# XIII. Torts

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During the survey period, the Indiana courts have continued to keep pace with the general trends in the law of torts. One trend is to expand the base of recovery for tortious conduct by recognizing rights and duties[1] and by removing traditional immunities.[2] A second trend is to grant increasing recognition to individual rights, particularly in cases involving liability for defamation.[3] A third trend is to consolidate the many varied and intricate qualitative standards of care applicable in negligence cases into a general standard requiring the use of due care under all of the circumstances.[4] Not all tort cases decided under Indiana law are discussed herein. An effort has been made, however, to discuss those cases which may be of importance to the practitioner.

## *A. Intentional Torts*

In *Saloom v. Holder*,[5] the court of appeals clarified Indiana's position concerning the tort liability of a police officer who arrests an individual for the violation of a law subsequently declared unconstitutional. Assuming, without deciding, that the statute under which the plaintiff was arrested was unconstitutional, the *Saloom* court held that a police officer is protected under color of law if the arrest were made in good faith.[6] The court set forth the caveat, however, that there is Indiana authority to the contrary with respect to lay persons who precipitate or make an arrest of another on the basis of a statute subsequently declared uncon-

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[1]*See, e.g.*, Brattain v. Herron, 309 N.E.2d 150 (Ind. Ct. App. 1974).

[2]*See, e.g.*, Campbell v. State, 284 N.E.2d 73 (Ind. 1972); IND. CODE §§ 34-4-16.5-1 to -18 (Burns Supp. 1974).

[3]*See, e.g.*, Gertz v. Robert Welch, Inc., 94 S. Ct. 2997 (1974).

[4]*See, e.g.*, Hammond v. Allegretti, 311 N.E.2d 821 (Ind. 1974); Ayr-Way Stores, Inc. v. Chitwood, 300 N.E.2d 335 (Ind. 1973) (products liability).

[5]304 N.E.2d 217 (Ind. Ct. App. 1973).

[6]*Id.* at 220. This holding is in accord with the general view. *See* W. LAFAVE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 47, at 366 (1972); R. PERKINS, CRIMINAL LAW 924 (2d ed. 1969); MODEL PENAL CODE § 204(3)(b). *See also* W. PROSSER, LAW OF TORTS § 25, at 128 (4th ed. 1971) [hereinafter cited as PROSSER].

stitutional.[7] Hopefully, this caveat was set forth as a suggestion to extend, in a proper fact situation, the same protection to laymen. The distinction between police officers and laymen in this context is difficult to justify. It is folly to presume that either police officers or laymen will be able to anticipate the ultimate resolution of the difficult legal questions presented when the constitutionality of a state statute is challenged.

Three cases decided during the survey period involved defamation privileges. In *Meirs v. Combs*,[8] the court of appeals held that statements made in a pleading are absolutely privileged if they are pertinent or relevant to the judicial proceedings. Relevancy is a question of law, and statements in a pleading should be liberally construed in favor of relevancy. On the other hand, in *Sanders v. Stewart*,[9] the "presumptive privilege" conferred by Indiana Code section 22-4-17-9[10] upon persons who furnish information to the Indiana Employment Security Division was held to be a qualified privilege which could be overcome by an affirmative showing of falsity and malice. Finally, in *Big Wheel Restaurants, Inc. v. Bronstein*,[11] the court of appeals followed the general rule that the federal privilege does not apply to statements made with actual malice.

The problems involved with "defamation per se" classifications and the constitutional privilege are complicated by the recent United States Supreme Court decision in *Gertz v. Robert Welch, Inc.*[12] In *Gertz*, the Supreme Court refused to extend the *New York Times, Inc. v. Sullivan*[13] privilege to cover cases involving the defamation of private individuals and held that the states may provide for the compensation of private individuals by any appropriate standard short of strict liability.[14] The Court further held that private individuals may not recover presumed or puni-

[7]Coleman v. Mitnick, 137 Ind. App. 125, 202 N.E.2d 577 (1964).

[8]297 N.E.2d 436 (Ind. Ct. App. 1973).

[9]298 N.E.2d 509 (Ind. Ct. App. 1973).

[10]IND. CODE § 22-4-17-9 (Burns 1974).

[11]302 N.E.2d 876 (Ind. Ct. App. 1973).

[12]94 S. Ct. 2997 (1974).

[13]376 U.S. 254 (1964). Dean Prosser calls the privilege conferred by the Court in *Sullivan* "the greatest victory won by the defendants in the modern history of the law of torts." PROSSER § 118, at 819.

[14]The majority in *Gertz* stated simply that the states may define the appropriate standards of liability "so long as they do not impose liability without fault . . . ." 94 S. Ct. at 3010. In dissenting opinions, Justices Burger and White spoke in terms of liability for negligence. *Id.* at 3014, 3025. Justice Blackmun, concurring with the majority, also construed the majority opinion to condition liability on negligence. *Id.* at 3014. Thus, it would seem that the Court has created a watered-down privilege in cases in which the plaintiff is not a public figure.

tive damages without first showing that the defendant had "knowledge of falsity or reckless disregard for the truth."[15] The Court spoke only to the issue of the liability of publishers and broadcasters and left open the question of the liability of other defamation defendants.[16] Since per se classifications are based upon the concept of presumed damages,[17] any per se classifications involving the liability of publishers and broadcasters must now include the requirement that the defendant act with reckless disregard of the truth or knowledge of the falsity of the defamatory statement. In all other cases, evidence of actual injury must be introduced, although actual injury is not limited to pecuniary loss and may include injury to reputation, mental distress, and personal humiliation.[18] Since the holding in *Gertz* is based upon first amendment grounds, it is, of course, binding upon Indiana courts.

In *Soft Water Utilities, Inc. v. LeFevre*,[19] a case involving an allegedly fraudulent sale of capital stock, the court of appeals discussed the various elements necessary for recovery based upon fraud. The most pertinent part of the court's discussion is that which concerns the element of reliance. The court stated that a person relying on a misrepresentation is "bound to use ordinary care and diligence to guard against fraud," but a person "has a right to rely on representations where the exercise of reasonable prudence does not dictate otherwise."[20] One difficulty which arises with the use of the phrase "ordinary care" in fraud cases is that one soon reaches the logical, but erroneous, conclusion that contributory negligence is a defense to an intentional tort. Counsel must remember that, when a court uses the phrase "ordinary care" in fraud cases, it means that the element of justifiable reliance is not satisfied when plaintiff's conduct is altogether foolish.[21] The phrases "reasonable prudence," "reasonable reliance," and "ordinary care" should be eliminated from the causal requirement of justifiable reliance[22] and should be appropriate only in cases of negligent misrepresentation.

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[15] *Id.* at 3011.

[16] Justice White stated in his dissenting opinion that the majority in *Gertz* was concerned with the "communications industry." *Id.* at 2032.

[17] *See* PROSSER § 112, at 762.

[18] 94 S. Ct. at 3012.

[19] 308 N.E.2d 395 (Ind. Ct. App. 1974).

[20] *Id.* at 398.

[21] *See* PROSSER § 108, at 715.

[22] The Advisors to the *Restatement* have recommended that the following language be adopted: "Failure of the recipient of a fraudulent misrepresentation to investigate it does not prevent his justifiable reliance upon it, although he might have ascertained the falsity of the representation by such investigation." RESTATEMENT (SECOND) OF TORTS § 540, at 126 (Tent. Draft No. 10,

### B. Negligence

The expansion of individual rights and duties has been particularly apparent in negligence cases. In *Brattain v. Herron*,[23] the sister of a person under twenty-one years of age knowingly permitted him to consume alcoholic beverages at her home with knowledge that he would soon be driving his car on a public highway. He left her home intoxicated and, shortly thereafter, was involved in an automobile accident in which four persons were killed. The decedents' representatives brought a consolidated action against the minor's sister on the grounds that she violated an Indiana statute which makes it illegal to sell, exchange, barter, give, provide or furnish alcoholic beverages to a person under the age of twenty-one,[24] and that the violation of the statute constituted negligence per se. A substantial verdict was rendered in favor of the plaintiffs and the defendant appealed on the ground that the trial court erred when, *inter alia*, it submitted the issue of negligence to the jury. The court of appeals followed the general rule that the "violation of a statute enacted for safety reasons is negligence per se"[25] and held that, under prior law,[26] the statute in question was deemed a safety regulation. With this established, the *Brattain* court held that the issues of negligence and proximate cause were properly submitted to the jury. The court refuted the defendant's contention that the statute confers negligence liability only upon persons who sell alcoholic beverages, but carefully limited its holding to cases in which a person furnishes liquor to a minor with either subjective or objective knowledge that the minor would later be driving on a public highway.[27]

Proof of the violation of a statute enacted for safety reasons does not, in itself, establish liability. In *Surratt v. Petrol, Inc.*,[28] the issue of negligence liability arose from the theft of a car in which the defendant had left his ignition key. The court held, as a matter of law, that the negligent leaving of ignition keys in a parked automobile "could not be considered the proximate cause of injuries later resulting from the negligent operation of the

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1964). The Advisors rejected the recommendation of the American Law Institute Council, which voted eleven to nine to have the section read: "The recipient of a fraudulent misrepresentation is justified in relying upon its truth without investigation, unless he knows of facts which make his reliance *unreasonable*." *Id.* (emphasis added).

[23]309 N.E.2d 150 (Ind. Ct. App. 1974).

[24]IND. CODE § 7-1-1-32(10) (Burns 1972).

[25]309 N.E.2d at 156.

[26]Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966).

[27]309 N.E.2d at 157.

[28]312 N.E.2d 487 (Ind. Ct. App. 1974).

stolen automobile by a thief."[29] The court refused to adopt the rule of some jurisdictions that the owner is liable for such injuries when the ignition key is left in a car parked in a "high crime area."[30] Throughout its opinion, the court postulated the negligence of the defendant on the basis of a statute which makes it illegal to leave a motor vehicle unattended without first removing the ignition key.[31] If negligence is to be postulated on the ground that a thief's erratic driving is one of the foreseeable risks which a statute is designed to prevent, so that violation of the statute is negligence, then it is difficult to understand why the risk was not foreseeable and thus a proximate consequence of the defendant's act.[32] Since it is not unusual for a "no duty" case to be decided under the guise of proximate cause, one suspects that the true basis of the holding in *Surratt* was the defendant's lack of duty.

In *Memorial Hospital v. Scott*,[33] the supreme court considered the proper application of the reasonable man standard to the issue of contributory negligence. The plaintiff, a multiple sclerosis victim who was taking medication, was severely burned when he mistakenly activated a hot water knob located near the flusher of a toilet he was using. After a trial on the issues of negligence and contributory negligence, the jury returned a verdict in favor of the defendant. Upon the plaintiff's filing of a motion to correct errors, the trial court weighed the conflicting evidence and ordered a new trial. In support of its findings of fact, the trial court concluded that the plaintiff was not contributorily negligent because he was unaware of the hot water knob and the dangers it presented. The court of appeals reversed on the ground that the trial court had erroneously reached this conclusion by considering the physical and mental ailments of the plaintiff in regard to the issue of contributory negligence. The supreme court reversed the decision of the court of appeals and held that the proper test to be applied is the "test of a reasonably prudent man suffering from the same maladies and disabilities under like circumstances

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[29] *Id.* at 490.

[30] *Cf.* Kiste v. Red Cab, Inc., 122 Ind. App. 587, 596, 106 N.E.2d 395, 399 (1952).

[31] Although the *Surratt* court did not expressly mention IND. CODE § 9-4-1-116 (Burns 1973), which makes it illegal to leave a motor vehicle unattended without first removing the ignition key, the court based its holding on Kiste v. Red Cab, Inc., 122 Ind. App. 587, 106 N.E.2d 395 (1952). The action brought by the plaintiff in *Kiste* was based upon the violation of this statute.

[32] The test of causation in Indiana is reasonable foreseeability. City of Indianapolis v. Falvey, 296 N.E.2d 896 (Ind. Ct. App. 1973).

[33] 300 N.E.2d 50 (Ind. 1973).

. . . ."[34] This holding is in accord with the general rule that "[a]s to his physical characteristics, the reasonable man may be said to be identical with the actor."[35]

The proper application of the reasonable man standard also involves a consideration of the age, intelligence and experience of a child who is alleged to have been contributorily negligent. In *Stewart v. Jeffries*,[36] the plaintiff, a young boy, was injured when he attempted to mount the running board of a truck driven by defendant. Although the child admitted on cross-examination that he recognized the risks involved in mounting the truck,[37] the trial court found the evidence bearing upon the issue of contributory negligence to be sufficiently conflicting to warrant its consideration by the jury. The defendant appealed from a judgment for the plaintiff and contended that the child should have been held contributorily negligent as a matter of law. The court of appeals affirmed, holding that contributory negligence is an issue for the jury whenever "reasonable men could differ on whether the evidence or reasonable inferences to be drawn therefrom showed that the appellee exhibited conduct which was below that of a child of like age, intelligence and experience."[38]

The *Jeffries* court also spoke to the issue of whether the defendant driver owed an absolute duty to maintain a look-out for the plaintiff.[39] In resolving this issue in favor of the plaintiff, the court relied upon *Indianapolis Harbor Belt Railroad v. Jones*,[40] in which it was held that "the probable presence of children upon property where a dangerous activity is being carried on imposes a duty of ordinary care . . . to anticipate their presence by keeping a look-out for them."[41] Although the application of this rule has the proper effect of exacting the appropriate quantum of care from the defendant, it is confusing to phrase general rules of negligence in terms of "absolute duty." In negligence cases, the defendant is bound by a duty to exercise reasonable care under the circumstances. Whether a look-out is required depends upon the facts and circumstances of a particular case. Thus, it is more logically said that the duty of reasonable care may require that one maintain a look-out for children when he knows or should know that children are likely to be present in the area in which he is driving.

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[34] *Id.* at 56.

[35] PROSSER § 32, at 151.

[36] 309 N.E.2d 443 (Ind. Ct. App. 1974).

[37] *Id.* at 445.

[38] *Id.* at 446.

[39] *Id.* at 447.

[40] 220 Ind. 139, 41 N.E.2d 361 (1942).

[41] *Id.* at 145, 41 N.E.2d at 363, *quoting from* 14 IND. L.J. 376, 377 (1939).

Some of the formulas which have been invented by the courts to solve particular fact situations still persist. The doctrine of "sudden peril" or "sudden emergency" set forth in *Bundy v. Ambulance Indianapolis Dispatch, Inc.*[42] is one such formula and is normally used as an exculpatory answer to the defense of contributory negligence. The doctrine provides that when a person is confronted with a sudden emergency not caused by his own negligence, and when the appearance of the danger was so imminent that he had no time to deliberate, "he is not held to the same accuracy of judgment as would have been required of him if he had had time for deliberation."[43] Although the person relying upon the doctrine must have been aware of the danger prior to the injury, such awareness need only be momentary. In all of its intricacy, the formulation of the doctrine is nothing more than a complicated way of saying that a person must adhere to the standard of a reasonable and prudent man under all of the circumstances, and one circumstance to be considered is whether the plaintiff or defendant was confronted with an emergency situation.[44]

### *C. Premises Liability*

Three cases decided during the survey period indicate, however slightly, that Indiana courts are departing from the outmoded common law rules pertaining to "premises liability" and are moving toward the modern standard of reasonable care under the circumstances.[45] In *Hammond v. Allegretti*,[46] the supreme court resurrected the basic principle that the duty of reasonable care owed to invitees is a full one which should not be diminished by arbitrary and rigid rules based upon the presence of one particular circumstance in a given case. In *Hammond*, the plaintiff was injured when she slipped and fell in the defendant's icy open-air parking lot. The trial court granted the defendant's motion for summary judgment on the ground that the defendant was under no duty to remove the snow and ice from the lot, and the court

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[42] 301 N.E.2d 791 (Ind. Ct. App. 1973).

[43] *Id.* at 792.

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> The conduct required is still that of a reasonable man under the circumstances, as they would appear to one who is using proper care, and the emergency is only one of the circumstances.

PROSSER § 33, at 169.

[45] *See, e.g.*, Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); Note, *Premises Liability: A Critical Survey of Indiana Law*, 7 IND. L. REV. 1001 (1974).

[46] 311 N.E.2d 821 (Ind. 1974).

of appeals affirmed. In a well reasoned opinion, the supreme court, reversing a line of appellate court decisions[47] which held that a landowner was under no duty to remove natural accumulations of ice and snow from his private parking lot, ruled that the possessor owed to invitees a duty of reasonable care under all of the circumstances. The court emphasized that it was not establishing a rigid rule which requires landowners to immediately remove natural accumulations of ice and snow from their premises.[48] The court recognized that what is reasonable in one situation might be unreasonable in another. Whether the landowner exercised reasonable care in removing or failing to remove ice and snow from his premises is a question for the jury to determine in light of the evidence.[49] The approach taken by the *Hammond* court is both sensible and realistic. Hopefully, it will soon be extended to cases involving licensees and trespassers.

In *Surratt v. Petrol, Inc.*,[50] in an effort to determine by analogy the duty of care owed by a private citizen to a trespasser on a chattel, the court of appeals surveyed the Indiana law with regard to a landowner's duty to discovered trespassers. After considering a number of cases, the court concluded that "[a]n owner or occupier owes a duty of reasonable care to a discovered trespasser not to injure him through active conduct."[51] Although the above statement was clearly dictum, it is indicative of the court's proclivity to create an "active negligence" exception to the general rule that the only duty owed by a possessor to licensees and trespassers is to refrain from wilfully or intentionally injuring them.[52] The fact that the active negligence exception to the general rule has resurfaced after having been twice overruled in previous years[53] suggests that the courts will continue to dilute the common law rules in an effort to mitigate their harsh and inflexible operation.

The determination of the liability of vendors and lessees of premises continues to be fairly complex. A lessor, as a general rule, is insulated from negligence liability to persons injured by a defective condition which existed at the time the lease was executed.[54] An exception to this rule arises when premises are

[47]Hammond v. Allegretti, 288 N.E.2d 197 (Ind. Ct. App. 1972); Kalicki v. Beacon Bowl, Inc., 143 Ind. App. 132, 238 N.E.2d 673 (1968).

[48]311 N.E.2d at 826.

[49]*Id.* at 828.

[50]312 N.E.2d 487 (Ind. Ct. App. 1974).

[51]*Id.* at 494.

[52]*E.g.*, Calvert v. New York Central R.R., 210 Ind. 32, 199 N.E. 239 (1936).

[53]Indiana Harbor Belt R.R. v. Jones, 220 Ind. 139, 41 N.E.2d 361 (1942); Fort Wayne Nat'l Bank v. Doctor, 272 N.E.2d 876 (Ind. Ct. App. 1971).

[54]PROSSER § 63, at 400.

leased for a purpose which contemplates the admission of the public. In this situation, the lessor owes a duty of reasonable care and must make reasonable inspections and repairs before transferring possession to the lessee.[55] Thus, a lessor who fails to prevent the public's exposure to unreasonable risks of harm is liable to members of the public for both personal injury and property damage caused by his negligence.

In *Chrysler Corp. v. M. Present Co.*,[56] the Court of Appeals for the Seventh Circuit applied the public purpose exception to a commercial warehouse setting and held that a lessor may be liable for the destruction of goods stored in the warehouse by members of the public. Prior to *Present*, the exception was applied only to situations in which premises were leased with the primary expectation that members of the public would be physically present thereon.[57] In *Present*, however, the premises were leased with the primary expectation that they would be used for the storage of goods, and the physical presence of the public was only incidental to that purpose. In finding potential liability, the court relied heavily upon the assumption that lessees are generally in possession for a limited period of time and, consequently, do not have as great an incentive to maintain the premises as the lessor.[58] Dean Prosser, however, has suggested that the true basis of liability in this situation is the "likelihood that the public would be permitted to enter before the dangerous condition is changed."[59] In *Present*, the lease had been in effect for two years at the time the goods were destroyed. This raises the question of whether a lessor should be held responsible for the defective conditions when a sufficient length of time has passed during which a reasonable and prudent tenant should have become aware of the conditions and should have had the opportunity to make the premises safe for the reception of the public and its goods.[60]

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[55] *Id.* at 403.

[56] 491 F.2d 320 (7th Cir. 1974) (applying Indiana law).

[57] *Id.* at 324.

[58] *Id.*

[59] PROSSER § 63, at 405.

[60] Only the following comment is made in the *Restatement:*

> The lessor is subject to liability for only such injuries as are caused to invitees of his lessee by the dangerous condition during the time within which the lessor had reason to believe that it would remain unchanged.

RESTATEMENT (SECOND) OF TORTS § 359, comment *i* at 248. Dean Prosser states that "it is logical that [liability] should be limited to the time within which there is reason to believe that [a defect existing when possession is transferred] will remain unaltered." PROSSER § 63, at 405.

### D. Strict Liability

In *Ayr-Way Stores, Inc. v. Chitwood,*[61] the plaintiff brought an action on behalf of his son against the seller of a defective lawn mower for injuries sustained when the braking mechanism of the mower failed. In ruling upon a number of procedural questions raised on appeal, the supreme court recognized section 402A of the *Restatement (Second) of Torts,*[62] which imposes strict liability on manufacturers and sellers of defective products which injure a purchaser or user. Prior to *Chitwood,* the supreme court had not specifically approved section 402A. However, the courts of appeal and the federal courts, in applying Indiana law, had recognized the rule and had vigorously expanded its application.[63] In addition to adopting section 402A, the *Chitwood* court held that breach of warranty was an additional basis for recovery.

### E. Limitations on Liability

In *Chaffin v. Nicosia,*[64] the supreme court held that Indiana's legal disability statute[65] creates an exception to the otherwise absolute two year statute of limitations for medical malpractice actions.[66] The plaintiff, within two years after his legal disability of infancy was removed, brought an action for injuries which he allegedly sustained at birth because of the negligence of the defendant doctor. The trial court sustained the defendant's motion for a judgment on the pleadings on the basis of a prior federal court decision in which it was held that the legal disability statute was inapplicable to malpractice actions.[67] The supreme court reversed and construed the legal disability statute to be an exception to the absolute bar of medical malpractice actions commenced more than two years from the date of the alleged act of negligence. The court noted that, although a legal disability does not toll the statute of limitations, it provides "a reasonable grace period within which to sue once a disability is removed."[68] The fact that the plaintiff was permitted to maintain an action almost twenty

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[61]300 N.E.2d 335 (Ind. 1973).

[62]RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[63]*See, e.g.,* Filler v. Rayex Corp., 435 F.2d 336 (7th Cir. 1970); Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965); Cornette v. Searjeant Metal Prods., Inc., 147 Ind. App. 46, 258 N.E.2d 652 (1970); Note, *Products Liability in Indiana: Can the Bystander Recover?,* 7 IND. L. REV. 403 (1973).

[64]310 N.E.2d 867 (Ind. 1974).

[65]IND. CODE § 34-1-2-5 (Burns 1973).

[66]*Id.* § 34-4-19-1.

[67]Burd v. McCullough, 217 F.2d 159 (7th Cir. 1954). *See also* Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891 (1956).

[68]310 N.E.2d at 870.

years after the alleged negligence occurred is likely to increase the already expensive rates for malpractice insurance.

During the survey period, both the courts and the legislature have attempted to identify the parameters of the vestige of governmental immunity remaining in Indiana law after the decision of *Campbell v. State*.[69] The legislative event was the enactment of a new Tort Claims Act which limits the tort liability of the state and sets forth the procedures through which aggrieved parties must seek relief.[70] Among its significant provisions is one that limits the liability of the state and its employees to $300,000 for the death or injury of one person and to $5,000,000 for all deaths or injuries arising from a single occurrence.[71] Complex notice provisions are set forth and persons asserting a claim against the state must file written notice with the attorney general and the appropriate state agency within 180 days after the loss occurs.[72] Within ninety days after filing, the state must notify the claimant of its approval or denial of the claim,[73] and suit may be brought only after the claim has been denied in whole or in part.[74] Unless a settlement has been reached, a claim is considered denied if the state fails to approve it in its entirety during the ninety day period.[75] The governor is authorized to settle the claim[76] and the attorney general must advise him as to the desirability of settlement.[77]

A major provision of the Act states that a governmental entity or employee is not liable for losses resulting from certain conditions of land, the initiation of judicial or administrative proceedings, the performance of discretionary functions, the enforcement of or failure to enforce a law, or an act or omission performed under the apparent authority of an invalid statute if liability would not have attached had the statute been valid.[78] These standards, with the exception of those relating to conditions of land, were previously utilized by the courts to immunize state

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[69]284 N.E.2d 733 (Ind. 1972). For a comparison of the status of sovereign immunity in various states in 1954 and in 1973, *compare* Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. REV. 1363 (1954), *with* RESTATEMENT (SECOND) OF TORTS, *Special Notes* § 895B & C, at 12-22 (Tent. Draft No. 19, 1973).

[70]Ind. Pub. L. No. 142 (Feb. 19, 1974), *codified at* IND. CODE §§ 34-4-16.5 -1 to -18 (Burns Supp. 1974).

[71]IND. CODE § 34-4-16.5-4 (Burns Supp. 1974).

[72]*Id.* § 34-4-16.5-6.

[73]*Id.* § 34-4-16.5-10.

[74]*Id.* § 34-4-16.5-12.

[75]*Id.* § 34-4-16.5-10.

[76]*Id.* § 34-4-16.5-13.

[77]*Id.* § 34-4-16.5-14.

[78]*Id.* § 34-4-16.5-3.

employees, acting within the scope of their authority, from personal tort liability.[79] Accordingly, the doctrine of respondeat superior is now the touchstone of state liability. The state, in its capacity as master, is immune from liability in the same situations in which state employees were immune from personal tort liability at common law.[80] However, since the respondeat superior approach was first suggested by the *Campbell* court, the Act does little more than codify existing case law.

The ministerial-discretionary distinction set forth in the Act was suggested by the *Campbell* court as a means of delineating the areas of governmental activity for which no liability would attach.[81] One wonders, however, to what extent the distinction between discretionary and ministerial functions will be easier to make than the pre-*Campbell* distinction between governmental and proprietary functions.[82] In addition to suggesting that the state will be liable only if the injury was caused by an employee performing a ministerial function, the *Campbell* court held that "[i]n order for one to have standing to recover in a suit against the State, there must have been a breach of a duty owed to a private individual."[83] Now that the legislature has distinguished between discretionary and ministerial functions in exempting the state from liability, a question is raised as to whether inquiry into the existence of a ministerial or discretionary function is a separate and distinct inquiry from inquiry into the existence of a private duty.

In *Roberts v. State*,[84] the court of appeals held that a complaint which alleged the *breach of private duty* was sufficient to withstand a motion to dismiss and declined to explore the "applicability of the discretionary-ministerial dichotomy."[85] After

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[79] *See, e.g.*, Wallace v. Feehan, 206 Ind. 522, 190 N.E. 438 (1934) (discretionary-ministerial distinction); Saloom v. Holder, 304 N.E.2d 217 (Ind. Ct. App. 1973) (unconstitutional statute); Note, *Sovereign Immunity in Indiana—Requiem?*, 6 IND. L. REV. 93, 102-05 (1972).

[80] *Cf.* Note, *supra* note 79, at 98.

[81] 284 N.E.2d at 737.

[82] *See* Perkins v. State, 252 Ind. 549, 251 N.E.2d 30 (1969); Note, *Separation of Powers and the Discretionary Function Exception: Political Questions in Tort Litigation Against the Government*, 56 IOWA L. REV. 930, 950 (1971). Much judicial effort has been expended in defining the flexible term "discretionary." Various meanings are included in the Federal Tort Claims Act, 28 U.S.C. § 2860(a) (1970), and in state statutory and common law. *See* RESTATEMENT (SECOND) OF TORTS § 895A, comment *b* at 8 (Tent. Draft No. 19, 1973); Note, *supra* note 79, at 104 n.60. *See also* Dalehite v. United States, 346 U.S. 15 (1953).

[83] 284 N.E.2d at 737.

[84] 307 N.E.2d 501 (Ind. Ct. App. 1974).

[85] *Id.* at 506.

so holding, however, the court noted the recent enactment of the Tort Claims Act and stated that "a legislative standard now exists for future reference."[86] Since *Roberts* was decided nine days *after* the effective date of the Act,[87] it seems to have implicitly held that the Act does not apply retroactively. Similarly, in a case decided four months after the effective date of the Act, the court looked solely to the private duty test.[88] Thus, the question remains as to whether the private duty test is simply another means of expressing the ministerial-discretionary distinction,[89] or whether a plaintiff must prove both the breach of a private duty and the misperformance of a ministerial function before he will be permitted to recover.

The state may also be liable for the intentional torts of its agents. In *Roberts*, an inmate of the Indiana State Reformatory brought an action against the state and certain state employees for injuries he suffered during a prison disturbance. The trial court dismissed the complaint on the basis of the doctrine of sovereign immunity. The court of appeals reversed and held that the state may be liable under the doctrine of respondeat superior when its agents, acting within the scope of their authority, intentionally or negligently breach a private duty owed to the plaintiff.[90] This holding is consistent with the Tort Claims Act which, unlike the Federal Tort Claims Act,[91] does not preclude suits against the sovereign for the intentional torts of its agents.

### *F. Damages*

No landmark cases involving the issue of damages were decided during the survey period. Two cases involved the damage component of lost earning capacity. In *Scott v. Nabours*,[92] the plaintiff introduced evidence at trial which indicated that, although he was able to continue his employment, his injury made his work more difficult to perform. The trial court expressly withdrew the element of impaired earning capacity from the jury's consideration because of a lack of evidence thereon. The court of appeals affirmed the action of the trial court and held that the "basic measure of damages for impairment of earning

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[86]*Id.* at 507.

[87]The effective date of the Act was February 19, 1974. *Roberts* was decided on February 28, 1974.

[88]Scott County School Dist. 1 v. Asher, 312 N.E.2d 131, 138 (Ind. Ct. App. 1974).

[89]*See* Note, *supra* note 79, at 105.

[90]307 N.E.2d at 506, 507.

[91]28 U.S.C. § 2680(h) (1970).

[92]296 N.E.2d 438 (Ind. Ct. App. 1973).

capacity is the amount which the plaintiff was capable of earning before the injury and the amount which he is capable of earning thereafter."[93] Since the plaintiff had failed to introduce any evidence which linked his injury to an impaired earning potential, the formula set forth by the court of appeals for ascertaining loss of earning capacity was incapable of application. In the similar case of *Cooper v. High*,[94] the plaintiff argued that, although he was able to maintain his employment after his injury, he was unable to perform work on an "exchange basis" with his friends and relatives.[95] The court of appeals refused to decide expressly whether work performed on an exchange basis can be considered in awarding damages for impaired earning capacity. However, the court implicitly rejected the damages rule as it applies to avocational activities by holding that, on the basis of *Scott*, the plaintiff had failed to take the "final step of relating his impairment to his vocation."[96]

Indiana courts continue to adhere to the minority rule that punitive damages cannot be awarded when the possibility exists that the tortfeasor will be subjected to criminal prosecution. In *Moore v. Waitt*,[97] the trial court refused to award punitive damages for the tort of conversion on the ground that the defendant was subject to criminal prosecution for theft. Finding no reason to depart from precedent, the court of appeals affirmed. Proponents of the minority rule have generally argued that an award of punitive damages in such cases would place a tortfeasor in the dilemma of being punished twice for the same offense.[98] On the other hand, opponents of the minority rule have contended that an award of punitive damages would punish conduct which, as a practical matter, "goes unnoticed by prosecutors occupied with more serious crimes."[99]

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[93] *Id.* at 441.

[94] 303 N.E.2d 829 (Ind. Ct. App. 1973).

[95] *Id.* at 830.

[96] *Id.*

[97] 298 N.E.2d 456 (Ind. Ct. App. 1973).

[98] C. McCORMICK, LAW OF DAMAGES § 77, at 276 (1935). For a discussion of the rationales for the minority rule in Indiana, see Aldridge, *The Indiana Doctrine of Exemplary Damages and Double Jeopardy*, 20 IND. L.J. 123 (1945).

[99] C. McCORMICK, *supra* note 98, § 77, at 276. The importance of making a timely objection to improper instructions is apparent from a consideration of the damages cases decided during the survey period. In both *Cooper* and *Scott*, the element of impaired earning capacity was submitted to the jury in an omnibus damage instruction. In *Cooper*, the defendant objected to the inclusion of impaired earning capacity and the omnibus instruction served as a basis for the reversal of the trial court's decision. In *Scott*, however, no objection was made and an instruction similar to the one used by the *Cooper*

In *Simms v. Bethlehem Steel Corp.*,[100] the plaintiff brought an action in the United States District Court for the Northern District of Indiana for the loss of her husband's consortium as a result of injuries he sustained while working at the defendant's plant. The defendant filed a motion to strike the plaintiff's allegation that she suffered mental anguish on the ground that mental anguish is not compensable unless it is incurred in conjunction with a physical injury. Judge Sharp granted the motion and held that the physical injury suffered by the plaintiff's husband was insufficient to meet the requirement that plaintiff also suffer actual physical injury.[101] The holding in *Simms* should alert counsel to exercise care with semantics in cases involving loss of consortium. For example, the damages awarded for loss of consortium are based upon intangible emotional injuries such as deprivation of society, affection, comfort and sexual relations. In effect, recovery is permitted for mental distress under the guise of ancient terminology.

## XIV. Trusts and Decedents' Estates

*Melvin C. Poland**

### *A. Wills*

#### *1. Will Contest—The Limitation Period*

During the current survey period the Indiana Court of Appeals was called upon to decide two cases involving the period of time in which an interested party may contest a will. In *Wilkinson v. Ritzman*,[1] plaintiff-appellants[2] filed a complaint contesting a will approximately six and one-half months after the original petition for

court was permitted to stand. A similar example is found in the *Moore* case and in Richards v. Scroggham, 307 N.E.2d 80 (Ind. Ct. App. 1974). In *Richards*, the defendant failed to object to an instruction which permitted an award of punitive damages for the tort of conversion. Although the award of punitive damages for conversion was previously held by the *Moore* court to be improper, the *Richards* court upheld the instruction on the basis of the defendant's failure to make a timely objection.

[100]40 Ind. Dec. 473 (N.D. Ind. 1973).

[101]*Id.* at 475-76.

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[1]301 N.E.2d 847 (Ind. Ct. App. 1973).

[2]Hereinafter referred to as appellants.