appear very satisfactory as a basis for governmental immunity. It simply invites buckpassing by those involved, because it will be a defense if they say they were merely following orders.

[65]449 N.E.2d at 1187.

[66]*Id.* at 1186 (quoting the trial court record at 11-12).

[67]450 N.E.2d 1023 (Ind. Ct. App. 1983).

him. Consequently, Nicholson ran over the plaintiff's decedent. The decedent died shortly thereafter from multiple injuries and shock.

Over objection, the trial court admitted evidence that the plaintiff's decedent was thoroughly intoxicated at the time of the accident, his blood alcohol level being approximately two and one-half times the legal limit. The plaintiff's objection was based on relevance: as a result of the initial collision, the decedent was lying helpless in the highway and was no different than a sober person who is so injured.

The court of appeals viewed the plaintiff's objections as an assertion that the second impact was an intervening and superseding force which would terminate any contributory negligence in the form of intoxication.[68] The court then analyzed and commented upon some of the leading Indiana proximate cause cases. This historical analysis led to the conclusion that a variety of factors may contribute to or determine the result in a particular case involving sequential accidents, including the element of timing and the conditions involved in the original accident.[69] The court suggested that because the first collision occurred on a dark, rainy, and foggy night, it was reasonably foreseeable that other motorists might run into the wreck. Thus, the negligence causing the first collision continued, and any evidence of intoxication bearing on negligence or contributory negligence was admissible over an objection of relevance.[70]

The leading case of *Slinkard v. Babb*,[71] which is important to defendants for its statement of the "mere condition" rule,[72] was reinforced as the law of Indiana in *Havert v. Caldwell*.[73] In *Havert*, the plaintiff, a police officer, pulled his police car into a parking lane. Another car abruptly stopped behind the police car and was promptly struck in the rear by defendant Caldwell's car. The police officer and the driver whose car had been struck moved to inspect the damage. While the two men were standing between the cars which had collided, a drunken driver coming down the parking lane struck the back of the rearmost vehicle, creating a chain reaction which pinned the two men between the two automobiles which had been involved in the initial collision. The officer sued the drunken driver and also sued Caldwell,

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[68]*Id.* at 1026.

[69]*Id.* at 1029.

[70]*Id.*

[71]125 Ind. App. 76, 112 N.E.2d 876 (1953).

[72]The "mere condition" rule, enunciated in *Slinkard v. Babb*, provides that if the defendant's acts do no more than furnish a condition by which the subsequent injury to the plaintiff is made possible, the defendant's acts cannot be held to be the proximate cause of the plaintiff's injuries. *Id.* at 85, 112 N.E.2d at 880.

[73]452 N.E.2d 154 (Ind. 1983). For a further discussion of this case, see Pardieck, *The Impact of Comparative Fault in Indiana, Symposium on the Indiana Comparative Fault Act*, 17 IND. L. REV. 925, 931 n.34 (1984).

the driver of the rearmost car which had been involved in the initial collision.

Caldwell moved for partial summary judgment and the trial court granted the motion. The Indiana Court of Appeals reversed the grant of partial summary judgment and remanded for further proceedings.[74] The supreme court granted Caldwell's transfer petition, vacated the opinion of the court of appeals, and reinstated partial summary judgment in favor of Caldwell. The supreme court found that Caldwell's act of negligence in driving into the rear of the car ahead of him was not the proximate cause of the injury to the police officer, even though it might be said that Caldwell's act "set in motion the chain of events" that ended in the injuries to the officer.[75] According to the supreme court, it was not reasonably foreseeable that a drunken driver would proceed down a parking lane and collide with a car already situated in that lane in the same manner as any legally parked car would have been.[76] In effect, the activity of the drunken driver was an intervening cause which broke the chain of causation between the original negligence of Caldwell and the injuries to the police officer. It is perhaps significant, however, that the court avoided the use of the "mere condition" language which marks the *Slinkard* decision.

These cases serve to emphasize that while the fundamental principle of proximate causation, the test of reasonable foreseeability, is easily stated, it is by no means easy to apply in many factual situations. Because the test ultimately amounts to a policy decision, the courts usually avoid the resolution of proximate cause issues as matters of law and leave them to the jury.

F. Damages

1. Property Damage Rule Where Property is Repairable or Restorable.—In *Hann v. State*,[77] the Indiana Court of Appeals considered a small property damage judgment in favor of the state. The court acknowledged the long-standing rule in Indiana that if personal property has been damaged by the fault of another but is repairable, the measure of damages is the difference in the fair market value of the property immediately before and immediately after the event in question plus any amount "reasonably expended" as a proximate result of the wrongful act.[78]

At issue in *Hann* was the type of evidence required to prove the before and after value of the damaged property. The state argued that

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[74]Hook v. Caldwell, 426 N.E.2d 708, 711 (Ind. Ct. App. 1981).

[75]452 N.E.2d at 158.

[76]*Id.* at 159.

[77]447 N.E.2d 1144 (Ind. Ct. App. 1983).

[78]*Id.* at 1146.

repair bills alone would constitute prima facie evidence of the difference between the vehicle's before and after fair market values, and contended that when the plaintiff presents such evidence, the burden of refuting it or showing that such costs are unreasonable shifts to the defendant. Refusing to accept the state's "burden-shifting" argument, the court of appeals adopted a rule which allows a plaintiff a choice in proving damages where the property is repairable or restorable. The plaintiff may prove the difference between the fair market value immediately before and immediately after the event in question, or may submit evidence of the cost to repair or restore the property.[79] If a plaintiff elects to submit evidence of repair costs, the evidence must be accompanied by proof of the actual physical damage to the property, plus proof that the cost of repair was reasonable and that it bore a "reasonable relationship to the difference between the fair market value of the property just before and just after the traumatic event."[80]

2. Punitive Damages: Malice Requirement Extended to Tort Actions.—In *Miller Pipeline Corp. v. Broeker*,[81] the court of appeals extended the malice requirement imposed in contract actions[82] to punitive damage awards in the tort field. *Broeker* arose out of a rear end collision which resulted when the defendant's brakes failed. During the ten day period prior to the accident, the red brake warning light had been lighted on the defendant's truck. Furthermore, for several days before the accident, the brakes had seemed increasingly unreliable, particularly during the afternoon hours. The truck had been taken to the defendant's maintenance department, where the problem was reported to a mechanic on the day before the collision. The mechanic checked the brake fluid level and checked the pedal for pressure, determined that the truck had brakes at the moment, and conducted no further examination or repairs. The plaintiff's expert testified that the brake defects responsible for the collision did not occur suddenly and could have been discovered before the accident had the mechanic inspected the brakes more thoroughly. A judgment for compensatory and punitive damages resulted.

In reversing the punitive award, the court of appeals rejected the plaintiff's contention that no showing of malice, ill will, or intentional wrongdoing was necessary. The plaintiff argued that a showing that the defendant acted "willfully in an abusive, wanton or oppressive manner

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[79]*Id.* at 1147.

[80]*Id.* In other words, it is incumbent on the plaintiff, should he elect to prove damages by submitting evidence on the cost of repair, to present proof as to (1) the damage sustained; (2) the reasonableness of the cost of repair; and (3) the relationship of the cost of repair to fair market value.

[81]460 N.E.2d 177 (Ind. Ct. App. 1984).

[82]*E.g.*, Prudential Ins. Co. v. Executive Estates, 174 Ind. App. 674, 369 N.E.2d 1117 (1977).

in heedless disregard of the consequences"[83] should suffice to support a punitive verdict. The court of appeals responded that "heedless disregard of the consequences" is simply not enough to justify the imposition of punitive damages.[84] Because the defendant did not send the truck out on the road knowing that there were uncorrected defects, the court of appeals concluded that the defendant lacked the requisite malicious state of mind required by *Prudential Insurance Co. v. Executive Estates.*[85] The court conceded that the defendant's conduct may have manifested a heedless disregard of the consequences, or at least more than a mere failure to exercise reasonable care. However, there was no proof that the defendant engaged in the sort of reprehensible conduct that implied a "consciousness of intended or probable effect calculated to unlawfully injure the personal safety or property rights of others."[86]

The *Miller Pipeline* decision, taken together with the "clear and convincing evidence" standard enunciated in *Travelers Indemnity Co. v. Armstrong*,[87] appears to clarify greatly the standard of proof required to justify punitive damages in Indiana tort cases. Obviously, the standard is not an easy one to meet.

G. Conclusion

During the survey period, Indiana decisions in the torts field continued to reflect the judiciary's reluctance to engage in judicial legislation. The torts field is, nonetheless, changing. Increasingly, remedies in the legislature are being sought and obtained where the courts have refused to legislate. While Indiana courts are often castigated for their aversion to legislating, they should be commended for their continuing efforts to preserve the balance between the branches of state government, and for recognizing that the legislature, as the branch of government most closely responsible to the people, should take the lead in debating and implementing far-reaching changes in Indiana tort law.

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[83]460 N.E.2d at 179.

[84]*Id.* at 185.

[85]174 Ind. App. 674, 369 N.E.2d 1117 (1977), *cited in Miller Pipeline*, 460 N.E.2d at 185.

[86]460 N.E.2d at 180 (quoting Hibschman Pontiac, Inc. v. Batchelor, 340 N.E.2d 377 (Ind. Ct. App. 1976) (Garrard, J., concurring)).

[87]442 N.E.2d 349 (Ind. 1982).