XVII. Torts

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A. Negligence

1. Affirmative Duty to Control Actions of Another.—The Indiana Courts of Appeals had several occasions during the survey period to address the aspect of duty in a negligence case. Of particular interest are the cases involving affirmative duties to act. The factual circumstances in *Estate of Mathes v. Ireland*[1] presented to the fourth district court of appeals an unusual context in which to consider the affirmative duty to control the actions of another. Kenneth Pierce abducted Brenda Mathes at knifepoint and drowned her in the St. Joe River. Brenda Mathes' husband brought a wrongful death action against Pierce, Pierce's mother, father, grandparents, and two psychiatric centers, one which formerly had Pierce in custody and one which had tested and evaluated him. At the time of the incident, Pierce lived with his mother and grandparents.

Mathes alleged that the mother and grandparents with whom Pierce lived knew he was insanely violent and that they had a responsibility to supervise him and control his activities. Mathes also claimed in his complaint that the staff at the psychiatric center, which had the killer in custody, and the staff at the psychiatric center, which had been responsible for testing and evaluating him, violated a duty if they knew or should have known it was dangerous to release him without providing extended treatment.[2] The trial court dismissed all the complaints, except the one against Pierce, for failing to state a claim upon which relief could be granted.[3] The court of appeals, complying with the rule enunciated in *State v. Rankin*,[4] held that all the claims except as to Pierce's father, who lived elsewhere, were prematurely dismissed.[5]

Mathes argued that because Pierce resided with his mother and grandparents, they knew Pierce to be violent and dangerous and they therefore had a responsibility to supervise Pierce and control his activities. The court agreed and, quoting from the *Restatement (Second)*

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[1]419 N.E.2d 782 (Ind. Ct. App. 1981).

[2]*Id.* at 785.

[3]*See* IND. R. TR. P. 12(b)(6).

[4]260 Ind. 228, 294 N.E.2d 604 (1973).

[5]419 N.E.2d at 784. The court expressed at the outset its doubts as to whether the plaintiff would ultimately be able to prove his case and made clear that it reversed because of the holding in State v. Rankin. In *Rankin*, the supreme court held that "[a] complaint is not subject to dismissal unless it *appears to a certainty* that the plaintiff would not be entitled to relief under *any set of facts* . . . ." 260 Ind. at 230, 294 N.E.2d at 606 (emphasis in original).

of Torts section 319, stated that "[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."[6] The court was careful to point out that although the situation in *Mathes* involved a mother and grandparents, the duty does not rest upon any familial relationship but upon the assumption of care and control of one known by the third person to be dangerous and likely to commit bodily harm.[7]

The court recognized, however, that families should not be discouraged from taking responsibility for "the treatment of less fortunate members of the family" and thus stressed that the injured party must show not only an actual taking charge of the dangerous individual, but also a knowledge of the likelihood he will cause harm.[8] In this regard, the custodians' reasonable reliance on medical advice may relieve them of responsibility.[9]

In adopting this novel approach, the court failed to note that this theory of liability has never been recognized in Indiana or that this decision is a dramatic departure from the basic common law premise of every man for himself; that is, in the absence of a special relationship, there is no affirmative duty to control the conduct of others.[10] However, the court was careful to state that "only under the most unusual set of circumstances" would the result be a successful verdict for the plaintiff.[11] Although the adoption of a theory of liability based on a duty to control another may be startling, the future ap-

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[6]419 N.E.2d at 784 (quoting RESTATEMENT (SECOND) OF TORTS § 319 (1977)).

[7]419 N.E.2d at 784.

[8]*Id.*

[9]*Id.*

[10]At common law a parent was not responsible for his child's torts. *See* Moore v. Waitt, 157 Ind. App. 1, 298 N.E.2d 456 (1973). Certain exceptions developed in the case law, and in 1957 the Indiana legislature enacted a statute which allowed victims to recover up to $750 from the parents of a tortious child for "any and all damage proximately caused by the injury to or destruction of any property, real, personal or mixed by the intentional or wilful or malicious act or acts of such minor." IND. CODE § 31-5-10-1 (1976) (repealed 1978) (current version at IND. CODE § 34-4-31-1 (1982)). However, any exceptions, whether derived from case law or statute, only applied when the child was a minor. *Mathes*, 419 N.E.2d at 787 (Hoffman, J., dissenting). In *Mathes*, Pierce was twenty years old, and the rule enunciated by the majority is neither based upon nor limited by the parent-child relationship.

The dissenting judge in *Mathes* objected to the majority's decision because it might result in a violation of due process in that Mathes' complaint does not allege that an adjudication of Pierce's insanity was ever made. *Id.* at 788. Before one can be involuntarily subjected to the control and custody of another, he is entitled to a court determination of insanity. *Id.* (*See* IND. CODE §§ 16-14-9.1-1 to-18 (1982)).

[11]419 N.E.2d at 784.

plication of such a theory is likely to be limited to the family custody situation.

In discussing the potential liability of the psychiatric centers, the court found that if the centers had actually taken charge of Pierce within the meaning of section 319 and had actual knowledge that he was dangerous, then they had a duty to exercise reasonable care.[12] The court thus clarified an aspect of the new duty which was ambiguous in the court's discussion of the duty of the mother and grandparents. Although section 319 requires only a constructive knowledge of a likelihood to do harm, in Indiana imposition of the duty apparently requires a finding of *actual knowledge* of danger.[13]

The first district court of appeals had an opportunity to consider the affirmative duty to control the actions of another to prevent injury to a third person in *Sports, Inc. v. Gilbert*.[14] In *Sports, Inc.*, the defendants who are owners and operators of the Sportsdome Speedway employed off-duty police officers and special deputies for traffic and crowd control. On August 9, 1975, Thomas Riggs drove his pickup truck into the parking lot of the Sportsdome and had a minor accident with another car. When security guards arrived, they found Riggs hiding in a nearby lot. Although he was intoxicated, Riggs was cooperative and the guards did not arrest him. Instead, the guards found two relatives who drove Riggs in his truck away from the Sportsdome. Shortly after Riggs left the Sportsdome and had regained control of the truck, he collided with the Gilberts' car, killing two of the occupants and injuring the others. The Gilberts sued Sports, Inc. for wrongful death of their two children and for their own personal injuries, and, at the trial, the jury found for the plaintiffs. Defendants appealed, claiming they owed no duty to the Gilberts to prevent the intoxicated Riggs from driving away from the Sportsdome. The court of appeals agreed with the defendants and reversed.[15]

The court in *Sports, Inc.* systematically rejected the plaintiffs' various contentions that the defendant owed a duty of care in this situation. Plaintiffs relied on two Indiana cases which stand for the proposition that a duty may arise out of knowledge of a situation and a violation of this duty would constitute negligence.[16] The court found these cases factually distinguishable.[17] In addition, the court found that

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[12]*Id.* at 785-86.

[13]*Id.* at 785.

[14]431 N.E.2d 534 (Ind. Ct. App. 1982).

[15]*Id.* at 534-35.

[16]*Id.* at 536 (citing Snyder v. Mouser, 149 Ind. App. 334, 346, 272 N.E.2d 627, 634 (1971); Vandalia Ry. v. Duling, 60 Ind. App. 332, 344, 109 N.E. 70, 73 (1915)).

[17]Vandalia Ry. v. Duling, 60 Ind. App. 332, 109 N.E. 70 (1915) dealt with a railroad's liability for injuries to animals who wander onto railroad tracks. Snyder v. Mouser,

the prerequisites for a successful assertion of a duty to control third persons, based on *Restatement (Second) of Torts* section 319, did not exist here, because section 319 contemplates a situation in which a third person is in the custody of the one charged with controlling him.[18] To further buttress this finding, the court noted that the comment section to *Restatement (Second) of Torts* section 319 addresses situations in which the dangerous person is actually in a custodial setting such as a state mental hospital.[19] Therefore, the court concluded that this section was not intended to apply to the factual context of *Sports, Inc.*[20]

The first district distinguished the recent fourth district's decision which had relied on section 319, *Estate of Mathes v. Ireland*,[21] on the basis that the relationships in *Mathes* were well established and continuing, whereas the relationship between Sports, Inc. and Riggs was "brief and accidental."[22] It is worthy of note, however, that the "taking charge" of a third person as contemplated in *Mathes* was not custodial in the sense that those in charge had a legal obligation to keep the killer in custody.[23]

The *Sports, Inc.* court also disagreed with the plaintiffs' contention that *Restatement (Second) of Torts* section 324A should apply. That section reads:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
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> (a) his failure to exercise reasonable care increases the risk of such harm, or

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149 Ind. App. 334, 272 N.E.2d 627 (1971) dealt with a welfare worker's duty to warn foster parents of a child's homicidal tendencies. The court distinguished these cases on the basis that neither dealt with the liability for the negligence of the third party. 431 N.E.2d at 536.

[18]RESTATEMENT (SECOND) OF TORTS § 319 (1965) states: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." *Id.*

[19]431 N.E.2d at 536.

[20]*Id.*

[21]419 N.E.2d 782 (Ind. Ct. App. 1981). For a discussion of this case, see *supra* notes 1-13.

[22]431 N.E.2d at 536 n.2.

[23]*Mathes*, 419 N.E.2d at 787-88 (Hoffman, J., dissenting). The killer in *Mathes* had attained the age of majority and thus his parents were no longer legally responsible for his actions. Further, the killer had never been adjudicated mentally ill which could give rise to a duty to control. *Id.* at 787-88.

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.[24]

The court found that section 324A did not apply because there was no indication that Sports, Inc.'s actions increased the risk of harm to the plaintiffs, that the plaintiffs relied on Sports, Inc., or that Sports, Inc. undertook a duty owed by Riggs.[25] However, it cannot be denied that if Sports, Inc. had taken the intoxicated Riggs into custody, the accident would have been prevented. Under this view, Sports, Inc.'s action, or inaction, would certainly have increased the risk of harm to the Gilberts. Thus, the proper inquiry here should be whether failing to do so was a failure to exercise reasonable care.

The court also refused to accept the plaintiffs' theory of negligent entrustment of a chattel to an incompetent based upon *Restatement (Second) of Torts* section 390.[26] The court found that the rule enunciated in section 390 applies only to those who own or have a right to control the chattel in question, and Sports, Inc. had no right to control Riggs' truck.[27]

The court in *Sports, Inc.* also failed to find the special kind of relationship between the defendant and Riggs necessary for an imposition of duty based upon the *Restatement (Second) of Torts* section 315. Section 315 states that there is a duty to control the conduct of a third person to avoid harm to another only if "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection."[28]

Although the court conceded that an owner of land has a duty to protect business invitees from the acts of third persons if the danger to the invitee is foreseeable, it aptly pointed out that this theory did not apply in *Sports, Inc.* because the plaintiffs were not patrons of the Sportsdome.[29] Furthermore, any statutory liability imposed on one

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[24]RESTATEMENT (SECOND) OF TORTS § 324A (1965).

[25]431 N.E.2d at 537.

[26]*Id.*

[27]*Id.* at 537. RESTATEMENT (SECOND) OF TORTS § 390 (1965) provides:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

[28]RESTATEMENT (SECOND) OF TORTS § 315 (1965).

[29]431 N.E.2d at 537-38.

who supplies alcoholic beverages under the Indiana Code[30] was inapplicable because Riggs did not consume alcohol at the Sportsdome.

Finally, the court in *Sports, Inc.* pointed out that the common thread woven through all the theories of liability for failure to control a third person espoused by the plaintiffs was that of "a person in need of special supervision . . . from someone who is in a superior position to provide it."[31] Essential to this relationship is the right to intervene or control. The court found such a right to intervene absent in *Sports, Inc.*[32] Because Sports, Inc. is a private entity, it had neither the power nor the duy to arrest Riggs.[33] Although the security force as off-duty police had the power to arrest, that power is conferred by the state and not by a private employer. Sports, Inc. did not "rent the state's police power" when it employed the off-duty police.[34] Therefore, the official inaction of the security guards could not be imputed to Sports, Inc.

The court's discussion of Sports, Inc.'s right to control its security force is fraught with difficulties and ambiguities. The court found that even though the security guards are employees, Sports, Inc. had no authority to require the guards to use their power to arrest because that power is conferred by the state. Thus, the employer/employee relationship is not the determining factor and negligent failure to arrest could not be imputed to Sports, Inc.

The court also pointed out, however, that the power to arrest is discretionary so that even if the plaintiffs could establish that the guards' negligent failure to enforce the law caused plaintiffs' injuries, the guards could claim governmental immunity.[35] The court concluded its discussion with the incredible statement that "[i]f the Sports employees are immune from liability for their failure to use powers granted to them by the State, their private employer is likewise immune."[36] Is the court suggesting that a private employer of a moonlighting governmental employee can claim govermental immunity if his employee negligently uses powers which can be seen as having been granted by the state? Such a suggestion raises questions and problems which are not within the scope of this Survey. However, it appears the court put Sports, Inc. in the enviable position of being

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[30]IND. CODE §§ 7.1-5-7-8, 7.1-5-10-15 (1982).

[31]431 N.E.2d at 538.

[32]*Id.* at 538-39.

[33]*Id.* at 539. The court found that a private citizen could be liable for false imprisonment in arresting someone for a misdemeanor. Because Riggs had, at worst, committed a misdemeanor, Sports, Inc. had no duty to make a citizen's arrest. *Id.*

[34]*Id.*

[35]*Id.* (citing IND. CODE § 34-4-16.5-3(7) (Supp. 1980) which is currently codified at IND. CODE § 34-4-16.5-3(7) (1982)).

[36]431 N.E.2d at 539.

able to deny the employer/employee relationship to the extent that it might produce liability and to invoke the employer/employee relationship to the extent that it would enable Sports, Inc. to escape liability. This is rather unusual in light of the normal effect of the doctrine of respondeat superior. Suffice it to say that Sports, Inc. benefited from a classic example of being given its cake and being allowed to eat it, too.

Following close on the heels of *Sports, Inc.*, the first district court of appeals found a duty to control the actions of a third person in *Martin v. Shea.*[37] *Martin* is perhaps the most significant and certainly the most startling case decided during the survey period. In *Martin*, the court held that a social guest injured by another guest at a swimming party stated a claim against the homeowner sufficient to withstand a motion to dismiss.[38]

The Martins attended a pool party at the home of the Sheas in June of 1979. Although Martin did not participate, some of the guests took part in "horse play" around the pool, and one of the guests struck Martin from behind. Martin fell into the pool and struck his head on the bottom. The fall injured Martin severely, and he sued the Sheas claiming that the host had a duty to control the conduct of those using the premises. The Sheas filed a motion to dismiss that was granted and Martin appealed. The court of appeals reversed and remanded.[39]

The *Martin* court noted that there was a tendency to classify this case among the long line of premises liability cases,[40] but the court refused to yield to such a classification. Rather, the court found that premises liability cases generally involve injuries caused by physical defects in the land, and the injury in this case was not a result of such a physical defect.[41] Therefore, the court in *Martin* concluded that imposing a duty only according to the plaintiff's status as business invitee, licensee or trespasser would be inappropriate.[42] Thus, it did not matter that Martin, as a social guest, would have been a licensee under the premises liability classification system. Unfortunately, the court cited no authority and did not give a satisfactory reason why such a distinction should be made between injuries resulting from dangerous conditions on the property and injuries resulting from dangerous activities on the property. If, as the dissent suggests, the

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[37]432 N.E.2d 46 (Ind. Ct. App. 1982).

[38]*Id.* at 49. *Martin v. Shea* was handed down just a week after *Sports, Inc. v. Gilbert.* Not surprisingly, Judge Neal, the writing judge in *Sports, Inc.*, dissented in *Martin v. Shea.*

[39]432 N.E.2d at 47. The defendant's original motion to dismiss was denied, but upon reconsideration the trial court granted it.

[40]*Id.*

[41]*Id.*

[42]*Id.*

reason for finding a lesser duty owed to a licensee in a premises liability case is that "[t]he licensee has no right to demand that the occupier change his method of conducting activities for his safety,"[43] then there seems to be no good reason for distinguishing between types of dangers.

Though considerable criticism has been levelled against the entire concept of the classification system in premises liability,[44] it has generally been based on the rigidity and arbitrariness of the categories.[45] Perhaps the best approach would be to abolish the classification system altogether as a number of jurisdictions have done[46] rather that to carve out ill-considered exceptions as the court did in *Martin*.

Having resisted any urge to classify this as a premises liability case, the *Martin* court moved to the question of the nature of the duty owed to Martin. Noting that duties may arise out of knowledge of certain situations and that a court may create a duty to fit the circumstances,[47] the court proceeded to fashion a duty to fit the circumstances of this case. The court focused on whether a host at a swimming party has a duty to control the conduct of one guest to prevent injury to another guest and concluded that the answer is yes. However, after making a point to remove this case from the area of premises liability, the court used premises liability cases to support its imposition of a duty in *Martin*.[48]

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[43]*Id.* at 51 (Neal, J., dissenting) (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 60 at 380 (4th ed. 1971)).

[44]*See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 62 (4th ed. 1971); F. HARPER & F. JAMES, THE LAW OF TORTS § 27.1-27.14 (1956); C. MORRIS & C. MORRIS, MORRIS ON TORTS 139 (2d ed. 1980); Note, *Tort Liability of Owners and Possessors of Land—A Single Standard of Reasonable Care under the Circumstances Toward Invitees and Licensees*, 33 ARK. L. REV. 194 (1979); Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?*, 36 MD. L. REV. 816 (1977); Comment, *Torts—Abolition of the Distinction Between Licensees and Invitees Entitles all Lawful Visitors to a Standard of Reasonable Care*, 8 SUFFOLK U.L. REV. 795 (1974).

[45]*See, e.g.*, W. PROSSER, *supra* note 44, § 58, 62 at 357, 398-99.

[46]*See id.* § 62.

[47]432 N.E.2d at 48 (citing Snyder v. Mouser, 149 Ind. App. 334, 272 N.E.2d 627 (1977)).

[48]432 N.E.2d at 48-49. The court first cited Glen Park Democratic Club, Inc. v. Kylsa, 139 Ind. App. 393, 213 N.E.2d 812 (1966). *Glen Park* involved a patron at a bar who was injured by other patrons. The case was obviously decided on the basis of a premise liability theory and turned upon the fact that the plaintiff was a business invitee. The court also cited Cory v. Ray, 115 Ind. App. 50, 55 N.E.2d 117 (1944) in which it was held that the operator of a place of public entertainment may be held liable for injuries to his patrons if reasonable care is not taken to keep the premises safe. The only case cited by the court that stands squarely for the proposition asserted here is the New York case Majione v. Dimino, 39 A.D.2d 128, 332 N.Y.S.2d 683 (1972). Although this case is factually close to *Martin*, it obviously has no mandatory precedential effect.

The *Martin* court also referred to the distinction made in some jurisdictions between conditions of the premises and conduct of the defendant as one between passive negligence on the one hand and active negligence on the other.[49] The former excuses liability, and the latter does not. However, presumably the former would fall into Indiana's well-established principles of premises liability in which the extent of a landowner's duty is based on the status of the plaintiff.

Additionally, the court pointed to the "general principles of law in regard to a duty to control conduct"[50] found in the *Restatement (Second) of Torts* section 318 which reads:

> If the actor permits a third party person to use land or chattels in his possession otherwise than as a servant, he is, if present, under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor (a) knows or has reason to know that he has the ability to control the third person, and (b) knows or should know of the necessity and opportunity for exercising such control.[51]

However, the court did not mention whether there was any indication that the defendant could have controlled the third person, that the defendant knew of the necessity for control, or that the defendant even knew who the third person was. The court apparently ignored the general common law principle which finds no duty to control the conduct of another. As the dissent aptly pointed out, normally such a duty only exists in the presence of a special relationship between defendant and plaintiff, or between defendant and the active tortfeasor.[52] The relationship of host and social guest has not been one which has given rise to this duty in the past.[53] Following in the footsteps of *Estate of Mathes v. Ireland*,[54] the *Martin* court has greatly

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[49]432 N.E.2d at 49.

[50]*Id.*

[51]RESTATEMENT (SECOND) OF TORTS § 318 (1965).

[52]432 N.E.2d at 50 (Neal, J., dissenting) (citing Sports, Inc. v. Gilbert, 431 N.E.2d 534 (Ind. Ct. App. 1982) and RESTATEMENT (SECOND) OF TORTS § 315 (1965)). Judge Neal in his dissent pointed out a number of the weaknesses and inconsistencies in the majority's opinion, claiming that there is no reason in sense or law to distinguish this case from the traditional premises liability case. However, some of the authorities Judge Neal uses to support his position are no more germane to the situation in the present case than those used by the majority. Swanson v. Shroat, 169 Ind. App. 80, 345 N.E.2d 872 (1976) and Pierce v. Walters, 152 Ind. App. 321, 283 N.E.2d 560 (1972) do not deal with the problem of a landowner controlling the actions of another for the protection of a licensee. However, Judge Neal's opinion is certainly more in keeping with the traditional approach in the area.

[53]432 N.E.2d at 50 (Neal, J., dissenting).

[54]419 N.E.2d 782 (Ind. Ct. App. 1981).

enlarged the concept of duty to control the conduct of others in Indiana.

2. Affirmative Duty Imposed by Gratuitous Undertaking.—The court of appeals for the fourth district dealt with another aspect of the affirmative duty issue in *Board of Commissioners v. Hatton.*[55] The fourth district noted that Indiana has previously recognized that "a duty may be imposed upon one who by affirmative conduct or agreement assumes to act, even gratuitously, for another to exercise care and skill in what he has undertaken."[56] However, in *Hatton*, the court qualified this rule holding that "liability for nonfeasance in connection with a gratuitous or voluntary undertaking may arise only where beneficiaries have relied on its performance."[57]

The plaintiff in *Hatton* was injured when her bicycle was struck by a truck, as the truck rounded a curve that was flanked by natural growth coming within six inches of the road and reaching a height of approximately ten feet. Hatton filed a complaint against the county alleging that its negligence in maintaining the growth around the curve failed to open the view of the curve in question and was thus the proximate cause of her injuries. The jury returned a verdict for Hatton, and the county appealed contending that Hatton failed to establish that the county had a duty to maintain the roadside. The court of appeals agreed and reversed the lower court decision.[58]

In *Hatton*, the plaintiff argued that the county had both a common law and a statutory duty to keep the area adjacent to the road cleared.[59] She claimed the common law duty existed both because of the counties' maintenance of the area and because of a broader duty to protect the users of the highway from inherent dangers. The court of appeals did not reach the second contention because the plaintiff had not objected to the jury instruction which predicated the common law duty on Hatton's ability to prove either that the county owned the adjacent land or had assumed responsibility for its maintenance. The plaintiff offered no evidence that the county owned the adjacent area, and the county had offered evidence to the effect that neither a record of ownership nor a description of the road itself could be

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[55]427 N.E.2d 696 (Ind. Ct. App. 1981).

[56]*Id.* at 699 (citing Clyde E. Williams & Assoc. v. Boatman, 375 N.E.2d 1138 (Ind. Ct. App. 1978)).

[57]427 N.E.2d at 700.

[58]*Id.* at 703.

[59]*Id.* at 703. The court agreed with the State's claim that the trial court should have granted the State judgment on the evidence on the issue of statutory duty. IND. CODE § 32-10-5-1 (1976), which imposes a duty to mow, requires grass to be cut to five feet. Because Hatton's visibility would not have been improved even if the grass were cut to five feet, violation of the statute could not have been the proximate cause of the injury. 427 N.E.2d at 703.

found. Although the county policy was to mow a three-foot wide strip along the highway twice a year, residents testified that the growth had not been cut by anyone since 1972. This testimony, accepted by the plaintiff as fact, indicated that the county did *not* assume responsibility for maintenance of the area. The court pointed out that such evidence might show lack of due care if a duty existed, but the establishment of a legal duty must necessarily precede the issue of due care.[60]

Although the court resolved the common law duty issue by finding no evidence that the county had assumed the responsibility to mow, the court qualified the rule pertaining to gratuitous assumption of responsibility. Looking to case law in other jurisdictions, the court concluded that "liability for non-feasance *in* connection with a gratuitous or voluntary undertaking may arise only where beneficiaries have relied on its performance."[61] The testimony by residents that no one had mowed the roadside in at least seven years indicated that reliance was not present.

In *Perry v. NIPSCO*,[62] the court of appeals for the fourth district may have enlarged the perimeters of the affirmative duty to come to the aid of another. NIPSCO entered into a contract with Babcock & Wilcox Company (B. & W.) for the construction of equipment at NIPSCO's Michigan City generating station. In April of 1972, a B. & W. foreman ordered Perry, a B. & W. employee, to do some welding twenty feet above ground. No scaffolding or other safety equipment was available. Perry complained to his B. & W. foreman and to a NIPSCO employee standing nearby. The NIPSCO man told Perry he had no control over what Perry did for B. & W. Perry ultimately attempted to do the job, fell, and was seriously injured. Perry sued NIPSCO for personal injuries claiming that NIPSCO owed a duty to exercise reasonable care relative to job safety, and the trial court granted NIPSCO's motion for summary judgment. Perry appealed, and the court of appeals reversed on the issue pertaining to NIPSCO's assumption of job site safety.[63]

The court of appeals began its analysis of the duty question by stating that in this area the general rule is that liability for the acts of another normally does not apply in the absence of a master-servant relationship.[64] The court then quoted at length from the venerable case

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[60]427 N.E.2d at 700.

[61]*Id.* (emphasis in original) (citing Chisolm v. Stephens, 47 Ill. App. 3d 999, 365 N.E.2d 80 (1977); Johnson v. Souza, 71 N.J. Super. 240, 176 A.2d 797 (App. Div. 1961); Florence v. Goldberg, 44 N.Y.2d 189, 375 N.E.2d 763, 404 N.Y.S.2d 583 (1978)).

[62]433 N.E.2d 44 (Ind. Ct. App. 1982).

[63]*Id.* at 50.

[64]*Id.* at 46.

Prest-O-Lite Co. v. Skeel[65] apparently to find that B. & W. was an independent contractor rather than an employee.[66] However, the court recognized that several exceptions have evolved to the general nonliability of independent contractors.[67] The plaintiff in *Perry* claimed that two of these exceptions applied in the instant case because the contract required performance of intrinsically dangerous work, and NIPSCO was charged by contract with providing safety on the job.[68]

The court found that the first exception asserted by plaintiff did not apply because "an undertaking is not intrinsically dangerous if the 'risk of injury involved in its use can be eliminated or significantly reduced by taking proper precautions.' "[69] Here, the use of scaffolding would have greatly reduced the potential for injury.

Based on the mandate from *Prest-O-Lite* that contracts be read as a whole in order to glean their "spirit and essence", the *NIPSCO* court further found that the contract between NIPSCO and B. & W. read as a whole did not reserve to NIPSCO the control of job site safety for B. & W.'s employees.[70]

Plaintiff, relying on *Mullins v. Easton*,[71] claimed that NIPSCO as owner of the property was required to provide a safe place for Perry to work. The court distinguished the *Mullins* case on its facts. In *Mullins*, the plaintiff was injured by a defect in the property itself, whereas here, plaintiff's injury had nothing to do with the condition of the property. Thus NIPSCO, as owner of the property, breached no duty to Perry.[72]

Though the court rejected Perry's arguments regarding NIPSCO's responsibility to the employee of a subcontractor and acknowledged the general rule that there is no duty to protect or aid others even if the actor should or does realize such action is necessary, the court did rule that "one who *assumes* supervision of safety at a construction site has a duty to use due care in the enforcement of safety regulations."[73] Here, the court found a special relationship between

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[65]182 Ind. 593, 106 N.E. 365 (1914) (contractor's worker was injured when building owned by Prest-O-Lite Co. collapsed; the court concluded that Prest-O-Lite was not liable because the contractor was found to be an independent contractor).

[66]433 N.E.2d at 47. The court made no specific preliminary statement that B. & W. was an independent contractor, but it is obvious that the opinion was based on that assumption. Perhaps the parties stipulated to that fact in their briefs.

[67]*Id.* (quoting Denneau v. Indiana & Michigan Elec. Co., 150 Ind. App. 615, 620, 277 N.E.2d 8, 12, (1971)).

[68]433 N.E.2d at 47.

[69]*Id.* (quoting Hale v. Peabody Coal Co., 168 Ind. App. 336, 343, 343 N.E.2d 316, 322 (1976)).

[70]433 N.E.2d at 48.

[71]376 N.E.2d 1178 (Ind. Ct. App. 1978).

[72]433 N.E.2d at 49.

[73]*Id.* (construing Clyde E. Williams & Assoc. v. Boatman, 375 N.E.2d 1138 (Ind.

NIPSCO and B. & W. regarding the safety of B. & W.'s employees. By holding safety meetings and by having employees who gave the appearance of supervising safety on the site, NIPSCO had "*assumed* the obligation to enforce safety measures."[74]

In reaching its conclusion, the court quoted the *Restatement (Second) of Torts* section 324A, which states in pertinent part:

> One who undertakes, gratuitously . . . to render services to another which he should recognize as necessary for the protection of a third person . . . is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> . . . .
>
> (b) he has undertaken to perform a duty owed by the other to the third person . . . .[75]

In light of NIPSCO's assumption of B. & W.'s obligation to monitor safety at the job site, the court had no trouble in finding that section 324A applied.

Although the court in *NIPSCO* stated that the duty set out in section 324A is nothing new in our law,[76] it appears that after *NIPSCO*, the limits of the affirmative duty to act in Indiana are those defined in section 324A of the *Restatement (Second) of Torts*. The court quoted *Board of Commissioners v. Hatton* as authority for the general proposition that Indiana recognizes duties imposed by assuming to act for another,[77] but the court in *NIPSCO* made no reference to the *Hatton* court's nonfeasance qualification to that rule. The fourth district court's adoption of section 324A may mean that subsection (b), dealing with the reliance factor, will supplant the nonfeasance/misfeasance distinction found in *Hatton*.

B. Proximate Cause

In *Bridges v. Kentucky Stone Co.*,[78] the Indiana Supreme Court dealt with that elusive concept, proximate cause. The plaintiff in *Bridges* was injured and his minor son killed in an explosion of a bomb at his residence. The bomb was made from explosives stolen from the

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Ct. App. 1978) where court found that if engineering firm assumed the supervision of safety at a construction site, a relationship would exist that would create a duty to supervise the project in the manner of a reasonably prudent man).

[74]433 N.E.2d at 49 (emphasis in original).

[75]*Id.* at 50 (quoting RESTATEMENT (SECOND) OF TORTS § 324A (1966)).

[76]433 N.E.2d at 50 (citing Nelson v. Union Wire Rope Corp., 31 Ill. 2d 69, 199 N.E.2d 769 (1964)).

[77]433 N.E.2d at 50 (quoting Board of Comm'rs v. Hatton, 427 N.E.2d 696 (Ind. Ct. App. 1981)). For a discussion of *Hatton* see *supra* notes 55-61 and accompanying text.

[78]425 N.E.2d 125 (Ind. 1981), *rev'g* 408 N.E.2d 575 (Ind. Ct. App. 1980).

defendant's plant. Bridges sued, claiming that the defendant negligently stored the dynamite so that it could be stolen and that this negligent act was the proximate cause of his damage. The trial court granted the defendant's motion for summary judgment holding as a matter of law that negligent storage of the dynamite was not the proximate cause of plaintiff's injuries.[79] The court of appeals for the fourth district reversed the trial court decision. In reviewing the legislative history and statutory purposes of federal laws controlling storage of explosives, the court of appeals found that "reasonable minds could differ as to whether the defendants reasonably should have foreseen that negligent storage of dynamite could result in its theft and misuse."[80] The Indiana Supreme Court granted the defendant's petition for transfer, vacated the decision of the court of appeals, and reinstated the trial court's decision to grant the defendant's motion for summary judgment.[81]

The supreme court noted the great disparity in approaches to the proximate cause question in cases involving the storage of explosives[82] and cited as examples of the divergent points of view, *Bottorff v. South Construction Co.*[83] and *Yukon Equipment, Inc. v. Firemen's Fund Insurance.*[84] In *Bottorff*, a fourteen-year-old child stole explosives from a dilapidated shed and gave them to a twelve-year-old who injured himself. The Indiana Supreme Court sustained a demurrer in *Bottorff* finding that the larceny of the child, not the negligent storage, caused the injury.[85] By contrast, in *Yukon Equipment*, when extensive damage was done to neighboring homes because thieves broke into the defendant's magazine and ignited great quantities of dynamite, the Alaska Supreme Court found the defendant absolutely liable based on the court's conclusion that storing explosives is an ultrahazardous activity.[86]

The supreme court in *Bridges* disagreed with the Alaska court's conclusion in *Yukon Equipment* that storing dynamite is an ultrahazardous activity that should result in a per se rule of liability.[87] Instead, the court adopted the *Restatement (Second) of Torts* section 520 approach[88] and concluded that the question of whether storage of

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[79]*Id.* at 126.
[80]408 N.E.2d 575, 578 (Ind. Ct. App. 1980).
[81]425 N.E.2d at 125.
[82]*Id.* at 126.
[83]184 Ind. 221, 110 N.E. 977 (1916).
[84]585 P.2d 1206 (Alaska 1978).
[85]184 Ind. at 227-28, 110 N.E. at 978.
[86]585 P.2d at 1211.
[87]425 N.E.2d at 126.
[88]RESTATEMENT (SECOND) OF TORTS § 520 (1977) reads in pertinent part:

> In determining whether an activity is abnormally dangerous, the follow-

dynamite is an ultrahazardous activity should be determined on a case-by-case basis.[89]

Unfortunately, the court in *Bridges* dropped its discussion of "ultrahazardous activities" without any statement as to whether the storage of dynamite *in this case* amounted to an ultrahazardous activity. Apparently, the court concluded that it did not because the court moved to a discussion based on a theory of negligence.[90]

Although unwilling to accept that storing dynamite will always result in liability if someone steals and misuses it, the *Bridges* court expressed dissatisfaction with the approach in *Bottorff* also. The court pointed out that since the *Bottorff* decision, there have been extensive regulations enacted regarding the storage of explosives.[91] This is indicative of a policy to encourage care. Thus, the court declined to follow the holding in *Bottorff* that the theft of explosives would always be a superseding cause which would relieve one who negligently stored them of liability.[92] Rather, the court looked to the particular

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ing factors are to be considered:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

[89]425 N.E.2d at 126. The court apparently assumed that if the activity is deemed ultrahazardous so as to justify the imposition of strict liability, the issue of proximate cause is no longer relevant. A logical argument can be made for the view that for strict liability to apply, the activity must be so hazardous and likely to cause harm that the foreseeability aspect of proximate cause as a limitation on liability is unnecessary. However, courts regularly interject limitations on strict liability on the basis of something in the nature of proximate cause. This is particularly true if an intervening cause, such as the act of a third person, plays a part in plaintiff's damage. Although extensively discussed by legal scholars, the problem has never been satisfactorily resolved. One noted torts scholar stated that, "[i]t is stuff like this that drives a torts professor mad and which convinces his students at the threshold of their professional training that the law is a crazy mess." Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 379 (1951). For various approaches to the problem see J. FLEMING, THE LAW OF TORTS 311-13 (3d ed. 1965); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 79 (4th ed. 1971); Harper, *Liability Without Fault and Proximate Cause*, 30 MICH. L. REV. 1001 (1932).

[90]425 N.E.2d at 127. Having adopted section 520 as the proper approach to a case involving the storage of dynamite, the court defers to the trial court for a determination on the issue of whether the storage here constituted an ultrahazardous activity. *See* RESTATEMENT (SECOND) OF TORTS § 520 comment 1 (1977).

[91]425 N.E.2d at 127 (citing IND. CODE § 22-11-13-1 to -28 (1976)).

[92]425 N.E.2d at 127.

facts of this case to determine that the trial court's grant of summary judgment on the issue of proximate cause was correct.

The relevant factors acting as a superseding cause precluding liability of the defendant in *Bridges* were that the blast occurred nearly three weeks subsequent to the theft, that the blast occurred at a location over one hundred miles from the storage site, and that the disappearance of the dynamite was reported to federal authorities pursuant to federal regulations.

In *Bridges*, the court recognized that negligence is the proximate cause of injury if it is a natural and probable consequence that should have been foreseen. Given the factual situation in *Bridges*, the court found that reasonable minds could not differ on the question of whether the damage to plaintiff was reasonably foreseeable.[93] However, in light of the likelihood of injury when explosives are stolen and misused, it is difficult to imagine how reasonable minds might not differ on the question of whether negligent storage and the resulting theft of explosives could foreseeably result in the thief making and exploding bombs regardless of how much later or how far away the explosion. Perhaps the court felt a bit uncomfortable with its decision because the court expressly limited the decision in *Bridges* to the facts,[94] making it difficult to assess the future impact of this case.[95]

The court of appeals for the second district had occasion to explore the vagaries of proximate cause in *Hiatt v. Brown*.[96] In *Hiatt*, a jet blast from a TWA airplane blew the plaintiff down as she walked up a ramp at Indianapolis International Airport.

In 1964, the Indianapolis Airport Authority (IAA) had contracted with defendant Brown, an architect, to design a plan for the expansion of the airport's terminal building. The expansion plan included a TWA arrival/departure gate near the ramp on which Hiatt was injured. The original understanding between the parties was that all airlines would use a nose in/nose out system of moving planes. With this system, the planes kept their engines off, and tugs pushed the planes in and pulled them out. In 1965, Brown learned that TWA intended to use a taxi in/taxi out operation which would subject the unprotected ramps to jet blasts from the arriving and departing planes. Although it was unclear whether Brown learned of this change before or after he submitted his architectural plans for approval, the record indicated he had time to make design changes during the construction.

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[93] *Id.*

[94] *Id.*

[95] Justice DeBruler in his short dissenting opinion expressed the view that what happened here could have been foreseen and a jury question was presented. *Id.* at 128 (DeBruler, J., dissenting).

[96] 422 N.E.2d 736 (Ind. Ct. App. 1981).

IAA accepted the completed terminal in 1967 with no jet blast protection for the ramp. Though numerous incidents of property and personal injury occurred, neither TWA nor IAA acted to warn pedestrians on the ramp of the possible danger.

Hiatt filed suit against Brown, TWA, and IAA. TWA and IAA settled, and Hiatt went to trial againt Brown. The trial court granted Brown's motion for summary judgment on the ground that Brown was relieved from liability because the conduct of IAA and TWA intervened to break the causal chain between Brown's negligence and Hiatt's injury.[97] When Hiatt appealed, the court of appeals reversed the entry of summary judgment finding that a genuine issue of material fact existed on the question of whether Hiatt's injuries were proximately caused by Brown's negligence.[98]

Before considering the proximate cause issue, the court addressed the question of whether the *Restatement (Second) of Torts* section 385 should apply to relieve Hiatt from having to establish privity between herself and Brown even though Hiatt was a stranger to the architect/owner relationship.[99] The court briefly traced the downfall of the privity requirement in contractor-owner relationships in numerous jurisdictions[100] and finally pointed out that section 385 reflects this trend. Although a fair reading of the case makes it appear as if the court's ultimate destination was to specifically adopt section 385 as law in Indiana, the court concluded that it did not need to adopt or reject section 385 to resolve this case. The court found that Hiatt's situation fell within an already well-recognized exception to the privity requirement in Indiana which applies if "the architect's design was done so negligently as to create a condition imminently dangerous to third persons."[101] Thus, even though the court in *Hiatt* decided not

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[97]*Id.* at 738. As an alternative reason for granting the summary judgment, the trial court found that Brown's negligence in failing to investigate or design jet blast protection merely created a condition which made plaintiff's injury possible and that the conduct of TWA and IAA actually caused the injury. *Id.* However, the court on appeal did not address this conclusion.

[98]*Id.* at 739.

[99]RESTATEMENT (SECOND) OF TORTS § 385 (1965) provides:

> One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others.

[100]*See generally* Comment, *Architect Tort Liability in Preparation of Plans and Specifications*, 55 CALIF. L. REV. 1361 (1967); Note, *Liability of Design Professionals—The Necessity of Fault*, 58 IOWA L. REV. 1221 (1973).

[101]422 N.E.2d at 740. One might take issue with the court's assertion that in Indiana the privity barrier has "repeatedly collapsed" in the situation of architects who have

to take the final step to adopt section 385 as law, nonetheless, the court laid the groundwork for the adoption of section 385 should the appropriate occasion arise.

After disposing of the privity issue, the court in *Hiatt* focused its consideration on the proximate cause question and inquired whether the conduct of TWA and IAA, in recognizing the danger and failing to rectify or warn of it, was an intervening cause which would relieve Brown of liability.[102] Although the court recognized the policy behind the rule that the conduct of an owner who learns of a dangerously defective condition on his land but fails to remedy it is an intervening cause which excuses an architect from liability,[103] the court, nevertheless, noted that "reasonable foreseeability is still the fundamental test of proximate cause" and that intervening causes will excuse liability only if they are not foreseeable.[104] The question in *Hiatt* was whether Brown should have foreseen that TWA and IAA would recognize the danger and fail to remedy it. Because the appellate court found conflicting facts and inferences to be drawn from the record on this question, it concluded that resolution of this issue should have been left to the trier of fact and the trial court's grant of summary judgment was reversible error.[105]

C. Damages

1. Crops.—In *Decatur County Ag-Services, Inc. v. Young*,[106] the Indiana Supreme Court granted transfer to settle the method for measuring damages for the destruction of growing crops having no ready market value. The plaintiff Young's soybean crop was partially destroyed as a result of defendant's negligent spraying for grass-

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designed hazardous structures in light of the fact that all the cases cited by the court involve contractors sued for negligent construction defects and not architects sued for negligent design defects. The cases cited are: Davis v. Henderlong Lumber Co., 221 F. Supp. 129 (N.D. Ind. 1963); Gillam v. J. C. Penney Co., 193 F. Supp. 558 (S.D. Ind. 1961); Great Atlantic & Pacific Tea Co. v. Wilson, 408 N.E.2d 144 (Ind. Ct. App. 1980); and Holland Furnace Co. v. Nauracaj, 105 Ind. App. 574, 14 N.E.2d 339 (1938). Arguably, however, the reason for holding architects liable for negligent design in the absence of privity is even stronger than that for holding contractors liable. In the cases cited by the court, the contractors were merely following designs and specifications drafted by someone else. The architect here, however, possibly created in his design "a condition imminently dangerous to third persons." 422 N.E.2d at 740.

[102]422 N.E.2d at 740-42.

[103]*Id.* at 740. Such a rule is necessary to protect an architect or builder who has turned property over to an owner and no longer has the ability to modify the structure. If such a principle did not apply, architects would remain liable to third persons with no power to cure the defect.

[104]*Id.* at 741.

[105]*Id.* at 741-42.

[106]426 N.E.2d 644 (Ind. 1981).

hoppers. After harvest, Young, as was his custom, stored what was left of his beans and sold them after the planting period the next year for $8.86 to $10.39 per bushel. The trial court awarded Young damages of $10 per bushel for the difference between what his crop would have yielded and what it did yield based on the market value at the time he actually sold what remained of his crop. Defendant appealed claiming, among other things, that the trial court erred in assessing the value of the lost portion at the market price at the time Young sold the crop rather than at the prevailing market price at the time of harvest, and that the trial court erred in failing to reduce the award by the amount Young saved by not having to harvest, cultivate, or store the lost portion of the crop. The court of appeals for the first district affirmed the damages awarded.[107] The supreme court granted transfer on the ground that the court of appeals decided erroneously a new question of law.[108]

Quoting a Wisconsin case and citing authorities from numerous other jurisdictions, the supreme court found that the proper measure of damages for the destruction or partial destruction of a growing crop to be "the difference between the value at maturity of the probable crop if there had been no injury and the value of the actual crop at maturity, less the expense of cultivation, harvesting and marketing that portion of the probable crop which was prevented from maturing."[109] In adopting this method of valuation, the court fell in line with the approach used in a majority of jurisdictions.[110]

However, the circumstances of this case illustrate the difficulties and possible inequities created by adhering to a hard-and-fast rule in the area of calculating damages for injuries to crops. The court in *Young* aptly pointed out that the purpose of damages is to compensate the injured party for loss.[111] The court further stated, though, that the plaintiff, by electing not to sell at the harvest time, speculated that the market value would be greater at a later date, and "[s]peculation about lost profits of this nature is not permitted."[112]

If the purpose of damages is to compensate the injured party for loss suffered, the remedy failed in this case. The plaintiff in *Young* actually sold part of his crop at a later time because it was his custom,

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[107]401 N.E.2d 731 (Ind. Ct. App. 1980).

[108]426 N.E.2d at 645.

[109]*Id.* at 646 (quoting Cutler Cranberry Co. v. Oakdale Electric Cooperative, 78 Wis. 2d 222, 229, 254 N.W.2d 234, 238 (1977)).

[110]*See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 5.2 (1973). For a discussion of the seemingly infinite variety of methods for assessing damages to growing crops, see Note, *Markets, Time, and Damages: Some Unsolved Problems in the Field of Crops*, 14 IND. L. REV. 647 (1981).

[111]426 N.E.2d at 646.

[112]*Id.* at 647.

and he would have sold the entire crop at this later date had it not been damaged by the defendant. The amount of plaintiff's actual loss was thus easily ascertainable; the formula was the difference between what he received when he sold and what he would have received had he been able to sell the entire crop. The practice of selling the crop at a later time may have appeared speculative to the court, but, for this particular plaintiff, evidence could have been introduced to show that selling late constituted an established business practice. Thus, damages calculated at the time of the actual sale would have been more commensurate with this plaintiff's loss.

To avoid the inequities that occurred in *Young*, a few courts have adopted a case-by-case approach in determining damages.[113] A flexible rule that allows plaintiff and defendant to introduce evidence on the extent of the plaintiff's actual losses has obvious appeal if compensation for the loss suffered is the ultimate goal.[114] However, the supreme court, by opting in favor of the majority rule, has foreclosed this as a possibility in Indiana.

2. Nuisance.—The first district court of appeals held in *Rust v. Guinn*[115] that damages for personal losses, such as inconvenience and injury to health, may be recovered in an action for an abatable private nusiance. This would be in addition to damages for the interference with and loss of use and enjoyment of property. The Guinns had resided on an eighty-acre farm for four years prior to the establishment of two chicken farms on an adjacent property. Because of the proximity of the chicken farms, the Guinns suffered an increased number of flies and repugnant odors. The Guinns brought suit against Eggacres, Inc. (Eggacres) and were awarded $9,500 in the second part of a bifurcated proceeding. Eggacres appealed from the judgment in the damages suit assigning as error the trial court's jury instruction on the measure of damages for an abatable private nuisance.[116]

Eggacres contended that the proper measure of damages for an abatable private nuisance is limited to the reduction in the fair rental value of plaintiff's real estate caused by the nuisance conditions. The trial court instructed the jury it could include not only the damage elements agreed to by Eggacres but also damages for actual expenses incurred by plaintiff in attempting to mitigate the effects of the nuisance and damages for injury to health caused by the nuisance.

Although the court of appeals noted that recent Indiana cases have held that the general measure of damages for an abatable private

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[113]*See* D. DOBBS, *supra* note 110.

[114]See *supra* note 110 for discussion of this approach.

[115]429 N.E.2d 299 (Ind. Ct. App. 1981).

[116]*Id.* at 301.

nuisance is the loss of the use of the land, measured by the diminution in rental value, the court found no Indiana cases which excluded other items of damage.[117] Nor did the court find that the legislature gave any guidance on the damages issue in the statutes dealing with nuisance.[118] However, intent on expanding the scope of damages recoverable for a private abatable nuisance, the court recognized that a plaintiff in a nuisance action often suffers damages beyond diminution in rental value.[119] To support its position, the court cited authority from other jurisdictions,[120] the *Restatement (Second) of Torts* section 929(1),[121] and Dean Prosser,[122] as well as dicta from a vintage Indiana

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[117]*Id.* at 303.

[118]*See* IND. CODE §§ 34-1-52-1 to -3 (1976). These sections define nuisance, identify the proper party to bring suit, and state possible remedies. These statutes are silent, however, on what items of damages are recoverable. *Id.*

[119]429 N.E.2d at 303.

[120]*Id.* at 304 (citing City of San Jose v. Superior Court of Santa Clara County, 12 Cal. 3d 447, 525 P.2d 701, 115 Cal. Rptr. 797 (1974); Miller v. Carnation Co., 39 Colo. App. 1, 564 P.2d 127 (1977); Nair v. Thow, 156 Conn. 445, 242 A.2d 757 (1968); Nitram Chemicals, Inc. v. Parker, 200 So. 2d 220 (Fla. Dist. Ct. App. 1967); Pollard v. Land West, Inc., 96 Idaho 274, 526 P.2d 1110 (1974); Earl v. Clark, 219 N.W.2d 487 (Iowa 1974); Holmberg v. Bergin, 285 Minn. 250, 172 N.W.2d 739 (1969); Nevada Cement Co. v. Lemler, 89 Nev. 447, 514 P.2d 1180 (1973); Spencer Creek Pollution Control Ass'n v. Organic Fertilizer Co., 264 Or. 557, 505 P.2d 919 (1973); Hendrix v. City of Maryville, 58 Tenn. App. 457, 431 S.W.2d 292 (1968); Lacy Feed Co. v. Parrish, 517 S.W.2d 845 (Tex. Civ. App. 1974)).

[121]429 N.E.2d at 303-04 (citing RESTATEMENT (SECOND) OF TORTS § 929(1) (1977)). The RESTATEMENT reads:

> Harm to Land from Past Invasions
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> (1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for
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> (a) the difference between the value of the land before the harm and the value after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred,
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> (b) the loss of use of the land, and
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> (c) discomfort and annoyance to him as an occupant.

[122]429 N.E.2d at 304 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 90, at 602-03 (4th ed. 1971)). PROSSER reads:

> As in the case of any other tort, the plaintiff may recover his damages in an action at law. In such an action the principal elements of damages are the value attached to the use or enjoyment of which he has been deprived, or—which often amounts to a measure of the same thing—the loss of the rental or use value of the property for the duration of a temporary nuisance . . . and in addition the value of any personal discomfort or inconvenience which the plaintiff has suffered, or of any injury to health or other personal injury sustained by the plaintiff, or by members of his family so far as they affect his own enjoyment of the premises, as well as any reasonable expenses which he has incurred on account of the nuisance.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 90, at 602-03 (4th ed. 1971).

case[123] to the effect that courts are not restricted to depreciation of the property but might also consider a plaintiff's inconvenience and discomfort.

To Eggacres' contention that damages beyond diminution in rental value constituted a double recovery, the court responded simply by voicing its disagreement and referring to a Colorado case distinguishing between proprietary and personal losses and recognizing a need to recover for both.[124]

Although the long-range impact of *Rust v. Guinn* cannot be ascertained yet, this decision, which broadens the scope of damages recoverable for abatable private nuisance, may encourage plaintiffs to bring nuisance actions.

D. Loss of Consortium

For the first time in Indiana, the issue of whether a noninjured spouse's cause of action for loss of consortium must be joined with the injured spouse's action for personal injuries was decided. In *Rosander v. Copco Steel & Engineering Co.*,[125] Rosander's husband was injured while working at Copco's plant. The injured spouse received worker's compensation benefits from Copco and executed a release of all claims againt Copco. Subsequently, Mrs. Rosander, who was not a party to the release, filed a separate action against Copco for loss of consortium. The trial court granted a summary judgment in defendant Copco's favor, holding that because loss of consortium is a derivative suit, the settlement of the injured spouse's primary suit bars the maintenance of an independent suit by the noninjured spouse.[126]

Although the court of appeals disagreed with the trial court's conclusion, it picked up the trial court's unfortunate use of the word "derivative" and stated that "[i]t cannot be denied that a claim for loss of consortium is derivative in that without an injury to one spouse, the other spouse would have no action."[127] That an action for loss of consortium by one spouse will not arise without negligent injury to the other spouse illustrates that the claim is for injury to a relational interest—the marriage relationship—not that it is a derivative

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[123]429 N.E.2d at 303 (quoting Weston Paper Co. v. Pope, 155 Ind. 394, 402-03, 57 N.E. 719, 721 (1900)).

[124]*Id.* at 304 (citing Miller v. Carnation Co., 39 Colo. App. 1, 564 P.2d 127 (1977)). The court neglects to point out that there is considerable authority for the proposition posited by Eggacres that recovery of personal damages amounts to double recovery. *See generally* D. DOBBS, *supra* note 110, § 5.3 and cases cited therein.

[125]429 N.E.2d 990 (Ind. Ct. App. 1982).

[126]*Id.* at 991.

[127]*Id.*

action.[128] Nevertheless, the court of appeals recognized that an action for loss of consortium is an independent action that is separate and distinct from the injured spouse's action for personal injuries and that one spouse cannot waive the rights of the other.[129]

Regardless of the independent status of an action for loss of consortium, the court considered whether the interests of judicial economy, the danger of double recovery, and the potential for inconsistent verdicts are sufficiently compelling reasons to justify a rule requiring mandatory joinder of the claim for loss of consortium with the personal injury claim.[130] The court cited *Troue v. Marker*,[131] in which the Indiana Supreme Court first recognized a wife's claim for loss of consortium, and noted that though *Troue* did not specifically answer the joinder question, the case implied that separate and distinct actions may be filed separately.[132] In addition, the court found that the *Troue* court settled the double recovery problem by holding that a wife cannot recover loss of support in an action for loss of consortium.[133] The court noted that the problem of inconsistent verdicts was not relevant to *Rosander*, because the husband had signed a release, and a release does not settle the merits of a claim.[134]

To answer the remaining question regarding judicial economy, the court turned to the *Restatement (Second) of Torts* section 693 which requires joinder, unless joinder is not possible.[135] Situations which would make joinder impossible include the release of the claim by the injured spouse without knowledge of the other spouse, as hap-

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[128]Derivative can generally be defined as "[c]oming from another; taken from something preceding; secondary. That which has not its origin in itself, but owes its existence to something foregoing." BLACK'S LAW DICTIONARY 399 (rev. 5th ed. 1979). Derivative action is traditionally an action brought by one party on behalf of someone else as in the situation of a stockholders' derivative action in which the corporation is the real party in interest and the stockholder only a nominal plaintiff. *See* 12 WORDS & PHRASES *Derivative Action* 312 (West 1954 & Supp. 1982).

[129]429 N.E.2d at 991.

[130]*Id.*

[131]253 Ind. 284, 252 N.E.2d 800 (1969).

[132]429 N.E.2d at 991.

[133]*Id.*

[134]*Id.*

[135]RESTATEMENT (SECOND) OF TORTS § 693 (1977) states:

> (1) One who by reason of his tortious conduct is liable to one spouse for illness or other bodily harm is subject to liability to the other spouse for the resulting loss of the society and services of the first spouse, including impairment of capacity for sexual intercourse, and for reasonable expense incurred by the second spouse in providing medical treatment.
>
> (2) Unless it is not possible to do so, the action for loss of society and services is required to be joined with the action for illness or bodily harm, and recovery for loss of society and services is allowed only if the two actions are so joined.

pened in the instant case; the abatement of the impaired spouse's claim by death; or the barring of the action by a workers' compensation act.[136] By adopting the approach in section 693, the court of appeals has made an effort to balance the sometimes competing interests of judicial economy and individual rights. After *Rosander*, in order to protect against subsequent suits by spouses who are unaware of the settlement of the primary suit, the negligent party, before finalizing a settlement agreement, should notify the uninjured spouse regarding the pending settlement.

E. Seat Belt Defense

In *State v. Ingram,*[137] the Indiana Supreme Court granted transfer and vacated the opinion of the court of appeals. The supreme court found that the trial court had properly admitted a loan receipt agreement and that the court of appeals had incorrectly reversed on that basis.[138] In the course of its discussion of issues not addressed by the court of appeals, the supreme court took occasion to settle the question of whether the "seat belt defense" has any validity in Indiana.

In *Ingram*, the plaintiffs were injured when their car went into a ditch that was negligently maintained. The State had responsibility to maintain the ditch. The plaintiffs were not wearing seat belts at the time of the accident. On appeal, the State claimed that the trial court erred in refusing to give the jury the following instruction:

> One who is injured is bound to exercise reasonable care and diligence to avoid loss or to minimize resulting damage. It is incumbant [sic] upon a person who is injured to use such means as are reasonable under the circumstances to avoid or to minimize the damage. If you find from a consideration of all the evidence that the using and fastening of seat belts would have avoided or minimized the resulting damage, then the person wronged cannot recover for any item of damage which could have been avoided, or minimized.[139]

The State claimed that the instruction was justified because the evidence showed that plaintiffs' injuries would have been reduced if they had worn seat belts, and a defendant may "show in mitigation or reduction of damages any facts surrounding the injury complained of which tend to reduce the amount required for just compensation to the plaintiff."[140]

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[136]*Id.* at comment g.
[137]427 N.E.2d 444 (Ind. 1981).
[138]*Id.* at 445.
[139]*Id.* at 447.
[140]*Id.*

The supreme court noted that the Indiana Court of Appeals had discussed this theory, commonly called the doctrine of avoidable consequences, in *Kavanagh v. Butorac*.[141] Although in *Kavanagh*, the court of appeals found insufficient evidence to justify application of the doctrine, the *Kavanagh* court recognized that the doctrine might apply at "some future date and in some matter where the circumstances are clearer than in the instant case in showing that some part of the injury would not have occurred except for the fact that plaintiff failed to avoid the consequence of the tort by not fastening his seat belt."[142]

In spite of the State's claim that the "future date" had arrived, the supreme court in *Ingram* refused to accept failure to fasten a seat belt as the kind of avoidable consequence that a defendant may show in mitigation of damages.[143] The court pointed out that the rule of avoidable consequences applies only to a plaintiff's conduct after the commission of the tort but while some damage might still be averted.[144] Because buckling or failing to buckle a seat belt must be accomplished before the tortious act occurs, the doctrine of avoidable consequences cannot logically include the seat belt defense.[145] In addition to finding logical inconsistency in including failure to wear a seat belt under the rubric avoidable consequences, the supreme court noted Indiana's traditional approach to limiting mitigation of damages to post-tort consequences.[146] Thus the court concluded that a defendant cannot successfully assert plaintiff's failure to wear seat belts as a way to reduce damages in a negligence action.[147]

To buttress its conclusion, the supreme court pointed out that the Indiana legislature addressed the matter of seat belts for other purposes but has never imposed the duty on riders to wear seat belts.[148] Until a time when the legislature feels called upon to impose such a duty upon riders in automobiles, the position of the seat belt defense is settled in Indiana.

F. Medical Malpractice

During the survey period, both the first and the fourth district

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[141]140 Ind. App. 139, 221 N.E.2d 824 (1966).

[142]*Id.* at 149, 221 N.E.2d at 830.

[143]427 N.E.2d at 447.

[144]*Id.* at 448.

[145]*Id.*

[146]*Id. But see* Note, *Spier v. Barker*, 3 HOFSTRA L. REV. 883, 892-93 (1975).

[147]427 N.E.2d at 448. *But see* Kircher, *The Seat Belt Defense—State of the Law*, 53 MARQ. L. REV. 172, 182-86 (1970); Comment, *Self-Protective Safety Devices: An Economic Analysis*, 40 U. CHI. L. REV. 421, 427-33 (1973).

[148]427 N.E.2d at 448. For a discussion of the seat belt defense see Note, *The Seat Belt Defense: A Comprehensive Guide for the Trial Lawyer and Suggested Approach for the Courts*, 56 NOTRE DAME LAW. 272 (1980).

court of appeals had an opportunity to interpret portions of the Medical Malpractice Act. In *Carmichael v. Silbert*,[149] the first district court of appeals held that the Indiana Malpractice Act[150] does not violate the equal protection or due process clauses of the United States Constitution or the privileges and immunities clause of the Indiana Constitution.[151] The Act provides that a medical malpractice action must be brought within two years from the alleged act, omission, or neglect while other tort actions for personal injuries need not be brought until two years after the cause of action has accrued.[152]

Mrs. Carmichael underwent surgery for the removal of warts and tumors in February 1977 and again in March 1977 because of resulting complications. In February 1980 she filed a malpractice complaint against Dr. Silbert, claiming that she currently suffers from a nervous disorder which is a result of Dr. Silbert's treatment. Dr. Silbert filed a motion for preliminary determination of law, claiming that the complaint was filed after the statute of limitations had run and the plaintiff's claim therefore should be barred. The trial court granted Silbert's motion and Carmichael appealed on the ground that the statute of limitations in the Medical Malpractice Act is unconstitutional.

Carmichael argued that the statute of limitations embraced in the Medical Malpractice Act violates the equal protection clause of the fourteenth amendment because it treats victims of medical malpractice differently from victims of other tortious acts. The statute of limitations provides that:

> No claim, whether in contract or tort may be brought against a health care provider based upon professional services or health care rendered or which should have been rendered unless filed within two (2) years from the date of the alleged act, omission or neglect except that a minor under the full age of six years shall have until his eighth birthday in which to file. This section applies to all persons regardless of minority or other legal disability.[153]

The basis of Carmichael's claim was that the Medical Malpractice Act requires the filing of a claim within two years of the act, omission, or neglect complained of, whereas the general statute of limitations provides that actions for personal injuries must be brought within two

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[149]422 N.E.2d 1330 (Ind. Ct. App. 1981).
[150]IND. CODE § 16-9.5-3-1 (1976).
[151]422 N.E.2d 1330 (Ind. Ct. App. 1981).
[152]IND. CODE § 16-9.5-3-1 (1976).
[153]*Id.*

years after the accrual of the action.[154] Because neither a fundamental right nor a suspect classification was at issue in *Carmichael*, strict judicial scrutiny was not required.[155] Only a fair and substantial relationship between the classification and the legislative purpose must be present. The court of appeals found that the legislative classifications were rationally related to maintaining the availability of sufficient medical treatment in the state.[156] Thus, the statute does not violate equal protection.

Carmichael also argued that the two-year time period violates due process because it may not be possible to ascertain the full extent of injury, including the possibility of recurrence or permanency, until after the two-year period.[157] However, the court pointed out that in this case Mrs. Carmichael was aware of her alleged injuries soon after they occurred, and she had failed to take proper steps to bring her claim. In view of the 1980 Indiana Supreme Court decision of *Johnson v. St. Vincent Hospital, Inc.*,[158] which upheld the Act's constitutionality against multiple attacks, it is likely that the *Carmichael* court's decision would have been the same no matter when the injuries were discovered.

The court of appeals also relied on *Johnson v. St. Vincent Hospital, Inc.*, in holding that the statute of limitations provision does not violate article I, section 23 of the Indiana Constitution.[159] The burdens on malpractice claimants and the benefits granted to health care providers were deemed consistent with the legislative goal of maintaining health care services.[160] Therefore, the statute of limitations of the Medical Malpractice Act has withstood constitutional challenge and those who cannot or do not comply with its provisions will be barred from bringing an action.

In *Kranda v. Houser-Norberg Medical Corp.*,[161] the court of appeals for the fourth district rendered a statutory interpretation of several provisions of the Medical Malpractice Act. Kranda brought suit against Dr. Houser and his medical corporation because Kranda suffered a rectal fistula following Dr. Houser's excision of a Bartholin cyst. The jury returned a verdict for Dr. Houser from which Kranda appealed.[162]

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[154]422 N.E.2d at 1332 (quoting IND. CODE § 16-9.5-3-1 (1976), now codified at *id.* § 16-9.5-3-1 (1982), and citing IND. CODE § 34-1-2-2 (1982)).

[155]422 N.E.2d at 1332.

[156]*Id.* at 1333.

[157]*Id.*

[158]404 N.E.2d 585 (1980). For discussion of this case, see Harrigan, *Torts, 1981 Survey of Recent Developments in Indiana Law,* 15 IND. L. REV. 425 (1982).

[159]422 N.E.2d at 1333-34.

[160]*Id.* at 1334.

[161]419 N.E.2d 1024 (Ind. Ct. App. 1981).

[162]Kranda claimed numerous errors in addition to those bearing on the statutory

Plaintiff claimed that the trial court erred in allowing two members of the medical review panel to testify regarding their decisions and in admitting each panel member's written opinion because those opinions were based upon casual conversations with other physicians.

Kranda contended that Indiana Code section 16-9.5-9-4[163] provides that the only information to be considered by the medical review panel under the Act is evidence submitted in writing by the parties. The court acknowledged that section 4 read alone might support that interpretation, but if read in conjunction with section 6 a different interpretation results.[164] Section 6 permits the panel to consult with "medical authorities."[165] Kranda argued that medical authorities include only treatises, journals, medical texts, etc., and that the opinions were not in conformance with the statute.[166] Applying traditional rules of statutory construction, the court of appeals rejected Kranda's argument on the basis that such a construction of the language would unnecessarily narrow the statutory provision.[167] The *Kranda* court noted that the ordinary meaning given to the word "authorities" includes written materials as well as individuals who are qualified in the field.[168] Additionally, the court interpreted section 6 as referring to individuals because the statute states that "[t]he panel may consult *with* medical authorities,"[169] and "ordinarily one consults *with* a person rather than a book or written materials."[170]

Kranda also argued that admission of the consultations was impermissible because she had no opportunity to cross-examine the consulted physicians. Because of her lack of knowlege of the conversations, she claims she was unable to present rebuttal evidence. The court also rejected this argument, based on section 5 of the Act which provides that either party may convene the panel and question the members regarding any relevant issues to be decided.[171] The court reasoned that Kranda could have availed herself of this opportunity by questioning the members as to any consultations that were made.[172] The court rejected Kranda's final argument regarding the admissibility

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construction of the Medical Malpractice Act. The court found all her constitutional attacks to have been settled by Johnson v. St. Vincent Hospital, Inc. 404 N.E.2d 585 (Ind. 1980).

[163]IND. CODE § 16-9.5-9-4 (1982).

[164]419 N.E.2d at 1032.

[165]*Id. See* IND. CODE § 16-9.5-9-6 (1982).

[166]419 N.E.2d at 1032.

[167]*Id.*

[168]*Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 146 (1976)).

[169]419 N.E.2d at 1032-33 (quoting IND. CODE § 16-9.5-9-6 (1976) now codified at *id.* § 16-9.5-9-6 (1982)).

[170]419 N.E.2d at 1033.

[171]*Id.*

[172]*Id.*

of the opinions. This argument was based on the fact that the opinions were not in the form of a collegial opinion. The court interpreted section 9 as not prohibitive of individual opinions and pointed out that if such a construction were adopted, individual panel members could not dissent to the majority opinion.[173]

The 1982 Session of the Indiana General Assembly amended the Medical Malpractice Act to include within the definition of patient, "any and all persons having a claim of any kind, whether derivative or otherwise, as a result of alleged malpractice on the part of a health care provider."[174] The Act provides that "[d]erivative claims include, but are not limited to, the claim of a parent or parents, guardian, trustee, child, relative, attorney, or any other representative of such patient including claims for loss of services, loss of consortium, expenses, and all such similar claims."[175]

The purpose of the amendment was apparently to clarify an ambiguity in the statute found by the court of appeals in *Sue Yee Lee v. Lafayette Home Hospital, Inc.*[176] In *Sue Yee Lee*, the court found "the Indiana Medical Malpractice Act to be ambiguous and unclear in meaning with regard to whether or not the action of parents for loss of services of, and medical expenses for, a minor child is subject to the act."[177] Looking to historical background in order to find legislative intent, the court in *Sue Yee Lee* concluded that "all actions the underlying basis for which is alleged medical malpractice are subject to the act."[178] Thus the recent amendment has codified the court of appeals' holding in *Sue Yee Lee.*

One effect of the amendment should be to clarify the question whether an action by survivors for a death caused by medical malpractice is properly brought under the Medical Malpractice Act or whether an independent action may be brought under the Wrongful Death Act.[179] The expansive language defining patient as "any and all per-

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[173]*Id.* at 1034.

[174]IND. CODE § 16-9.5-1-1(c) (1982).

[175]*Id.* The amendment suffers from the use of the word "derivative" to refer to such actions as loss of consortium and loss of services. The implication is that any claim brought by one who has not sustained the actual physical injury has a "derivative" claim. However, such claims for loss of consortium or loss of services, though they may have arisen from an alleged medical malpractice, are independent claims for damage to the plaintiff's relational interest with the injured party. *See supra* notes 125-36 and accompanying text.

[176]410 N.E.2d 1319 (Ind. Ct. App. 1980). For a discussion of this case, see Harrigan, *Torts, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 425, 429 (1982).

[177]410 N.E.2d at 1323.

[178]*Id.* at 1324.

[179]This problem was raised and discussed in Warrick Hosp., Inc. v. Wallace, 435 N.E.2d 263 (Ind. Ct. App. 1982). The court of appeals concluded "that the right to pros-

sons having a claim of any kind" must include claims based on death caused by alleged medical malpractice. Thus, it appears that if death is caused by medical malpractice, any claims that would have been filed on behalf of survivors separately under provisions of the Wrongful Death Act must now be included in the medical malpractice claim and, presumably, will be subject to the limitations on recovery[180] provided for in the Medical Malpractice Act.

G. Tortious Interference With Contract

Although the Indiana Court of Appeals decided several cases during the survey period involving interference with a contractual relationship, *Stanley v. Kelly*[181] is the most interesting case from the point of view of legal development—or in this particular case, nondevelopment. In *Stanley v. Kelly*, the court of appeals for the fourth district declined to find that an oral contract of employment terminable at will was an adequate contract to sustain a claim for tortious interference with a contractual relationship.[182]

Plaintiff Stanley and defendant Kelly both worked for Financial Sales Corporation (F.S.C.) in Indianapolis until Stanley fired Kelly. Sometime thereafter, Kelly called the F.S.C. home office and told a top executive that Stanley had fired him because he would not support Stanley's attempt to form his own company. When Stanley was later fired, he brought suit against Kelly alleging both intentional interference with a contractual relationship and slander. The jury entered a verdict for Stanley and awarded him both actual damages and punitive damages. Kelly made a motion to correct errors which the trial court granted on the basis that the verdict was clearly erroneous and not supported by the evidence.[183] Stanley appealed.

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ecute a claim for wrongful death based upon medical malpractice is governed by the wrongful death statute with regard to the parties eligible to institute such proceeding, the persons for whose benefit recovery may be had, and the manner of distribution of such proceeds." *Id.* at 268.

[180]IND. CODE § 16-9.5-2-2 (1982).

[181]422 N.E.2d 663 (Ind. Ct. App. 1981).

[182]*Id.* at 665. For cases which hold that interference with an employment contract terminable at will gives rise to a cause of action, see American Surety Co. v. Schottenbauer, 257 F.2d 6 (1958); Canuel v. Oskoian, 184 F.Supp. 70 (1960).

[183]422 N.E.2d at 665. This case has had a strange procedural history. The trial court originally granted a new trial pursuant to Trial Rule 59(I)(7). The court of appeals on the first appeal retained jurisdiction but sent the case back to the trial court for clarification on whether the trial court intended to enter judgment for Kelly or grant a new trial. 417 N.E.2d 1145 (Ind. Ct. App. 1981). The trial court clarified its ruling, rendered a judgment for Kelly on the interference with contract issue, and ordered a new trial on the slander issue. In addition to deciding in Kelly's favor on the interference with contract issue, the court on this appeal also found that the trial

Because the court of appeals found that an action for interference with a contractual relationship presupposes the existence of a valid and enforceable contract,[184] and Stanley had only an oral contract of employment which was terminable at will, the court on appeals agreed with the trial court that the verdict in favor of Stanley was clearly erroneous. In so finding, the court of appeals rejected Stanley's argument that a majority of jurisdictions recognize interference with employment contracts terminable at will.

The court purported to find support in Indiana law for its conclusion. The cases cited by the court, however, are either factually distinguishable or mention only in dicta that oral contracts are not a basis for an action in interference with a contract.[185] Thus, Indiana authority does not compel the court's conclusion that an oral contract of employment, which is terminable at will, is insufficient as a basis for a cause of action in tortious interference with contract. In difficult economic times where unemployment is rampant, the employer-employee relationship may be the most important economic relationship one can have. It is unfortunate that the court in *Stanley* was unwilling to fall in line with the majority and to extend protection for oral employment contracts.

H. Malicious Prosecution

Wong v. Tabor[186] presented the first opportunity for an Indiana appellate court to review a malicious prosecution suit which was brought by a physician against an attorney for wrongful initiation of a claim for medical malpractice. In *Wong v. Tabor*, attorney Tabor had filed suit against Dr. Wong on behalf of a couple who sustained injuries allegedly caused by Dr. Wong's medical malpractice. When Tabor subsequently failed to answer interrogatories, Wong moved for summary judgment. Prior to the hearing, an attorney from Tabor's office

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court did not abuse its discretion in granting Kelly a new trial on the slander issue. 422 N.E.2d at 668-69.

[184]422 N.E.2d at 667. The elements of the tort of interference with a contractual relationship were set out by the court of appeals in Hurst v. Town of Shelburn, 422 N.E.2d 322 (Ind. Ct. App. 1981). They include:

(1) existence of a valid and enforceable contract;
(2) defendant's knowledge of the existence of the contract;
(3) defendant's intentional inducement of breach of the contract;
(4) the absence of justification; and
(5) damages resulting from defendant's wrongful inducement of the breach.

Id. at 325. *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 129, at 931-33 (4th ed. 1971).

[185]422 N.E.2d at 667 n.3. *See* Miller v. Ortman, 235 Ind. 641, 136 N.E.2d 17, (1956).

[186]422 N.E.2d 1279 (Ind. Ct. App. 1981). For further discussion of this case, see Jackson, *Professional Responsibility, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 265, 275 (1983).

informed Wong's attorney that there would be no objection to the entry of summary judgment. The trial court entered summary judgment in favor of Wong, and he subsequently filed suit against Tabor for malicious prosecution. At the trial for malicious prosecution, the medical records indicated that Wong's sole involvement in the original plaintiff's hospital care had been prescribing a laxative. Wong argued that Tabor had been or should have been aware of this fact prior to initiating the suit, and therefore Tabor lacked probable cause for bringing the claim. The jury found in Wong's favor and awarded damages, but the trial court granted Tabor's motion for judgment on the evidence and set aside the verdict for Wong on the ground that the prior dispute was terminated by agreement which served as a bar to Wong's suit.

The four elements to be proven by the plaintiff in a malicious prosecution action are "(a) the defendant instituted, or caused to be instituted, a prosecution againt the plaintiff; (b) the defendant acted maliciously in doing so; (c) the prosecution was instituted without probable cause; and (d) the prosecution terminated in the plaintiff's favor."[187] Although the court of appeals for the third district affirmed the trial court's judgment, it held that electing not to oppose summary judgment does not constitute settlement or agreement in terms of terminating the prior malpractice suit.[188] Rather, the appellate court resolved the case on the probable cause element, finding that Wong failed to prove Tabor lacked probable cause.[189]

Initially, the court made some general observations on malicious prosecution and its application to the problem of medical malpractice. Noting that malicious prosecution has not been favored by the legal system,[190] the court pointed out that physicians are increasingly alarmed by the recent marked increase in what they often consider groundless malpractice actions, and that physicians have counterattacked by suing attorneys for malicious prosecution. According to the court, the tort of malicious prosecution was not designed to address the problem of attorneys who file groundless suits, and courts have been reluctant to allow plaintiffs to use it to effect such a result.[191] The court recognized, however, that if any cause of action exists against an attorney, malicious prosecution is essentially the only vehicle available for seeking relief.

In addressing the elements of the case, the *Wong* court pointed out that termination in favor of a prior defendant for the purpose of

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[187]*Id.* at 1283.
[188]*Id.* at 1282.
[189]*Id.*
[190]*Id.* at 1283.
[191]*Id.*

a malicious prosecution action may occur in a number of ways: adjudication by a competent tribunal, withdrawal of the proceedings by the plaintiff, or dismissal of the proceedings for failure to prosecute.[192] However, if settlement or agreement is the basis for the termination of the suit, no action in malicious prosecution will lie.[193]

Although entry of summary judgment in favor of a prior defendant qualifies as termination in his favor, if the judgment is merely the formal means of securing settlement benefits, then such judgment does not constitute a termination in plaintiff's favor for purposes of a malicious prosecution suit.[194] Thus, the circumstances surrounding the entry of summary judgment must be considered. The court of appeals found no evidence of settlement or agreement in *Wong v. Tabor*. Tabor's decision to forego contesting the motion was apparently a personal choice. Because voluntary abandonment by the plaintiff can constitute termination in favor of the defendant, the court of appeals found that the trial court had erred in setting aside the verdict on this ground. The appellate court found, however, that Wong failed to show probable cause, and on this basis, the court was able to affirm the trial court's decision.[195]

The court pointed out that though the probable cause question has previously been addressed from a litigant's perspective, this is the first case to enunciate a standard of probable cause for assessing a lawyer's decision to bring suit. Early in its discussion of the probable cause issue, the court set the stage in such a way that its ultimate conclusion in favor of the attorney defendant comes as no surprise. Purporting to review authorities which have addressed the issue of "articulating a standard by which an attorney's actions may be judged," the court took advantage of the opportunity to point out society's need to keep attorneys free from the threat of suit so they may effectively protect the interests of their clients.[196] An attorney's decision to initiate an action cannot be judged merely from an evaluation of the merits of the case.[197] The lawyer's role is to facilitate access to the judicial system; thus, that role carries a high degree of professional and ethical responsibility of meeting the client's needs even if the client's case is not likely to succeed. Because of this duty to the

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[192]*Id.* at 1284 (quoting RESTATEMENT (SECOND) OF TORTS § 674 comment j (1977)).

[193]422 N.E.2d at 1284 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 854 (4th ed. 1971)).

[194]422 N.E.2d at 1284.

[195]*Id.* at 1290.

[196]*Id.* at 1286-87 (quoting RESTATEMENT (SECOND) OF TORTS §§ 674, 676 (1977) and citing Mallen, *An Attorney's Liability for Malicious Prosecution, A Misunderstood Tort*, 46 INS. COUNS. J. 407 (1979); Note, *A Lawyer's Duty to Reject Groundless Litigation*, 26 WAYNE L. REV. 1561, 1587 (1980)).

[197]422 N.E.2d at 1285.

client, "mere negligence in asserting a claim is not sufficient to subject an attorney to liability for the bringing of the suit."[198] The court pointed out that if negligence alone were sufficient for liability only "easy cases" would be taken and that would result in a chilling effect upon the legal system.

The *Wong* court looked to the California Court of Appeals' decision in *Tool Research & Engineering Corp. v. Henigson*[199] to define a standard of care for attorneys in initiating a cause of action. The court in *Tool Research & Engineering Corp.* articulated the most frequently cited judicial standard of probable cause:

> An attorney has probable cause to represent a client in litigation when, after a reasonable investigation and industrious search of legal authority, he has an honest belief that his client's claim is tenable in the forum in which it is to be tried. The test is twofold. The attorney must entertain a subjective belief in that the claim merits litigation and that belief must satisfy an objective standard.[200]

The Indiana Court of Appeals noted that this test correctly focuses upon an attorney's right to pursue any claim he deems worthy but, at the same time, offers protection to potential opponents by requiring an objective standard of reasonableness of belief.[201] The *Wong* court proceeded to establish an objective standard to review the reasonableness of an attorney's action in filing a client's claim stating that the test is "whether the claim merits litigation against the defendant in question on the basis of the facts known to the attorney when suit is commenced."[202] An attorney-defendant lacks probable cause only if "no competent and reasonable attorney familiar with the law of the forum would consider that the claim was worthy of litigation on the basis of the facts known by the attorney who instituted suit."[203] The standard recognizes that the facts actually known may be insufficient but seeks to avoid incorporation of what might have been discovered by diligent investigation.[204]

The court of appeals also intended that the time available for investigation be considered in reviewing the attorney's conduct, and indeed made several references to it in the instant case.[205] Tabor had only thirty days to investigate prior to filing suit against numerous

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[198] *Id.* at 1286.

[199] 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975).

[200] *Id.* at 683, 120 Cal. Rptr. at 297 (citations omitted).

[201] 422 N.E.2d at 1288.

[202] *Id.*

[203] *Id.*

[204] *Id.* at 1288 n.9.

[205] *Id.* at 1289.

potential defendants. The court pointed out that many times evidence is not discovered or developed until after suit is filed; therefore, when some factual basis exists for bringing the claim, lack of probable cause is not a basis upon which to rest negligent failure to investigate thoroughly.[206]

The court took great care in *Wong v. Tabor* to lay out the policy bases for its conclusion. It recognized the trauma and expense suffered by physicians who get caught in the "sue everyone in sight" net so common in the medical malpractice cases and those who must defend groundless lawsuits.[207] On the other hand, it ably stated the critical importance of keeping the courtroom door open. Lawyers who fear retribution do not attempt to assert novel claims. Such a stifling effect on the evolution of the law cannot be countenanced. Regardless, this case will do little to dispel the not altogether meritless belief often held by other professionals and the general public that those in the legal profession look after their own.

I. Indiana Tort Claims Act

In *Seymour National Bank v. State*,[208] the Indiana Supreme Court granted the state's petition for transfer and vacated the decision of the first district court of appeals because the appellate court had "erroneously decided a new question of law; *i.e.*, the interpretation to be placed upon the term 'enforcement of a law' as used in the Indiana Tort Claims Act."[209] In *Seymour*, a state police car involved in a high-speed chase of a fleeing suspected felon collided with a passenger car. The occupants of the car were killed and their personal representative brought suit.

The trial court granted the state's motion for summary judgment on the basis that the state was immune from suit under a provision of the Indiana Tort Claims Act which provides that a governmental entity is not liable for a loss resulting from "the enforcement of, or failure to enforce, a law."[210] The court of appeals for the fourth district reversed the trial court[211] because it found the phrase "enforcement

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[206]*Id.* (citing Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978)).

[207]*See* Note, *Physicians' Cause of Action Against Attorneys For Institution of Unjustified Medical Malpractice Actions: The Aftermath of* Drago v. Buonagurio, 44 ALB. L. REV. 188 (1979).

[208]422 N.E.2d 1223 (Ind. 1981). For further discussion of this case see Johnson, *Constitutional Law, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 101, 117 (1983).

[209]*Id.* at 1223 (citing IND. CODE § 34-4-16.5-3(7) (1974), *amended by* § 34-4-16.5-3(7) (1976) (now codified at *id.* § 34-4-16.5-3(7) (1982)).

[210]IND. CODE § 34-4-16.5-3(7) (1974), *amended by* IND. CODE § 34-4-16.5-3(7) (1976) (now codified at *id.* § 34-4-16.5-3(7) (1982)).

[211]384 N.E.2d 1177 (Ind. Ct. App. 1979).

of, or failure to enforce, a law" ambiguous.[212] The appellate court concluded that the trial court erred in finding immunity because the statute is in derogation of the common law and a finding of immunity produced a harsh result.[213]

The supreme court, however, found that the court of appeals had erred in concluding that the term "enforcement of a law" is ambiguous.[214] Using the time worn, though not necessarily time honored,[215] axiom of statutory construction that statutory language will be given its "plain meaning," the supreme court held that an officer engaged in attempting to effect an arrest is enforcing a law.[216] Although the court found that the language of the statute is unambiguous, it stated that even if the language were interpreted as being ambiguous, the legislature's later amendment of the statute clarified its intent by stating that all acts of enforcement except false arrest and imprisonment render the state immune from suit.[217]

Justices DeBruler and Hunter each dissented with separate opinions. Justice DeBruler agreed with the court of appeals that the immunity statute is in derogation of the common law; therefore, the statute should be strictly construed.[218] Furthermore, he concluded that because the immunity granted by the statute conflicts with a statutory duty that drivers of emergency vehicles operate them with due care, immunity should not be granted which would shield negligent or reckless conduct.[219]

Justice Hunter's dissenting opinion focused on potential abuses of power possible if employees of governmental entities are granted absolute immunity.[220] He suggested that the "King can do no wrong" approach taken by the court's majority leaves citizens with no legal recourse for losses even though a governmental employee may have acted with reckless disregard for the consequences of his "enforcement."[221] In addition, Justice Hunter noted a number of inherent ambiguities in the phrase "enforcement of law."[222] He pointed to the fact that the legislature has employed the term "enforcement" to describe a variety of government controlled activities, thus giving

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[212]*Id.* at 1184.

[213]*Id.* at 1186.

[214]422 N.E.2d at 1226.

[215]*See* United States v. American Trucking Ass'ns, 310 U.S. 534 (1940); Jackson, *The Meaning of Statutes*, 34 A.B.A. J. 535 (1948).

[216]422 N.E.2d at 1226.

[217]*Id.*

[218]*Id.* at 1227 (DeBruler, J., dissenting).

[219]*Id.*

[220]*Id.* (Hunter, J., dissenting).

[221]*Id.* at 1228.

[222]*Id.*

rise to a number of different connotations and interpretations of the word.[223] In addition, he noted that the legislature has not used the word "enforcement" in several contexts in which the activity contemplated could be viewed as "enforcement of law."[224] Such inconsistencies in Justice Hunter's view, open a "Pandora's box of unsettling questions."[225]

In a rare written opinion on Petition for rehearing, denominated, in part, Modification of Prior Opinion, the majority attempted to clarify its original opinion.[226] Although the majority upheld its previous position that the state is not liable for losses resulting from its employees' enforcement of or failure to enforce the law, it did address one problem raised by the dissenters to the original opinion. The court considered whether the grant of immunity would protect government entities and employees even where the acts complained of were wilful and wanton or intentional. The majority, on rehearing, found that "[i]t does not follow, however, that the statute necessarily grants immunity for all acts of law enforcement officers committed while engaged in the enforcement of the law."[227] The majority admitted that sometimes "an employee's acts, although committed while engaged in the performance of his duty, might be so outrageous as to be incompatible with the performance of the duty undertaken."[228] Such acts, said the court "are simply beyond the scope of the employment."[229] If the difficulty in granting the immunity in question is that it is prejudicial to the public because losses suffered by private citizens at the hands of government employees go unrecompensed, such a facile answer hardly resolves the problem.

Using traditional agency concepts, the court reasoned that the employee is immune as long as he is the representative of his employer, the immune governmental entity. If the acts of the employee are so outrageous as to be beyond the scope of his employment, then he is no longer covered by the immunity blanket and is subject to suit. This concession gives little solace to the injured plaintiff. As the majority so aptly points out, the governmental entity now has no need

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[223]*Id. See, e.g.*, IND. CODE § 22-8-1.1-35.6 (1982) (commissioner of the Occupational Health and Safety Board empowered to enforce a safety order, penalty assessment or notice of failure to correct a violation); IND. CODE § 22-2-9-4 (1982) (duty of the commissioner of labor to enforce claims).

[224]422 N.E.2d at 1229. *See, e.g.*, IND. CODE § 14-2-3-2 (1982) (director of Fish and Wildlife or his representative may enter private or public property for purpose of managing or protecting any wild animal).

[225]422 N.E.2d at 1229.

[226]Seymour Nat'l Bank v. State, 428 N.E.2d 203 (Ind. 1981).

[227]*Id.* at 204.

[228]*Id.*

[229]*Id.*

for the immunity because there is no basis for liability.[230] Thus, the employer, as the only likely party to have sufficient funds to pay a judgment, can no longer be held liable. In addition, to find that outrageous behavior puts a governmental employee outside the scope of his employment could have far-reaching negative effects for the plaintiff whose civil rights have been violated by the "enforcement" and who might want to bring a section 1983 action.[231]

Justice Hunter in his dissenting and concurring opinion reasserted his earlier position that the term "enforcement" is ambiguous.[232] Though he agreed with the majority that the scope of immunity encompassed in the Indiana Torts Claim Act does not include immunity for wilful and wanton misconduct, he concluded that the majority's affirmance of the trial court's grant of summary judgment was inappropriate because the decision of whether the officer's conduct was merely negligent or was wilful and wanton and therefore outside the scope of the immunity should have been for the trier of fact.[233]

The opinions in this case emphasize the conflicting policies surrounding the granting of governmental immunities in situations in which private individuals have suffered losses. State agencies must be free to actively enforce the laws of the state unfettered by the constant threat of suits. On the other hand, the public interest demands that governmental employees and entities act with care so that the rights of citizens will not be jeopardized.

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[230] *Id.*

[231] *See* Monroe v. Pape, 365 U.S. 167 (1961).

[232] 428 N.E.2d at 206 (Hunter, J., dissenting).

[233] *Id.*