Survey of 1992 Developments in Tort Law

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Introduction

During this survey period, Indiana courts again took advantage of opportunities to bring Indiana tort law into the mainstream. Our courts addressed a multitude of tort-related issues in 1992. However, this Article is necessarily limited to significant developments in tort law, excluding products liability and medical malpractice law. The Article discusses recent court holdings pertaining to important tort doctrines, including the discovery rule, the fireman's rule, and the impact rule, as well as the resolution of issues stemming from Indiana's Tort Claims Act, including its application to minors and the scope of immunity for enforcement of the law. Additionally, the Article examines abrogation of the release rule in both common law and comparative fault actions. The Article then explores the related issue of whether set-off of settlement amounts is appropriate in comparative fault cases when the nonparty defense is invoked. The Article also provides guidance on how courts are applying the recently developed test for determining whether a tort duty exists and the test for determining a claimant's status in premises liability cases.

I. The Discovery Rule

In *Wehling v. Citizens National Bank*,[1] the Indiana Supreme Court ended the piecemeal transition from the "ascertainment" rule to application of the discovery rule for determining statute of limitation dates in tort actions.[2] Prior to the *Wehling* decision, the supreme court had been adopting the discovery rule on a case-by-case basis, limiting its

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1. 586 N.E.2d 840 (Ind. 1992).
2. *Id.* at 843.

rulings to the specific context of each case.[3] The problem created by this approach is best illustrated by the 1991 appellate decision in *Madlem v. Arko*.[4] In *Madlem*, the Indiana Court of Appeals supported its decision not to apply the discovery rule on the basis that the previous Indiana Supreme Court decisions applying the discovery rule had each been specifically limited to only those circumstances before the court.[5] The supreme court's broad-based decision in *Wehling* finally closed the door on the rationale used by the court of appeals in *Madlem* to continue only narrow application of the discovery rule.

Wehling involved a claim against a bank for negligently failing to properly record the address of an owner on a property deed. The owners did not discover the omission until they attempted to sell the property and learned for the first time that the property had been sold at a tax sale. The failure to receive notice of the tax sale resulted from the omission of the owners' address from the deed.

The court of appeals held that the cause of action against the bank first accrued upon the date the deed was recorded with the address omitted.[6] The supreme court disagreed, holding that the cause of action did not accrue, nor did the appropriate period of limitation begin to run, until the owners "knew, or in the exercise of ordinary diligence, could have discovered" the injury.[7]

In broadly adopting the discovery rule in *Wehling*, the supreme court made a heroic effort to reconcile the confusion surrounding Indiana's historical "ascertainment rule."[8] The supreme court reasoned that Indiana's original ascertainment rule did "not significantly differ" from the new "discovery rule."[9]

Although the historical ascertainment rule is facially no different than the new discovery rule, as adopted by Indiana the rule did not explicitly

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3. *See, e.g.*, Allied Resin Corp. v. Waltz, 574 N.E.2d 913 (Ind. 1991) (applying the discovery rule to a products liability action); Burks v. Rushmore, 534 N.E.2d 1101 (Ind. 1989) (applying the discovery rule to claim for defamation); Barnes v. A.H. Robins Co., Inc., 476 N.E.2d 84 (Ind. 1985) (applying the discovery rule to accrual of the date of a claim for injury from toxic exposure).

4. 581 N.E.2d 1290 (Ind. Ct. App. 1991). *See also* Keesling v. Baker & Daniels, 571 N.E.2d 562 (Ind. Ct. App. 1991) (refusing to apply a discovery rule to a claim for legal malpractice).

5. "*Burks* and *Barnes* cite but do not overrule *Shideler* and its teachings. Since both cases carefully limit their holdings to the facts before them, and *Shideler* has been precedent of longstanding, the rule in *Shideler* constitutes precedent here because it concerns professional negligence resulting only in property damage." *Madlem*, 581 N.E.2d at 1293 (discussing *Shideler v. Dwyer*, 417 N.E.2d 281 (Ind. 1981)).

6. *Wehling*, 586 N.E.2d at 842.

7. *Id.* at 843.

8. *See, e.g.*, Montgomery v. Crum, 161 N.E. 251 (Ind. 1928).

9. *Id.*

contain an objective standard for determining whether an injury was discovered by a claimant. Instead, Indiana's original historical rule considered only whether the injury had occurred and was thereby "ascertainable," and not whether a claimant had an objective cause to investigate a possible, but unknown injury.[10]

The supreme court's decision in *Wehling* has eliminated the previous difficulties with the ascertainment rule by fully adopting the discovery rule, complete with an objective standard, as applicable to all tort actions.[11] Notably, although the supreme court suggested that the discovery rule applies to all tort claims,[12] too much reliance should not be placed upon the broad language of the decision given the exceptions in tort law, such as the statute of limitations in medical malpractice claims.[13] However, it is now the law in Indiana that a tort cause of action accrues when the claimant knew of the injury or, "had he exercised ordinary diligence, could have discovered that an injury had been sustained . . . ."[14] Under

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10. [T]he two-year statute of limitations will not begin to run as a shield against the consequences of wrongful acts until the wrongdoer thereby accomplishes an injury to the person of another . . . (that is to say, damages susceptible of ascertainment), for not until then would the cause of action accrue to invoke the statute.

Montgomery v. Crum, 161 N.E. 251, 259 (Ind. 1928). Whether simply being "susceptible of ascertainment" included an objective standard was seemingly clarified by the subsequent supreme court decision in Marengo Cave Co. v. Ross, 10 N.E.2d 917, 922 (Ind. 1937) ("[T]he statute of limitations does not begin to run until the injured party discovers, or with reasonable diligence might have discovered.").

Unfortunately, the supreme court decisions after *Montgomery* and *Marengo Cave Co.* reverted to the date of actual injury, regardless of whether the plaintiff could not have known of the harm. *See* Guy v. Schuldt, 138 N.E.2d 891 (Ind. 1956); Shideler v. Dwyer, 417 N.E.2d 281 (Ind. 1981).

11. *Wehling*, 586 N.E.2d at 843.

12. "[T]he reasoning inherent in both decisions [previous decisions applying the discovery rule] logically applies to all tort claims." *Id.* at 842.

13. The discovery rule probably does not apply to *all* tort claims, the one notable exception being the tort of medical malpractice. The statute of limitations in medical malpractice is controlled by Indiana Code § 16-9.5-3-1 (1992), which provides that a claim is barred if not filed within two years of the wrongful act. In other words, the statute does not begin to run when the action "accrues" as in most statutes of limitations. The limitation contained in the Medical Malpractice Act would perhaps be better defined as a statute of repose, such as applies to products liability, rather than a true statute of limitations. The medical malpractice statute has been defined as an "occurrence" statute of limitations to which the discovery rule would not apply. Yarnell v. Hurley, 572 N.E.2d 1312 (Ind. Ct. App. 1991). However, the Act prescribes a slightly more flexible statute of limitations for minors under the full age of six, who have until their eighth birthday to file an action. *See* Walker v. Rinck, 604 N.E.2d 591 (Ind. 1992) (holding that it is up to the legislature to amend the statute of limitations in the Act if deemed appropriate in the case of preconception torts).

14. *Wehling*, 586 N.E.2d at 843.

Wehling, it is not appropriate for a trial court to consider the actual date of the alleged occurrence; rather, it is now a jury question as to when a claimant actually discovered the injury or should have discovered it based upon an evaluation of the objective criteria available to the claimant.[15]

II. The Fireman's Rule

The Indiana Court of Appeals twice upheld the viability of the fireman's rule, a venerable doctrine of tort law which prescribes that public safety officers "whose occupations by nature expose them to particular risks, may not hold another negligent for creating the situation to which they respond in their professional capacity."[16] In Indiana, the rule is premised on three theories: the law of premises liability, the defense of incurred risk, and public policy. The fireman's rule was therefore challenged in light of the Indiana Supreme Court's decision in *Burrell v. Meads,*[17] Indiana's Comparative Fault Act,[18] and policy considerations.

The Indiana Supreme Court first adopted the doctrine in *Woodruff v. Bowen*,[19] where the court held that firemen acting in the course of their duties enter the property of another under a license granted by law for a public purpose.[20] Indiana has extended the fireman's rule to police officers as well.[21] As licensees, landowners owe public safety officers only the duty of abstaining from any positive wrongful act.[22] Accordingly, public safety officers are precluded from recovering for injuries sustained in the line of duty which result from the mere negligence of a landowner.[23]

Indiana courts have also applied the fireman's rule to injuries sustained when responding to off-premise situations, i.e., cases which do not involve a landowner defendant. The courts have relied upon the doctrine of

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15. *Id.*
16. Koehn v. Devereaux, 495 N.E.2d 211, 215 (Ind. Ct. App. 1986).
17. 569 N.E.2d 637 (Ind. 1991).
18. Ind. Code § 34-4-33-1 (1988 & Supp. 1992).
19. 34 N.E. 1113 (Ind. 1893).
20. *Id.* at 1116.
21. Koop v. Bailey, 502 N.E.2d 116 (Ind. Ct. App. 1986).
22. *Id.* at 118.
23. Indiana's later adoption of the rescue doctrine created a dichotomy. Under the rescue doctrine, one who negligently endangers the safety of another may be held liable for injuries sustained by a third party in attempting to save the other from harm. Neal v. Home Builders, Inc., 111 N.E.2d 280 (Ind. 1953). *See also* Lambert v. Parrish, 492 N.E.2d 289 (Ind. 1986). Thus, rescuers may recover for negligence. Yet public safety officers who are duty-bound to effect rescues are precluded from recovery under the fireman's rule. To resolve this inconsistency, Indiana courts described the fireman's rule as an exception to the liability imposed by the rescue doctrine. Koehn v. Devereaux, 495 N.E.2d 211, 215 (Ind. Ct. App. 1986).

incurred risk as a justification for applying the rule to off-premises situations. Generally, the doctrine of incurred risk bars recovery to a plaintiff who knowingly undertakes a risk of harm arising from the negligent or reckless conduct of the defendant.[24] Because public safety officers knowingly undertake the risks inherent with their jobs, the incurred risk defense supports the application of the fireman's rule to preclude recovery for injuries sustained in the line of duty in off-premises cases.[25]

This year the court of appeals adopted the public policy rationale as additional support for the fireman's rule in *Kennedy v. Tri-City Comprehensive Community Mental Health Center, Inc.*, a case involving a landowner defendant.[26] In *Kennedy*, the plaintiff police officers responded to a call for assistance by a residential care facility (Tri-City). Tri-City advised the officers that a resident had been disruptive. When one of the officers reached for the resident's arm, a scuffle ensued and the officers were injured. The police officers challenged the continued viability of the fireman's rule in the wake of the supreme court's decision in *Burrell v. Meads*,[27] which changed the status of social guests from licensees to invitees. The police officers challenged the rule based upon the enactment of Indiana's Comparative Fault Act and public policy considerations as well.

The court rejected the officers' contention that application of *Burrell* rendered their status as that of invitees rather than licensees. The court in *Kennedy* held that, although the officers were called or "invited" by Tri-City, they were there solely in their capacities as police officers and were therefore licensees.[28] The court also rejected the officers' assertion that Indiana's Comparative Fault Act precludes application of the fireman's rule. Without engaging in a substantive analysis, the court upheld the rule in Indiana, in part, because of the many exceptions available to temper its use.[29]

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24. *See* RESTATEMENT (SECOND) OF TORTS § 496A (1965).

25. *See* Sports Bench, Inc, v. McPherson, 509 N.E.2d 233, 235 (Ind. Ct. App. 1987), *trans. denied*; *Koehn*, 495 N.E.2d at 215.

26. 590 N.E.2d 140 (Ind. Ct. App. 1992).

27. 569 N.E.2d at 643.

28. *Kennedy*, 590 N.E.2d at 142.

29. *Id.* at 143.

The rule does not preclude recovery in the following situations: where a defendant is guilty of willful or wanton misconduct, where a landowner defendant misrepresents the situation, where injury results from hidden or unanticipated perils, and where the defendant's violation of a statutory duty causes the injury. *Id.* (citing Lipson v. Superior Court, 644 P.2d 822 (Cal. 1982); Armstrong v. Mailand, 284 N.W.2d 343 (Minn. 1979); Mahoney v. Carus Chem. Co., 510 A.2d 4 (N.J. 1986); Scheurer v. Trustees of the Open Bible Church, 192 N.E.2d 38 (Ohio 1963)). The court elected not to extend the statutory duty exception

Finally, the court in *Kennedy* rejected the officers' contention that public policy does not justify treating fire fighters and police officers differently from other public employees. The court believed that public policy favors continued viability of the rule because of the "nature of the service provided by [public safety officers], as well as the relationship between these safety officers and the public they are employed to protect."[30] The court did not elaborate on why the nature of the service and the relationship with the public justifies the fireman's rule.[31]

The public policy rationale, however, was further developed in *Fox v. Hawkins*, an off-premises case.[32] The *Fox* court explained that it is the general public which hires, trains, and pays public safety officers, and that the general public both expects public safety officers to confront hazardous situations and benefits from that undertaking.[33] Accordingly, it is the general public which compensates public safety officers for the negligently caused injuries they sustain in the discharge of their duties through publicly-sponsored medical, disability, and pension schemes.[34] Moreover, according to the court, to abrogate the fireman's rule would constitute a breach of the social contract, because the poor or uninsured may then hesitate to summon officers for fear of being assessed damages, and officers may give preference to people of means to avoid exposure to uncompensated harm.[35]

The *Fox* court provided further justification for *Kennedy's* holding that the Comparative Fault Act did not abolish the fireman's rule. In the *Fox* case, Donald Hawkins, acting in his capacity as a Marion County Deputy Sheriff, had investigated the Foxes' unattended car, which had been left partly in the motoring lane after stalling. Hawkins parked his car behind the stalled car. As Hawkins stood by the driver's door of the car, another vehicle skidded out of control and struck Hawkins' car, the Foxes' car and Hawkins. Because this was an off-premises case, the court drew upon the incurred risk rationale.

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to include Tri-City's alleged breach of a promise made to the board of zoning appeals for a special use permit. *Id.* at 144.

30. *Id.* at 144-45 (quoting Kreski v. Modern Wholesale Electric Supply, 415 N.W.2d 178, 186-87 (Mich. 1987)).

31. Because the injuries sustained by the officers resulted from an inherent and foreseeable risk of the situation to which they responded, application of the fireman's rule was appropriate and the court affirmed the trial court's entry of summary judgment. *Id.*

32. 594 N.E.2d 493 (Ind. Ct. App. 1992).

33. *Id.* at 496.

34. *Id.* This rationale withstands scrutiny only if the public medical, disability and pension benefits fully compensate public safety officers for injuries, which is likely to be an arguable premise.

35. *Id.*

Hawkins premised his argument on the fact that the defense of incurred risk is specifically included in the Comparative Fault Act's definition of "fault."[36] Because the fireman's rule is based on the doctrine of incurred risk, Hawkins asserted that the rule had been implicitly abrogated as a result of the Act's enactment. The court rightfully noted that the fireman's rule is based only in part on the doctrine of incurred risk; specifically, the incurred risk foundation supports the application of the rule in off-premises cases only. Because the claimant's argument would only support eradication of the rule in some situations, the court held that the Comparative Fault Act did not abolish the fireman's rule.[37] In sum, it is fair to conclude that the fireman's rule has become solidly entrenched as a viable doctrine of Indiana tort law after the decisions in *Kennedy* and *Fox*.

III. The Release Rule

A. Abrogation of the General Rule

In *Huffman v. Monroe County Community School Corp.*,[38] the Indiana Supreme Court seized the opportunity to abrogate the much maligned release rule.[39] Although the *Huffman* case involved a common law negligence claim against a governmental entity, the court broadened its holding, abrogating the release rule to include both common law actions[40] and actions subject to Indiana's Comparative Fault Act.[41] Prior to *Huffman*, the common law of Indiana dictated that the release of one joint tortfeasor operated as a release of all other joint tortfeasors.[42] The release rule operated even where the parties had entered into an agreement specifically reserving rights of action against other tortfeasors.[43]

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36. Ind. Code Ann. § 34-4-33-2(a) (West 1992).

37. *Fox*, 594 N.E.2d at 497. The eradication of [the incurred risk theory] would therefore affect only off-premises cases, and we would then have two sets of rules, one for public safety officers injured in on-premises situations, and one for public safety officers injured in off-premises situations. We could not accept such a situation. *Id.*

38. 588 N.E.2d 1264 (Ind. 1992).

39. Although the appellate court clearly disfavored the Release Rule, if felt constrained to follow precedent. Huffman v. Monroe County Community Sch., 564 N.E.2d 961, 965 (Ind. Ct. App. 1991), *rev'd*, 588 N.E.2d 1264, 1267 (Ind. 1992) ("In any event, regardless of whether the Release Rule has ever constituted anything but an abomination in the law, we must follow our Supreme Court's precedence of *Belew*, *supra* and *Cooper*, *supra*.").

40. *Huffman*, 588 N.E.2d at 1267. For a list of actions exempted from the Comparative Fault Act, *see infra* note 50.

41. Ind. Code § 34-4-33-1 to -13 (1988 & Supp. 1992).

42. *Huffman*, 588 N.E.2d at 1266.

43. *See, e.g.*, Cooper v. Robert Hall Clothes, Inc., 390 N.E.2d 155 (Ind. 1979).

Historically, the release rule was justified based upon: 1) a fictional treatment of joint tortfeasors as one entity; and 2) an equitable attempt to prevent unjust enrichment, which could occur through multiple settlements based upon one injury.[44] The supreme court in *Huffman* found both of these underlying purposes no longer applicable in actions subject to the Comparative Fault Act.[45] The Indiana Comparative Fault Act requires a jury to allocate a percentage of fault to each tortfeasor whose individual actions combine to produce the injury of the plaintiff.[46] First, the court explained that the Act's requirement that the degree of fault be allocated among joint tortfeasors has superseded the common law concept which views joint tortfeasors as one entity.[47] Second, the supreme court observed that allocation of fault under the Act prohibits compensation for more than 100% of a plaintiff's damages.[48] Therefore, the other primary purpose of this rule—preventing unjust enrichment—is no longer a valid concern, because comparative fault prevents a plaintiff from receiving more than complete satisfaction for an injury.[49]

Logically, destruction of the twin rationales for the release rule under the Comparative Fault Act did not necessitate abrogation of the release rule in actions which continue to be subject to the common law rather than comparative fault. However, the Indiana Supreme Court brought Indiana law a courageous step forward by also abrogating the release rule as to common law actions.[50]

The court noted the development of covenants not to sue, covenants not to execute, and loan agreements as a means of avoiding the harshness of the release rule.[51] The "common law has reacted to these creative agreements by providing for their use in civil trials so as to prohibit excessive recoveries."[52] Instead of creating two competing and conflicting applications of the release rule, one under the Comparative Fault Act, and one under the common law, the supreme court chose instead to abrogate the release rule as to both comparative fault and common law actions.[53] The court stated:

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44. Bellew v. Byers, 396 N.E.2d 335 (Ind. 1979); *Cooper*, 390 N.E.2d 155.
45. *Huffman*, 588 N.E.2d at 1266.
46. IND. CODE § 34-4-33-5 (1988).
47. *Huffman*, 588 N.E.2d at 1266.
48. *Id.*
49. *Id.*
50. *Id.* at 1267. The Comparative Fault Act does not apply to actions involving governmental entities (§8), products liability or warranty actions (§13), contract actions (§1(a), medical malpractice (§1(a)(1)), or actions for intentional injury (§2(a)). IND. CODE § 34-4-33 (1988 & Supp. 1992).
51. *Huffman*, 588 N.E.2d at 1267.
52. *Id.*
53. *Id.*

> It would be illogical to hold that the rationales for the release rule have been destroyed but to continue to impose the release rule in some cases only because one of the defendants has been exempted from the Comparative Fault Act. To apply only two separate rules based on the legal status would serve to add further confusion to the orderly administration of justice in cases, as here, where some parties are covered by the Comparative Fault Act and others are not.[54]

Accordingly, it is now the law of Indiana that a release will operate only as to those parties who are clearly intended to have the benefit of the agreement.[55]

B. The Exception to Abrogation

Practitioners should be cautioned not to take too much comfort in abrogation of the release rule. It is not unusual for a release agreement to contain a provision stipulating that the entire claim for damages is to be released by the agreement. A standard release agreement will often contain language requiring the plaintiff to give up all rights and claims against all persons for damages.[56] Releases which contain either of these limiting provisions are enforceable and may be used to preclude actions against other joint tortfeasors who were not parties to the agreement.[57] A release agreement should therefore be carefully drafted to exclude claims against other third parties not signatories to the agreement and to reserve rights of action against other responsible persons, if that is the parties' intent.

C. Remaining Viability for the Release Rule?

Surprisingly, although *Huffman* should have been the last word on the release rule, it was not. After the supreme court's decision, the release rule was given a limited reincarnation by the Indiana Court of Appeals in *Chaiken v. Eldon Emmor & Co., Inc.*[58] In *Chaiken*, the court of

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54. *Id.*
55. *Id.*
56. *See, e.g.,* Smith v. Hansen, 582 N.E.2d 446, 449 (Ind. Ct. App. 1991).
57. For example, prior to the *Huffman* decision, the Indiana Court of Appeals applied the release rule, stating "whether passage of the Comparative Fault Act has abolished the rule is a question for our supreme court to answer, not this one." *Smith*, 582 N.E.2d at 449. However, foreseeing the supreme court's pronouncement on this issue, the Indiana Court of Appeals was careful to base its enforcement of a release agreement as to other tortfeasors upon the alternative grounds that the document contained unambiguous language releasing "all persons" from any claims which the plaintiff might assert. *Id.* at 449.
58. 597 N.E.2d 337 (Ind. Ct. App. 1992).

appeals did not discuss *Huffman* in the body of its opinion; rather, the supreme court's decision was relegated to a footnote.[59] The Indiana Court of Appeals interpreted the new rule adopted in *Huffman* as operating prospectively, thereby making it inapplicable to this case.[60] The *Chaiken* pronouncement is troubling in view of the language in *Huffman* upon which it was based: "[f]rom this point forward, a release *shall be interpreted* as a contract releasing only those persons intended to be released."[61] The Indiana Court of Appeals in *Chaiken* apparently construed the foregoing language as holding that the release rule continued to operate on agreements executed prior to the date of the *Huffman* decision. Yet, if this logic were carried completely through, the release at issue in *Huffman* should likewise not have been exempted from operation of the release rule.

The *Chaiken* interpretation of *Huffman* is also difficult given that the supreme court's primary rationale for rejecting the release rule was the adoption of the Comparative Fault Act.[62] In other words, if the release rule remained effective as to *any* actions, such viability would be limited to only agreements releasing causes of action which arose prior to the effective date of the Comparative Fault Act.[63] In any event, no matter how inexplicable the rationale of *Chaiken*,[64] practitioners should perhaps not automatically disregard application of the release rule without first determining the agreement's date of execution.

IV. Set-Off in Comparative Fault Actions

Although *Huffman* was decided in the context of a common law action, the court extended its ruling to comparative fault cases as well. Thus, the court's reaffirmation of a trial court's duty to reduce jury verdicts by previously received settlement amounts[65] could arguably be construed as approving the application of set-off of amounts received in

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59. *Id.* at 347 n.1.

60. *Id.*

61. Huffman v. Monroe County Community Sch. Corp., 588 N.E.2d 1264, 1267-68 (Ind. 1992) (*emphasis added*).

62. *Id.* at 1266.

63. The Comparative Fault Act became effective Jan. 1, 1985. *See* Pub. L. 317-1983, § 2. The possibility of successfully prosecuting a negligence action arising prior to the effective date of the Comparative Fault Act is not merely academic in light of the recent decision on the discovery rule. *See supra* notes 1-15 and accompanying text.

64. The purpose of the *Chaiken* court's analysis and application of the release rule after *Huffman* is difficult to discern at best. However, the court was careful to further support its decision based upon a set-off of the amount received under the settlement agreement against the damages verdict rendered. *Chaiken*, 597 N.E.2d at 347.

65. *Huffman*, 588 N.E.2d at 1267 (citing Manns v. State Dep't of Highways, 541 N.E.2d 929 (Ind. 1989)).

settlement in comparative fault cases. However, in comparative fault cases, there is no rationale for reducing a jury verdict by the amount received by a plaintiff as consideration for a covenant not to sue, a covenant not to execute, or, in light of *Huffman*, a release of one of several tortfeasors. Settlements between an injured party and less than all potentially liable persons are common in multi-tortfeasor cases. The practical effects of settlements are thus of crucial importance to both claimants and defendants.[66] Accordingly, this section of the Article explores the inequities which can arise when set-off is applied in comparative fault cases where a settling tortfeasor remains in the action as a nonparty, and concludes that set-off is not appropriate in comparative fault cases.

A. Application of Pro Tanto Discharge in Comparative Fault Cases

The decision of the Indiana Supreme Court in *Bedwell v. De Bolt*[67] is generally cited as authority for the application of set-off, or pro tanto discharge, in cases involving joint tortfeasors. In *Bedwell*, the court explained the common law rule that all joint tortfeasors liable for injury may be fully discharged only by (1) an unqualified release of one of the tortfeasors, or (2) full satisfaction of a claim for damages by one of the tortfeasors, regardless of the character of the instrument, even if no release is executed.[68] Further, the court stated that, "under an answer of full satisfaction by a joint tortfeasor a defendant is entitled to a pro tanto credit for anything less than full payment which the plaintiff has received from that source."[69] This directive to reduce a plaintiff's damages by amounts received in settlement has been consistently and frequently applied in cases involving multiple tortfeasors.[70] Whether the funds re-

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66. For a discussion of numerous issues arising in partial settlement in comparative fault cases, see generally Elizabeth M. Behnke, Note, *Partial Settlement of Multiple Tortfeasor Cases Under the Indiana Comparative Fault Act*, 22 IND. L. REV. 939 (1989).

67. 50 N.E.2d 875 (Ind. 1943).

68. *Id.* at 878-79.

69. *Id.* at 879.

70. *See, e.g.*, Manns v. State Dep't of Highways, 541 N.E.2d 929, 933-34 (Ind. 1989) (partial or total satisfaction is determined by simply applying the amount received against the amount of the verdict rendered; verdict to be reduced pro tanto (meaning "for so much")); Indiana State Highway Comm'n v. Morris, 528 N.E.2d 468 (Ind. 1988); Board of Comm'rs of Adams County v. Price, 587 N.E.2d 1326 (Ind. Ct. App. 1992); City of Hammond v. Rossi, 540 N.E.2d 105 (Ind. Ct. App. 1989).

Each of these decisions discusses set-off in the context of an action involving a governmental entity as a defendant. While *Huffman* focused attention on the Comparative Fault Act, it too was decided in the context of a defending governmental entity. Surprisingly, no decisions have yet been rendered in a context which would force resolution of the issue of set-off under comparative fault, even though settlements under any type of agreement have been subject to set-off for several years.

ceived constitute a partial or total satisfaction is determined by applying the amount received against the amount of the verdict rendered.[71]

Under the Comparative Fault Act,[72] a plaintiff is not required to file suit against all potentially liable tortfeasors. However, the Act directs the jury to assess the percentage of fault of the claimant, any defendant, and any "nonparty."[73] It has been noted that the nonparty most frequently encountered by juries is a tortfeasor who has settled with the claimant.[74] A defendant can and must affirmatively invoke the nonparty defense for purposes of an allocation of fault which includes a settling tortfeasor.[75] The Comparative Fault Act specifically prescribes the manner in which the jury is to perform its allocation function. First, the jury is to determine the percentage of fault of each party and any person who is a nonparty.[76] If the claimant's action is not barred,[77] the jury assesses the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded.[78] The jury then enters a verdict against each defendant in an amount based on each defendant's percentage of fault as applied to the total damages.[79] The verdict form requires disclosure of only the percentage of fault charged against each party and nonparty and the amount of the verdict against each defendant.[80]

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71. Manns v. State of Indiana Dep't of Highways, 541 N.E.2d 929, 934 (Ind. 1989); Sanders v. Cole Mun. Fin., 489 N.E.2d 117, 121 (Ind. Ct. App. 1986).

72. IND. CODE § 34-4-33-1 (1988 & Supp. 1992).

73. IND. CODE § 34-4-33-5(b)(1) (1988). A "nonparty" is defined as "a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant. A non-party shall not include the employer of the claimant." *Id.* § 34-4-33-2(a).

74. Leonard E. Eilbacher, *Comparative Fault and the Nonparty Tortfeasor*, 17 IND. L. REV. 903, 908 (1984).

75. Bowles v. Tatom, 546 N.E.2d 1188, 1190 (Ind. 1989). *See also* IND. CODE § 34-4-33-10 (1988). The claimant is not required to join those persons as parties, but often will because, although the Act allows the jury to include the nonparty in the allocation of fault, it specifies that verdicts may be entered only against defendants. Further, under the holding of Manns v. State of Indiana Dep't of Highways, 541 N.E.2d 929 (Ind. 1989), a jury should not be informed of the settlement or of the amount of settlement. Thus, a jury presented with a nonparty defense in a comparative fault action may negatively wonder why plaintiff pursued only the party defendant and not both. This negative effect upon the jury can have a significant and prejudicial impact upon the plaintiff's case which would not occur in cases exempt from the Comparative Fault Act where the nonparty defense is unavailable.

76. IND. CODE § 34-4-33-5(b)(1) (1988).

77. In a comparative fault action brought against two or more defendants, a claimant is barred from recovery only "if his contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages." *Id.* § 34-4-33-4(b).

78. *Id.* § 34-4-33-5(b)(3).

79. *Id.* § 34-4-33-5(b)(4).

80. *Id.* § 34-4-33-6. Although the statutory scheme of the Act may require several

If set-off is applied in a case subject to the Comparative Fault Act where non-settling defendants have invoked the nonparty defense — and especially the general rule that the set-off is applied against the jury "verdict" — two interrelated problems occur. First, the claimant faces a significant risk of being precluded from full compensation. Second, partial settlements are significantly discouraged. For example, consider a case where A was injured through concurrent negligent acts of B, C, and D. A files suit against B, C, and D. A then settles with B for $25,000. When A moves to dismiss B from the action, the remaining defendants assert the nonparty defense. At the end of trial, the jury determines the fault of each party and nonparty as follows: A - 40%; B - 30%; C - 20%; and D - 10%. Because A's percentage of fault has not barred recovery, the jury can continue its deliberations. If the jury assesses the full injury to A to be in the amount of $100,000, A will be fully compensated through recovery in the amount of $60,000.[81] For convenience, this discussion will refer to this amount as A's "adjusted damages." The verdict form discloses the assessed percentages of fault of the parties and of nonparty B, and a verdict is entered against C in the amount of $20,000 and against D in the amount of $10,000, for a total amount recoverable by judgment in the amount of $30,000.

If the general rules of set-off are applied, the jury "verdict" may be reduced by the amount A received in settlement. The verdicts total $30,000; a set-off of $25,000 would result in a judgment in favor of A in the amount of only $5,000. A's total recovery in the case, through judgment and settlement, is thereby diminished to $30,000, one-half of the amount required to fully compensate A under a comparative fault scheme. Clearly this is an inequitable result and a severe disincentive to partial settlements. This result occurs because the amount A is able to recover through judgment under the Comparative Fault Act has already been diminished by an amount based on both A's and the settling nonparty's percentage of fault. Accordingly, our appellate courts must clarify that set-off is inappropriate in cases subject to comparative fault, or demonstrate how set-off can be equitably incorporated without diminishing the incentive of parties to enter into partial settlements.

Few options exist for an equitable use of set-off in comparative fault cases. One imperfect alternative would be to require the non-settling

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verdict forms to be given to the jury, courts should not characterize them as "special verdicts or interrogatories," but as "general verdicts"; and thus such verdicts may not be used to impeach a general verdict that appears inconsistent. State of Indiana Highway Dep't v. Snyder, 594 N.E.2d 783 (Ind. 1992).

81. Under the Act, "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault . . . ." IND. CODE § 34-4-33-3 (1988).

defendants to elect between a set-off or the nonparty defense. If the remaining defendants elect the nonparty defense rather than set-off, a plaintiff has the potential to receive greater than full compensation only in those few cases where the claimant has settled for an amount greater than that portion of damages allocated to the nonparty. However, trials utilizing the nonparty defense are more expensive and lengthy than trials not involving the nonparty defense. If defendants are required to elect between set-off and the nonparty defense, many nonparty trials would be eliminated. Thus, the potential for windfall to the plaintiff is arguably counterbalanced by furthering the interests of judicial economy. Nonetheless, implementation of this method arguably would be appropriate only for the legislature.

Within the province of the judiciary, one option would be to adopt a system which applies set-off against the claimant's adjusted damages, rather than against the jury verdict. In A's case, although the verdict form would not require disclosure of this value, it could readily be calculated that the jury determined that A was entitled to compensation in the amount of $60,000. If set-off of the $25,000 received by A in settlement from B is applied against A's adjusted damages of $60,000, A would then be entitled to a recovery in the amount of $35,000. Two options then exist. First, the court could enter a verdict against C and D based on the application of the percentage of fault figures determined by the jury to the $35,000; i.e, 20% of $35,000 ($7,000) and 10% of $35,000 ($3,500), respectively. However, the resulting verdicts totalling $10,500, combined with the $25,000 received in settlement, still significantly undercompensate A for his adjusted damages valued at $60,000. This system would therefore fail to resolve the inequities to a claimant in comparative fault cases if set-off is permitted.

Alternatively, the court could require the verdict amounts to total $35,000. That is, the total amount of $35,000 could be recovered from the nonsettling defendants via verdicts against C and D in amounts based on their assessed percentages of fault; i.e., a verdict against C in the amount of $23,333.33, and against D in the amount of $11,666.67.[82] However, this option seems at odds with the scheme of the Comparative Fault Act. Indiana's Act, in essence, reduces a claimant's recovery by an amount based on the percentage of fault of the settling nonparty applied to the claimant's total damages; and verdicts against parties are specifically directed to be in an amount based on the party's percentage of fault as applied to the claimant's total damages.[83] Thus, nonsettling

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82. These amounts are based on the following calculations: C's liability = (2/3 x $35,000); D's liability = (1/3 x $35,000).

83. "The cornerstone principle of a comparative fault system is that each person

tortfeasors would vigorously oppose any incorporation of set-off that could increase their liability above that amount, which would occur in situations where the settlement received by a claimant is less than the settling-nonparty's comparative liability would have been.

A more feasible judicial solution would be to apply a set-off only when the amount received in settlement is greater than the settling—nonparty's comparative liability would have been.[84] In A's case, B's liability as assessed by the jury would have been $30,000. Under this proposed solution, because the settlement amount of $25,000 was less than that amount, no set-off would occur. If, however, A and B had settled for $35,000, a set-off in the amount of $5,000 could be applied. The set-off would benefit the non-settling defendants by reducing the verdicts against them proportionately, yet would still allow the claimant to be fully compensated. Of course this also represents a deviation from a strict application of the comparative fault procedures, but it is arguably a more equitable incorporation of set-off.

Notably, however, even this application of set-off does not realistically alleviate the significant discouragement from settlement caused by concurrent use of both the nonparty defense and set-off.[85] All settlements are, at best, an educated guess based upon each attorney's experience, available evidence, and intuition. Under this proposed use of set-off, if settlement can be reached with B, but not with recalcitrant C or D, the plaintiff must suffer the risk that a jury will assess more fault to B than A predicted. If this occurs, the plaintiff has no ability to recover the full amount of compensation to which the jury determined that A was entitled, and A must absorb the full extent of his poor bargain. On the other hand, if the plaintiff successfully defends or diminishes the percentage of fault allocated to the nonparty, the settlement amounts in excess of the apportioned nonparty damages may be applied as a set-off to the remaining defendant's liability. While this would not result in an actual penalty, it would deny the plaintiff the full benefit of his previous settlement.

Even with this very restricted use of set-off, the plaintiff bears a very significant risk in partial settlement which is not offset by any

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who contributes to cause an injury must bear the burden of reparation for that injury in exact proportion to his share of the total fault which contributed to cause the injury." Eilbacher, *supra* note 74, at 903.

84. That is, a set-off would apply only when it is greater than the product of the multiplication of the settling-nonparty's percentage of fault times the total amount of the claimant's damages.

85. Charles v. Giant Eagle Mkts., 522 A.2d 1, 3 (Pa. 1987) ("[I]t would be a disservice to a supportive settlement policy to provide a windfall to a non-settling tortfeasor where the settlement process proves to be more generous than the subsequent verdict.").

corresponding potential gain, even while having been put through the expense of trial as to all parties, including those nonparties with whom settlement had been previously reached. The plaintiff's attorney is placed in the uncomfortable position of having to perfectly predict how the jury will apportion fault to the settling party in order to arrive at an appropriate settlement amount. As in the tale of Goldilocks, the plaintiff attorney's foresight must be "just right." Yet the potential for getting it "just right" is incredibly unlikely in multi-party litigation. Plaintiffs' attorneys would require a crystal ball — not normally part of the practitioner's tools — to successfully evaluate partial settlement in complex litigation.

Thus, the most equitable solution may be for our courts to pronounce that set-off is not applicable to cases subject to the Comparative Fault Act, or, put another way, that comparative fault cases represent an exception to the general rules of pro tanto reduction of amounts received in settlements. Absent application of pro tanto discharge, a plaintiff still risks a penalty depending on the accuracy of the plaintiff's prediction in the settlement process, but this risk is offset by the potential for gain if his estimate is better than the settling tortfeasor's. This windfall/penalty settlement rule would satisfy goals of fairness within a comparative fault scheme without adding further disincentives to the settlement process.[86] Further, such a judicial interpretation could be readily justified by either (1) a finding that joint and several liability was abrogated, or at least significantly modified by enactment of the Comparative Fault Act, or (2) a policy determination that the use of partial settlements may otherwise be seriously threatened.

B. The Rationale for an Exception to Set-Off in Comparative Fault Cases

The common law rules requiring pro tanto reduction of a plaintiff's claim evolved from the related historical concepts of joint tortfeasors and joint and several liability. Historically, joint tortfeasors were viewed as a single entity, whereby the act of one equaled the act of all; and thus there could exist but one cause of action.[87] Joint and several liability is the distinct common law principle that one joint tortfeasor could be held liable for the entire loss sustained by the plaintiff because a defendant is liable for all consequences proximately caused by that defendant's wrongful act.[88]

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86. Eilbacher, *supra* note 74, at 910-11.

87. *See generally* W. PAGE KEETON ET. AL, PROSSER AND KEETON ON THE LAW OF TORTS § 51, at 346 (5th ed. 1984).

88. *Id.* § 47, at 328.

The relation between the common law concepts of joint tortfeasors, joint and several liability, and set-off was recently emphasized by the court of appeals. In *Sanders v. Cole Municipal Finance*,[89] Albert Sanders and his wife brought suit against multiple defendants for damages sustained by Sanders through the course of his employment. Prior to trial, the Sanders settled with all defendants except Cole Municipal Finance. The settlement agreements were in the form of covenants not to sue or execute and a loan receipt agreement, all of which unquestionably reserved the plaintiffs' rights against Cole Municipal Finance. The jury returned a verdict against Cole Municipal Finance in the amount of $320,000. On the defendant's motion for pro tanto discharge, the trial court reduced the verdict by the amounts received in settlement. Because the settlement amounts exceeded the amount of the jury verdict, the court entered an order of judgment in favor of the defendant. Sanders appealed, in part asserting that, by granting the discharge, the trial court failed to give effect to the express terms of the covenants not to sue or execute which were intended to be only partial satisfaction.[90]

The court of appeals' rationale for rejecting that contention hinged on the concept of joint and several liability:

> If the agreement is a covenant not to sue and the co-defendants are jointly and severally liable, the funds received by the plaintiff for a covenant not to sue with any defendant must be credited pro-tanto against any judgment against any co-defendant. The principle behind this credit is that the injured party is entitled to only one satisfaction for a single injury and the payment by one joint tortfeasor inures to the benefit of all.[91]

The plaintiffs also argued that the pro tanto discharge was in error because the funds were received in settlement of independent rather than joint acts of negligence. This argument was premised on the fact that the co-defendants were not in fact "joint tortfeasors" as that concept originated.[92] The court again rejected the argument because joint and

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89. 489 N.E.2d 117 (Ind. Ct. App. 1986).

90. *Id.* at 119-20.

91. *Id.* at 120 (citing Bedwell v. DeBolt, 50 N.E.2d 875 (Ind. 1943); *see also* Scott v. Krueger, 280 N.E.2d 336 (Ind. Ct. App. 1972), *trans. denied*; Parry Mfg. Co. v. Crull, 101 N.E. 756 (Ind. Ct. App. 1913), *trans. denied* (1914)). The court further stated that, although funds received from covenants not to sue are set-off, funds received under a loan receipt agreement are treated differently. *Id.*

92. The original meaning of "joint tort" applied only to cases involving a common purpose or where there was mutual aid in carrying out the purpose, not where the acts were independent. KEETON ET. AL, *supra* note 87, § 46, at 322-25.

several liability applies even where each co-defendant acts separately and independently.[93]

As noted, the directive to reduce a plaintiff's damages by amounts received in settlement has been consistently and frequently applied in cases involving multiple tortfeasors.[94] Significantly, none of the reported decisions have been decided under the Comparative Fault Act.[95] Because the concept of pro tanto credit is premised on the concept of joint and several liability, applying set-off in cases exempt from the Act does not raise immediate difficulties. However, most commentators suggest that joint and several liability was abrogated, or at least significantly modified, by enactment of the Comparative Fault Act. If so, an exception to the rules of pro tanto credit in comparative fault cases is justified.

The supreme court concluded in *Huffman* that the release rule should no longer apply in comparative fault cases.[96] The court's conclusion was based, in large part, on the fact that the "metaphysical common law concept of viewing all joint tortfeasors as a single entity has been superseded by the Act . . . ."[97] Yet, this statement does not necessitate the conclusion that the distinct concept of joint and several liability has been abrogated. Notably, the supreme court has expressly stated that whether joint and several liability was abrogated by the Comparative Fault Act is an unresolved issue that has not been addressed by the court.[98]

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93. *Sanders*, 489 N.E.2d at 121. The court in *Sanders* did not address the unfairness of the rules to the settling codefendants, but merely stated that because there is no right to contribution, the settling defendants had no legal right to complain. *Id.* at 121.

94. *See, e.g.*, Manns v. State Dep't of Highways, 541 N.E.2d 929, 933-34 (Ind. 1989) (partial or total satisfaction is determined by simply applying the amount received against the amount of the verdict rendered; verdict to be reduced pro tanto (meaning "for so much")); Indiana State Highway Comm'n v. Morris, 528 N.E.2d 468 (Ind. 1988); Board of Comm'rs v. Price, 587 N.E.2d 1326 (Ind. Ct. App. 1992); City of Hammond v. Rossi, 540 N.E.2d 105 (Ind. Ct. App. 1989).

95. Interestingly, the settling co-defendant in reported cases is generally the party which would have been subject to the Act; and the non-settling defendant is generally a governmental entity, which is exempt from the Comparative Fault Act. *See* IND. CODE § 34-4-33-8 (1988).

96. Huffman v. Monroe County Community Sch. Corp., 588 N.E.2d 1264, 1266 (Ind. 1992).

97. *Id.*

98. Bowles v. Tatom, 546 N.E.2d 1188, 1190 n.1 (Ind. 1989). Interestingly, this pronouncement came shortly after the United States District Court for the Southern District of Indiana determined that the Indiana Supreme Court would abandon the traditional release rule in light of the Act. *See* Gray v. Chacon, 684 F. Supp. 1481 (S.D. Ind. 1988) (Barker, J.). In *Gray*, Judge Barker also stated that the Comparative Fault Act abrogated joint and several liability, and specifically noted that academic arguments in favor of retention of joint and several liability lack "persuasive force and [are] at odds with the legislative motivation otherwise evidenced throughout the Act." *Id.* at 1495 n.6.

Whether joint and several liability has survived has been the subject of much scholarly debate.[99] The Comparative Fault Act, by precluding recovery only if a plaintiff's fault is assessed at greater than 50 percent, even in multi-party cases, modified the harshness of the common law rule that held a plaintiff's contributory negligence could totally bar recovery from other negligent actors. It has been noted that the trade-off for this benefit to the plaintiff was, in part, a partial abrogation of the joint and several liability rule.[100] On the other hand, the assertion that the Comparative Fault Act abrogated joint and several liability is largely premised on a "necessary implication" argument.[101] That is, the Act and its legislative history do not expressly abrogate joint and several liability. Rather, the premise must rest on the jury instructions which direct "a verdict against each defendant" based on the assessment of each defendant's allocation of fault.[102] Moreover, numerous arguments can be advanced in support of an interpretation that the Comparative Fault Act affects only the plaintiff's right to recovery of damages—not the defendant's liability—and thus retains joint and several liability.[103] Indeed, the Act is internally consistent only under the interpretation that joint and several liability is retained in modified form.[104]

It is beyond the scope of this discussion to resolve the extent to which joint and several liability may remain viable in light of the Comparative Fault Act. Rather, the primary point of this discussion is that pro tanto reduction of a non-settling defendant's liability is inequitable in comparative fault cases. However, the most logical reasoning in support of a judicial exception to the general rules of pro tanto discharge is that joint and several liability has been abrogated or at least significantly

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99. *See* Lawrence P. Wilkins, *The Indiana Comparative Fault Act at First (Lingering) Glance*, 17 IND. L. REV. 687 (1984).

100. *See* Edgar W. Bayliff, *Drafting and Legislative History of the Comparative Fault Act*, 17 IND. L. REV. 863, 867 (1984). The abrogation is arguably only partial because there is no legislative indication of an intention to abolish joint and several liability for defendants who can be treated as a single party as defined in section 2(b) of the Act, or from application in cases in which claims under the Act are joined with claims not covered by the Act. *Id.* at 867-68.

101. *See* Wilkins, *supra* note 98, at 687, 703-05.

102. Wilkins, *supra* note 98, at 687, 703-05. *See* IND. CODE § 34-4-33-5(b)(4) (1988).

103. Wilkins, *supra* note 98, at 705-18. The arguments include: (1) the Act's substantive sections do not expressly abrogate joint and several liability as many comparable state statutes do; (2) the requirement of "a verdict" is ambiguous and does not compel seriatim verdicts; (3) even if separate verdicts are rendered, a judgment against two or more defendants is considered joint and several for purposes of permitting enforcement proceedings jointly or separately under procedural trial rules; (4) the Act's distinction between defendants who "may be treated along with another as a single party" under section 2(b); and (5) abrogation of joint and several liability results in a disproportionate benefit to tortfeasors. *Id.*

104. *See infra* note 104.

modified by the Comparative Fault Act.[105] The rule directing a trial court to reduce a verdict against a co-defendant by amounts received in settlement with other co-defendants evolved in order to preclude a plaintiff from recovering more than a single satisfaction of a judgment. Pro tanto discharge was necessary because a plaintiff could obtain and execute a judgment for all damages against any defendant under the doctrines of joint tortfeasors and joint and several liability. Under the Comparative Fault Act, the verdict rendered against any defendant is restricted to an amount based on the jury's allocation of fault to that defendant. If joint and several liability is deemed to be vitiated, then a comparative fault

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105. Notably, the express language of the Comparative Fault Act suggests that the Indiana General Assembly contemplated that joint and several liability would continue to operate in some form in comparative fault cases. The Act denies contribution amongst tortfeasors in comparative fault cases. *See* IND. CODE § 34-4-33-7 (1988). Yet this statutory provision merely continues the general common law rule denying contribution amongst jointly and severally liable tortfeasors. *See* Sanders v. Cole Mun. Fin., 489 N.E.2d 117, 121 (Ind. Ct. App. 1986). Thus there was no need to legislatively deny contribution if the Act abrogated joint and several liability.

Rather, the express legislative provision suggests that joint and several liability survives in modified form, and that the General Assembly intended to preclude a jointly and severally liable *comparative fault* defendant, against whom the plaintiff executed an entire judgment, from using the allocation of fault as a basis for contribution. Importantly, the retention of joint and several liability must be in *modified* form because the traditional concept would render the nonparty defense meaningless.

If joint and several liability has survived in modified form, our courts have the option of defining the new contours for the doctrine in light of the Act. Most significantly, the doctrine should be modified so as to maintain its compensatory function to the plaintiff, while at the same time encouraging partial settlements. These dual purposes can be attained by interpreting the Act as retaining joint and several liability as to parties to the action, but abrogating its application to nonparties.

This interpretation would encourage settlement by assuring settling tortfeasors that they cannot be held responsible for liability apportioned to defendants who refuse to settle. Further, while it would continue to encourage plaintiffs to name all potentially liable tortfeasors as parties unless they have settled, this interpretation would lessen the plaintiff's burden of collecting from multiple parties.

Moreover, retaining joint and several liability as to parties to the action would achieve perhaps the only rational internal reconciliation of the Act in its most current version. That is, this interpretation gives meaning to the prohibition on contribution, as well as to the nonparty defense.

Under this interpretation, plaintiffs will need to make extra effort to discover all potential defendants prior to expiration of relevant statutes of limitation, and also to get a complaint on file as to each known defendant prior to 150 days before expiration of the relevant statute of limitation. This would force the named defendants to name any potential nonparties at least 45 days prior to the expiration of the statute of limitations. *See* IND. CODE § 34-4-33-10 (1988). Failure to take this action could result in the potential naming of a nonparty after the expiration of the statute of limitations. Under the proposed interpretation, this would then be the only possible way in which a plaintiff could be denied her full measure of damages attributed to multiple tortfeasors.

defendant cannot be held liable for any amount of damages beyond that specified in the verdict rendered against that defendant. Further, a plaintiff could recover greater than full satisfaction only in those few cases where the amount received in settlement turns out to be greater than the amount of damages apportioned to the settling defendant, i.e., where the claimant has made a good settlement bargain. Set-off thus becomes an unnecessary judicial device.

Additionally, even if joint and several liability has survived in some form, strong policy arguments dictate against any application of set-off in comparative fault cases. Most notably, there is a strong judicial policy in this state to encourage partial settlements.[106] Contrary to this policy, any use of pro tanto discharge discourages settlements; even the most equitable use of set-off will compel a claimant to absorb the risk of a poor settlement bargain without the potential for any gain when a good bargain is made. This is unjustifiable because, in its most practical terms, a settlement can be viewed as a mutual contract of insurance. The plaintiff compromises his claim for less than the best potential jury award in return for insurance against the worst possible verdict. The settling party pays more in settlement than the lowest possible verdict in return for insurance against the highest possible verdict. If settlement agreements with nonparties are allowed to be set-off, then the plaintiff has no significant incentive to enter into partial settlements because any excess settlement amount over the liability assessed to the settling nonparty will simply enure to the benefit of the remaining party defendants who rightfully or wrongfully refused to settle.[107] In fact, where a plaintiff has received a significant settlement from one of the tortfeasors, there will be a very powerful incentive for the remaining party defendants not to make reasonable offers in settlement based upon the "right" of set-off. Thus, to promote the attainment of partial settlements, the judiciary should create an exception to pro tanto discharge rules in comparative fault cases.

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106. Manns v. State of Indiana Dep't of Highways, 541 N.E.2d 929, 932 (Ind. 1989) (the judicial policy of this state strongly favors the use of partial settlements).

107. Ultimately, a settlement is simply the sale of a cause of action for an agreed price. In effect, set-off in a comparative fault action allows for adjustment after the sale, and irrationally gives the benefit to a third wrongdoer, not even a party to the original transaction. Just as in any business deal, a plaintiff should be able to "sell" his cause of action for the best price he can get and not be exposed to penalty for selling too low without being allowed the incentive to retain the benefit of selling high. Applying the same principles to the futures commodity market would result in the ridiculous situation of requiring the futures soybean buyer to pay to seller any additional amount by which the price of soybeans went up from the date of contract to the date of delivery, while at the same time if the price goes down, the seller is not required to make any refund of the original contract price to the buyer. Our capitalist economy would grind to a shuddering halt.

Furthermore, a strong policy underlying the Comparative Fault Act is the expansion, and refinement, of the compensatory function of tort law. The primary purpose of set-off is to preclude a windfall to the plaintiff—with no corresponding assurance of full compensation. Yet the Act's directive to allocate fault among parties and nonparties and to enter a verdict against each defendant based on that defendant's percentage of fault, effectively circumscribes the claimant's ability to obtain greater than full satisfaction. A more appropriate refinement of the compensatory function of tort law is achieved by exempting comparative fault actions from the general rule requiring a set-off of amounts received in settlement. This proposition is supported by Judge Sarah Evans Barker's statement in *Gray v. Chacon*, that, under the Comparative Fault Act, "each defendant has liability to the plaintiff that can be neither increased nor decreased by the relative amount of some other defendant's payment to the plaintiff."[108]

In sum, set-off serves no rational purpose in comparative fault cases. The plaintiff is no longer settling with a party who is legally responsible to pay the entire damages; rather, the plaintiff is settling with a party that is legally responsible only for that portion attributable to the settling party's culpability. An application of set-off in a comparative fault action could not be based upon any real possibility of unjust enrichment to the plaintiff and should not be allowed in any form. This situation needs to be clarified with direction from the court of appeals as to whether set-off is to be applied in comparative fault cases where a settling party is subject to being subsequently named as a nonparty defendant. The alternative is to leave a scheme in place which could effectively discourage partial settlements in multi-party comparative fault litigation.

V. The Impact Rule

During this survey, the court of appeals further explored the dimensions of the impact rule as recently modified by the Indiana Supreme Court. Although exceptions have been carved out through the years, the impact rule has been a mainstay of the rules regarding recovery for infliction of emotional distress in Indiana tort law for nearly one hundred years.[109] Following the majority of jurisdictions throughout the nation, the rule in Indiana has been dramatically circumscribed during the last two years. Traditionally viewed, the impact rule permits recovery of damages for mental distress or emotional trauma "when the distress is accompanied by *and* results from a physical injury caused by an impact

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108. 684 F. Supp. 1481, 1485 (S.D. Ind. 1988).

109. *See, e.g.*, Kalen v. Terre Haute & I.R.R. Co., 47 N.E. 694 (Ind. Ct. App. 1897).

to the person seeking recovery."[110] This translates to three elements: (1) an impact on the plaintiff, (2) which causes physical injury, and (3) which physical injury causes the emotional distress.[111]

The recent evolution of the impact rule began with the supreme court's decision in *Cullison v. Medley*.[112] As detailed in last year's tort survey,[113] the Indiana Supreme Court in *Cullison*[114] determined that the rationale for the impact rule was no longer valid.[115] Its holding was narrow though. The court held that the rule will no longer bar recovery for emotional distress when sustained in the course of a tortious trespass.[116] The *Cullison* decision also led the supreme court to recognize for the first time the tort of intentional infliction of emotional distress, which occurs when one "by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another."[117]

The impact rule's application in an action for negligent infliction of emotional distress was considerably modified but not abrogated in *Shuam-*

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110. Shuamber v. Henderson, 579 N.E.2d 452, 454 (Ind. 1991) (citing New York, Chicago & St. Louis R.R. Co. v. Henderson, 146 N.E.2d 531, 543 (Ind. 1957); Boston v. Chesapeake & O. Ry., 61 N.E.2d 326 (Ind. 1945); Indianapolis St. Ry. v. Ray, 78 N.E. 978, 980 (Ind. 1906)).

111. *Id.* at 454.

112. 570 N.E.2d 27 (Ind. 1991).

113. Jay Tidmarsh, *Tort Law: The Languages of Duty*, 25 IND. L. REV. 1418, 1449-56 (1992).

114. The court in *Cullison* addressed whether the "impact rule" prohibited Cullison from recovering under any of several legal theories for emotional distress which resulted from the Medleys' wrongful conduct. Cullison had invited the Medleys' 16 year old daughter to his house for a coke. The 16 year old arrived at his home late that evening. Cullison invited her in and went to put some clothes on. When he returned to the living room her father, her mother and her brother-in-law were sitting in the still dark living room. The father had a gun and the Medleys threatened Cullison. As a result, Cullison sought psychological counseling and therapy for approximately 18 months.

115. The court explained that the mere fact of physical injury does not make mental distress damages less speculative or subject to exaggeration or fictitious claims. *Cullison*, 570 N.E.2d at 30. Further, the court stated that juries are as qualified to judge someone's emotional distress as one's pain or suffering. *Id.*

116. *Id.* at 30. However, recovery depends on whether the intentional invasion provokes a reasonably foreseeable emotional disturbance or trauma. *Id.*

117. *Id.* at 31 (quoting RESTATEMENT (SECOND) OF TORTS § 46 (1965)). The court held that recovery under the tort would be allowed in Indiana under proper circumstances. *Id.* The facts in *Cullison* did not rise to that level, however. The court noted that a jury could not reasonably infer that Medley intended to inflict emotional injury based on the sole allegation that the Medleys knew that Cullison disliked guns. *Id.* Thus, under the court's holdings, Cullison was permitted to proceed to the jury on the question whether his emotional distress was a reasonably foreseeable result of the Medleys' intentional trespass, but could not seek recovery under the distinct tort of intentional infliction of emotional distress.

ber v. Henderson.[118] In *Shuamber*, the defendant's car collided with the car driven by Gail Shuamber and caused physical injuries to the plaintiffs. Gail's son, a passenger in the vehicle, was killed. The Shuambers did not seek recovery for emotional trauma rising out of or caused by their own physical injuries; rather, their claim was based on the emotional trauma imposed on them as a result of observing a member of their immediate family sustain mortal injuries in the collision. The court found that the case did not fit within the exception to the impact rule recognized in cases where the defendant's conduct was "inspired by fraud, malice or like motives involving intentional conduct."[119] More notably, the court stated that the Shuambers had not alleged "any intentional tort which would bring them within the recently announced rule in *Cullison v. Medley*."[120] The court thus broadened the *Cullison* holding by construing it to apply to any intentional tort, not just intentional trespass.[121]

The court then restated its rejection of the rationale for the impact rule,[122] as it had done in *Cullison*, and held that, under appropriate circumstances, recovery for emotional distress should be allowed where the distress is the result of a physical injury negligently inflicted on a third person.[123] However, the court expressly declined to totally abolish Indiana's impact rule. The court stated:

> When, as here, a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person, we hold that such a plaintiff is entitled to maintain an action to recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff.[124]

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118. 579 N.E.2d 452 (Ind. 1991).

119. *Id.* at 454 (citing Naughgle v. Feeney-Hornak Shadeland Mortuary, Inc., 498 N.E.2d 1298, 1301 (Ind. Ct. App. 1986); Montgomery v. Crum, 161 N.E. 251, 260 (Ind. 1928) (intentional abduction of a child); Kline v. Kline, 64 N.E. 9 (Ind. 1902) (attempted arson); Lazarus Dep't Store v. Sutherlon, 544 N.E.2d 513, 526 (Ind. Ct. App. 1989) (false imprisonment, malicious prosecution and defamation)).

120. *Id.* at 455.

121. In the court's words, "where intentional torts are concerned, recovery is now permitted in the absence of any physical injury if the tort is one which would foreseeably provoke an emotional disturbance of the kind normally to be aroused in the mind of a reasonable person." *Id.* at 455. *See also* Smith v. Methodist Hosp. of Indiana, 569 N.E.2d 743 (Ind. Ct. App. 1991).

122. *Shuamber,* 579 N.E.2d at 455 (quoting *Cullison*, 570 N.E.2d at 30).

123. *Id.*

124. *Id.* at 456.

Thus, only the third element of the impact rule, which requires that the physical injury caused by the impact be the cause of the emotional distress, was expressly abrogated in the case. It is now sufficient if the emotional trauma is the result of being "directly involved" in an impact.[125] Yet, the court's language suggests that the second element was abolished as well, and that it is sufficient if a claimant sustains any "direct impact" regardless of whether "physical injury" results.[126]

During this survey period, the court of appeals had the opportunity to apply the supreme court's pronouncements regarding the impact rule. *Comfax Corp. v. North American Van Lines, Inc.*[127] involved a claim for intentional infliction of emotional distress. North American Van Lines (NAVL) agreed to purchase computer software accounting packages from Comfax, including two packages which Comfax agreed to custom design for NAVL. Comfax envisioned that the programs would remain Comfax property and that, for two years, NAVL would inform its agents of Comfax's products and would allow Comfax to contact the agents and advertise the products. NAVL realized the potential for profits and decided to attain the financial opportunity for itself. The comprehensive referral system Comfax envisioned never materialized, NAVL terminated the contract and one of Comfax's key programmers left Comfax and began to work for NAVL. NAVL then filed suit against Comfax and its president, James Kuker, for breach of contract and to prevent disclosure of, and to recover from Comfax, NAVL information or documents. Subsequently, Comfax went into financial collapse and ceased doing business. James Kuker attempted suicide, was hospitalized, and underwent an extensive rehabilitation program.

Kuker's counterclaims included an action for intentional infliction of emotional distress. The court held that, even if NAVL's conduct in terminating the contract could be characterized as extreme and outrageous, the facts did not demonstrate that NAVL intentionally or recklessly caused Kuker's emotional problem.[128] Although the court did not specify the facts leading to that conclusion, the conclusion is sound because the case indicates that NAVL's intent was to seize the financial opportunity for

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125. Specifically, the court stated that the jury will need to determine that Gail's emotional trauma was the result of "being involved in the accident," as opposed to being merely the normal emotional distress experienced by a mother who has tragically lost her son. *Id.* at 456.

126. In applying this rule to the facts, the court found that both Gail Shuamber and her daughter sustained a sufficient impact because they were "directly involved" in the accident. The court did not bring into the analysis the fact that they suffered physical injury. *Id.*

127. 587 N.E.2d 118 (Ind. Ct. App. 1992).

128. *Id.* at 127.

itself despite any representations to Comfax—not to cause Kuker's emotional distress. The court then held that Kuker's claim would fail on a motion for summary judgment, even if brought under the theory of negligent infliction of emotional distress. The court's conclusion was primarily based on its reasonable, but nonetheless harsh, determination that economic loss is not sufficiently serious in nature, and the resulting emotional trauma is not of a kind and extent normally expected to occur in a reasonable person.[129]

However, the court also analyzed the requirement of physical injury or impact in light of *Shuamber*. The court's analysis on this point is more questionable. Kuker alleged that NAVL caused him to suffer mental and emotional breakdown and to eventually slit his wrists.[130] The court held that this was an insufficient direct impact because "the accompanying physical impact must occur prior to or simultaneously with the infliction of emotional distress."[131] The troublesome nature of this statement is twofold. First, the language in *Shuamber* does not require a "physical" impact. In *Shuamber*, the court's analysis of whether the plaintiffs sustained a sufficient "impact" did not include the fact that the plaintiffs had suffered physical injuries;[132] rather, the *Shuamber* analysis focused on the fact that the plaintiffs were in the car which the defendant collided with, and were thus "directly involved" in the defendant's conduct.[133]

Second, *Shuamber* did not hold that the emotional distress must occur contemporaneously with the direct impact; rather, it held that emotional distress must merely be "by virtue of [the claimant's] direct involvement" with the defendant's negligent conduct.[134] Because the supreme court intentionally used this broad language, it is troubling that *Shuamber* would be construed to preclude a situation where an individual has experienced a potentially fatal physical injury by virtue of his involvement with a defendant's negligent course of conduct merely because of the timing of that impact. The court of appeals' reasoning, however, stemmed from its great reluctance to expand the torts of both intentional and negligent infliction of emotional distress beyond what it perceived to be the "narrow class of cases in which these torts may offer relief."[135]

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129. "We recognize that an economic loss may cause emotional distress, but cannot compare the loss of a loved one with the loss of an investment, and will not extend *Shuamber*'s holding as *Kuker* suggests." *Id.*

130. *Id.* at 127 n.11.

131. *Id.*

132. Shuamber v. Henderson, 579 N.E.2d 452, 456 (Ind. 1991).

133. *Id.*

134. *Id.*

135. Comfax Corp. v. North American Van Lines, Inc., 587 N.E.2d 118, 128 (Ind. Ct. App. 1992).

The court of appeals also applied the modified impact rule in *Adams v. Clean Air Systems, Inc.*[136] In *Adams*, the plaintiffs acquired salvage rights to an abandoned hospital from Clean Air Systems (CAS). The owners of the hospital had hired CAS to remove asbestos from the building. Although CAS allegedly removed the asbestos before the plaintiffs began salvaging materials, the plaintiffs discovered a powdery substance while working without breathing equipment. The plaintiffs sought recovery for negligent infliction of emotional distress based on their constant fear that they may develop a fatal asbestos-related malady. The court determined that, although the plaintiffs earnestly argued that they suffered emotional distress due to the possibility of exposure to asbestos, "some certainty that plaintiffs actually inhaled the potentially harmful toxin is required" to maintain the cause of action.[137]

The court properly applied *Shuamber* by requiring some type of direct impact for recovery. However, the court made a confusing statement about the need for a causal link. The court said:

> It does not appear that the mere possibility that an individual has inhaled or ingested a toxin, which may or may not produce physical injury, *which in turn causes emotional distress to that individual*, states a cause of action under the exception announced in *Shuamber*.[138]

Because *Shuamber* abrogated the need for such causal link, this statement should be read as affirming that emotional trauma must be "by virtue of [the] direct involvement." The court also declined to create an exception to the impact rule where a defendant acts with gross indifference to the welfare of others.[139]

Lastly, in *Mehling v. Dubbois County Farm Bureau Cooperative Ass'n, Inc.*,[140] the court declined to further extend the doctrine of intentional infliction of emotional distress in at will employment termination situations. The court declined to follow persuasive authority from California cited by the plaintiff. Instead, the court relied upon the decision in *Comfax*, which declined to recognize economic loss as a supportable claim for recovery of emotional distress damages.[141] Thus, although the supreme court's recent holdings undermining the impact rule allowed for further development of the torts of intentional and negligent infliction

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136. 586 N.E.2d 940 (Ind. Ct. App. 1992).
137. *Id.* at 942.
138. *Id.* at 942 (emphasis added).
139. *Id.*
140. 601 N.E.2d 5 (Ind. Ct. App. 1992).
141. *Id.* at 9.

of emotional distress, this year's court of appeals decisions reveal firm resistance against broadening their scope.

VI. Application of the Balancing Approach Articulated in *Webb v. Jarvis* to Determine Whether a Duty in Tort Exists

Last year the supreme court articulated a new test for determining whether a duty in tort exists. In *Webb v. Jarvis*,[142] the court concluded that the existence of a duty in tort depends on the balancing of three factors: (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns.[143] Indiana courts used this approach numerous times during 1992, particularly in the context of evaluating the relationship between the parties. One distinct relationship giving rise to a tort duty is that of landowner and entrants onto land. This section of the Article illustrates the merging of the *Webb* test into traditional premises liability analyses. Additionally, this section describes the more factually similar use of the test to determine the existence of a duty in preconception tort cases.

A. Duty in Pre-conception Tort Cases

The Indiana Supreme Court resolved a conflict among the court of appeals regarding the recognition in Indiana of a duty in tort owed to individuals prior to their conception. *Walker v. Rinck*,[144] and *Yeager v. Bloomington Obstetrics and Gynecology, Inc.*,[145] involved plaintiff-children who alleged that their respective mothers' physicians negligently failed to prescribe RhoGAM and thus caused their serious personal injuries.[146] In *Walker*, the Third District Court of Appeals declined to allow a cause of action for children injured as a result of a pre-conception tort committed against their mother.[147] Because the decision was rendered before *Webb*, the court did not rely on the three-factor balancing approach; rather, the court followed the reasoning espoused by the New York Court

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142. 575 N.E.2d 992 (Ind. 1991).

143. *Id.* at 995.

144. 566 N.E.2d 1088 (Ind. Ct. App. 1991), *vacated*, 604 N.E.2d 591 (Ind. 1992).

145. 585 N.E.2d 696 (Ind. Ct. App. 1992), *aff'd*, 604 N.E.2d 598 (Ind. 1992).

146. The drug RhoGAM can prevent an Rh-negative woman from developing sensitivity to Rh-positive blood when administered during the pregnancy and delivery of the first Rh-positive child. Without treatment with RhoGAM, a woman develops antibodies which attack Rh-positive blood. These antibodies attack the blood cells of Rh-positive children both during the pregnancy and after birth until the antibodies are cleared from the child's system, thereby causing serious permanent injuries. *Id.* at 697. The Walkers also sued a medical laboratory alleging that the physician's failure to administer the RhoGAM was caused by the lab's erroneous analysis of Mrs. Walker's blood.

147. 566 N.E.2d at 1090.

of Appeals in *Albala v. City of New York*.[148] The *Albala* court disallowed a pre-conception tort claim in order to retain tort liability within manageable bounds.

In *Yeager*, the First District Court of Appeals disagreed with the majority in *Walker* and allowed the child plaintiff's claim.[149] Notably, the court in *Yeager* used the approach set forth in *Webb v. Jarvis*.[150] The court first rejected a blanket no-duty rule that would preclude all claims based on pre-conception torts. The *Yeager* court was influenced by Prosser and Keeton's critique of the *Albala* decision as a "thinly reasoned case."[151] The *Yeager* court agreed with Prosser and Keeton's premise that, although some pre-conception torts should not be recognized because of serious problems related to proof and proximate causation,[152]

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148. 429 N.E.2d 786 (N.Y. 1981).

149. 585 N.E.2d at 697.

150. Notably, the court's application of the first two prongs of the *Webb* test drew largely upon the dissenting opinion in *Walker* written by Judge Staton. Written before the *Webb* decision, Judge Staton stated that, to determine the existence of a duty in negligence cases, "Indiana courts apply a foreseeability test tempered by a consideration of the relationship between the parties." *Walker*, 566 N.E.2d at 1090.

Judge Staton reasoned that the defendants knew or should have known of the risk flowing from a failure to administer RhoGAM to Mrs. Walker; and that Mrs. Walker's later-born children clearly constituted reasonably foreseeable victims of a breach of a duty to administer RhoGAM. *Id.* Further, Judge Staton readily found the requisite relationship between the defendants and the plaintiff children, based on two grounds. First, Judge Staton noted that courts have recognized that a tortfeasor who causes a direct injury to one member of the family may indirectly damage another because of the interconnected legal interests inherent in a family. *Id.* at 1091 (quoting Schroeder v. Perkel, 432 A.2d 834, 839 (1981) ("A family is woven of the fibers of life; if one strand is damaged, the whole structure may suffer.")).

Interestingly, Judge Staton bolstered his finding of the requiste relationship via the Medical Malpractice Act's definition of patient, which includes "a person having a claim of any kind, whether derivative or otherwise, as a result of alleged malpractice . . . ." *Id.* (quoting IND. CODE § 16-9.5-1-1(c) (Supp. 1992)). The definition of derivative claims includes "the claim of a . . . child . . . for loss of services, loss of consortium, expenses, and other similar claims." IND. CODE § 16-9.5-1-1(c) (Supp. 1992). Thus, precluding the plaintiffs' claims in *Walker* would, in essence, constitute an exclusion from "the class of 'patients' those individuals who were not physically present when the health care provider rendered services." *Walker*, 566 N.E.2d at 1090. Such a result would controvert the plain meaning of the Medical Malpractice Act.

Judge Staton also relied on cases from other jurisdictions. *E.g.*, Renslow v. Mennonite Hosp., 367 N.E.2d 1250 (Ill. 1976) (recognizing a right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother); Monusko v. Postle, 437 N.W.2d 367 (Mich. Ct. App. 1989) (recognizing a viable preconception tort against physicians who failed to immunize a mother from rubella who later contracted the disease while pregnant with the plaintiff).

151. 585 N.E.2d at 697 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, 855 (5th Ed. 1984)).

152. Such problems arise in cases involving from toxic chemicals or radioactive waste. *Id.* at 697-98.

a "blanket no-duty rule" which disallows all pre-conception claims should not be applied where proof and proximate cause problems do not exist.[153]

The supreme court resolved the conflict in favor of the children through application of the *Webb* approach in *Walker v. Rinck*.[154] The court first disposed of two preliminary arguments. The supreme court clarified that "pre-conception" tort claims involve allegations that the defendant's tortious conduct is the cause of abnormalities in infants that would otherwise have been born normal and healthy.[155] Accordingly, the defendants' argument that the claim was precluded under Indiana Code section 34-1-1-11, which proscribes wrongful life claims based on negligently performed abortions,[156] was rejected.[157] The court also declined to leave the resolution of the issue to the legislature. The court reiterated that it is the traditional role of the highest court of the state to determine the common law of the state, even if the result is an innovative growth of the common law.[158] Moreover, the court noted that the recognition of a preconception tort would not be a "dramatic innovation" in Indiana because tort law allows infants to recover for injuries sustained as a result of defective products manufactured prior to the conception of the infant.[159]

The court then applied the *Webb* analysis to determine that Dr. Rinck owed a tort duty to the Walker children. In evaluating the relationship between the parties, the court explained that a duty may be owed to a third party beneficiary of the consensual physician-patient relationship where the physician has actual knowledge that the services are being provided, in part, for the benefit of the third party.[160] Although Dr. Rinck could not have had actual knowledge of the Walker children before they were conceived, the court concluded that Dr. Rinck had actual knowledge that the only reason for the administration of RhoGAM was to protect the future children of Mrs. Walker.[161] The court held that, "under those circumstances," Dr. Rinck owed a duty to the children which may have been breached when he failed to administer RhoGAM to their mother.[162]

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153. *Id.* at 698.

154. 604 N.E.2d 591 (Ind. 1992).

155. *Id.* at 594.

156. IND. CODE § 34-1-1-11 (1988) provides that "[n]o person shall maintain a cause of action . . . based on the claim that but for the negligent conduct of another he would have been aborted."

157. *Walker*, 604 N.E.2d at 593-94.

158. *Id.* at 594.

159. *Id.* (citing Second Nat'l Bank v. Sears Roebuck & Co., 390 N.E.2d 229 (Ind. Ct. App. 1979) (negligent installation of a furnace)).

160. *Id.* at 594-95 (quoting Webb v. Jarvis, 575 N.E.2d 992, 996 (Ind. 1991)).

161. *Id.* at 595.

162. *Id.* It is interesting that the court used such conclusory language regarding the

The foreseeability factor of the *Webb* approach focuses on whether the person actually harmed was a foreseeable victim and whether the type of harm actually inflicted was reasonably foreseeable.[163] The court in *Walker* readily found the requisite foreseeability because the only medical reason for giving RhoGAM to Mrs. Walker was to prevent the exact injuries which occurred—injuries to the future children of Mrs. Walker caused by the antibodies which formed in Mrs. Walker when RhoGAM wception tort claim in this case. The court stated:

> The administration of RhoGAM to a mother neither benefits nor harms the mother; it is given only to protect potential fetuses not yet conceived. Surely the public policy of this State follows and is coincident with the well-established medical practice of giving RhoGAM to an Rh negative mother who has given birth to an Rh positive child in order to protect future children of such mother from injury.[166]

Based on the analysis of all three factors—relationship, foreseeability, and public policy[167]—the court concluded that Dr. Rinck owed a duty to the Walker children to use reasonable care concerning the administration

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duty before engaging in the analysis of the other two factors. Two inferences are that the relationship factor is (1) the most significant factor generally or (2) the most weighty factor in this case. As the following section of this article illustrates, lower courts seem uncertain of the appropriate application of the *Webb* approach. It is thus unfortunate that the court was unable to provide a clearer example.

163. Webb v. Jarvis, 575 N.E.2d 992, 997 (Ind. 1991).

164. *Walker*, 604 N.E.2d at 595.

165. *Id.* at 595 (citing *Webb*, 575 N.E.2d at 997 ("We believe that public policy and social requirements weigh most heavily against imposing a duty on physicians to consider unknown third persons in deciding whether or not to prescribe a course of drug therapy for a patient.")).

166. *Id.* at 595.

167. In *Yeager*, the appellate court's analysis of the public policy considerations delved into other areas. The *Yeager* court acknowledged the import of considerations such as the decision's impact on the affordability of liability insurance and the availability of obstetrical care, yet found that the Indiana Medical Malpractice Act adequately addresses these concerns through protections such as an occurrence statute of limitations, a cap on the total amount recoverable, and a panel to review all proposed medical malpractice complaints. *Yeager*, 585 N.E.2d at 699. The court found that "the legislature has preempted this area and that all further 'blanket' type protections designed to ensure that tort claims remain within manageable bounds should be implemented by our legislature." *Id.* at 699.

of RhoGAM to their mother.[168] The supreme court also summarily affirmed the opinion of the court of appeals in *Yeager*.[169] Notably, the analysis of the *Webb* factors in both the *Walker* and *Yeager* cases hinged on the specific purpose of the drug RhoGAM. Although the court adopted the notion that a "blanket no-duty" rule which precludes all pre-conception claims is unnecessary, the recognition of a tort duty in other pre-conception tort cases may not be so readily achieved.

B. Merging the Webb Test Into Premises Liability Cases

Several decisions during the survey period explored the doctrine of premises liability in light of the supreme court's decisions in both *Webb v. Jarvis*[170] and *Burrell v. Meads*.[171] The *Webb* approach should be invoked in premises liability cases to assist in the determination of whether a duty in fact exists. *Burrell* should then be followed to determine the scope of that duty. In Indiana, the scope of the tort duty owed to a person entering the land of another is determined in accord with the person's status as a trespasser, a licensee or an invitee. The highest duty is owed to invitees.[172] In *Burrell*, the supreme court discarded the "economic benefit test" and, instead, adopted the Restatement's invitation test to decide who qualifies as an invitee.[173]

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168. *Walker*, 604 N.E.2d at 595. The court similarly held that the second defendant, the laboratory which erroneously reported that Mrs. Walker had Rh-positive blood, owed a duty to use reasonable care in analyzing Mrs. Walker's blood. *Id.* On remand, one issue will therefore be whether Dr. Rinck breached his duty in light of the facts that Mrs. Walker, who was a nurse, informed Dr. Rinck that she was Rh-negative, yet the laboratory reported that she was Rh-positive.

Additionally, the supreme court reversed the court of appeals' finding that, even assuming a cause of action for the preconception tort, in this case the parents' conduct constituted an intervening, superseding cause. *Id.* at 596. Depositions revealed that the parents were aware of the Rh sensitization in 1979, three years after the birth of their first Rh-positive child. One of the child plaintiffs, their second child, was born in 1981. The other child plaintiffs were twins born to the Walkers in 1985; one twin was Rh-positive, the other was Rh-negative. The appellate court found that the parents' conduct in conceiving children with knowledge of the Rh sensitization was an intervening, superseding cause of the children's injuries. *Walker*, 566 N.E.2d at 1090. The supreme court disagreed, however, because "[a] superseding, intervening cause sufficient to break the causal chain . . . must be one that is not 'foreseeable' at the time of the wrongful conduct." *Walker*, 604 N.E.2d at 596. A failure to administer RhoGAM leads to totally foreseeable consequences.

169. *See* Yeager v. Bloomington Obstetrics and Gynecology, Inc., 604 N.E.2d 598, 599 (Ind. 1992).

170. 575 N.E.2d 992 (Ind. 1991).

171. 569 N.E.2d 637 (Ind. 1991).

172. The duty owed to invitees is outlined in the RESTATEMENT (SECOND) OF TORTS § 343 (1965).

173. 569 N.E.2d at 642.

An instructive case on the interplay between the tests in *Webb* and *Burrell* is *Kinsey v. Bray*.[174] In *Kinsey*, the plaintiff, Vontris Kinsey, brought suit against her former husband, Rex Kinsey, for failure to protect her from harm inflicted by Rex's girlfriend, Linda Bray. The court applied *Webb's* balancing approach to resolve whether Rex owed a duty to Vontris to protect her from Linda. The court first analyzed the relationship prong of the test. The court noted that section 315 of the Restatement prescribes that there is no duty to control the conduct of a third party to prevent harm to another unless (a) a special relationship exists between the actor and the third party which imposes a duty, or (b) a special relationship exists between the actor and the other which gives rise to protection.[175] Thus, the relationship factor required analysis of the relationship between Rex and Linda, as well as between Rex and Vontris.

To resolve whether a special relationship existed between Rex and Linda under prong (a), the court relied on section 318 of the Restatement. That section requires a possessor of land, if present, to exercise reasonable care to control the conduct of licensees to prevent intentional harm to others or unreasonable risks of bodily harm to others in certain circumstances—namely, when the possessor knows he has the ability to control the third party and knows of the necessity and opportunity for exercising control.[176] The court found that the trier of fact could have concluded that Rex knew he could have controlled Linda by asking her to leave the premises, and further, that the trier of fact could have concluded that Rex knew he should have ordered Linda to leave due to Linda's past threats and animosity aimed at Vontris and her violent tendencies. Moreover, the court held that section 318 would apply to Linda even though under Indiana law a social guest is deemed an invitee rather than a licensee.[177] The court thus concluded that the relation between Linda and Rex gave rise to a duty to control Linda's conduct.

To determine whether a duty could be found based on the relationship between Rex and Vontris under prong (b) of section 315, the court looked to section 314A of the Restatement, which lists special relations that give rise to a duty to aid or protect.[178] Relations listed in section 314A of the Restatement include the relationship between the landowner who holds his land open to the public and public invitees. Under *Burrell*, the standard

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174. 596 N.E.2d 938 (Ind. Ct. App. 1992).

175. *Id.* at 940 (quoting RESTATEMENT (SECOND) OF TORTS § 315 (1965)).

176. *Id.* at 940 (quoting RESTATEMENT (SECOND) OF TORTS § 318 (1965)). The court noted that the Indiana Supreme Court has cited this section as generally helpful. *Id.* (citing Gariup Constr. Co., Inc. v. Foster, 519 N.E.2d 1224, 1229 (Ind. 1988)).

177. *Id.* at 940 (citing Burrell v. Meads, 569 N.E.2d 637 (Ind. 1991)).

178. *Id.* at 941.

of care accorded the public invitee, the business visitor, and the social guest are equal;[179] therefore, the court held that the law recognizes a duty on the part of landowners to protect social invitees as well.[180]

Because the landowner's duty to protect invitees against unreasonable risk of harm extends to risks arising out of the condition of the land, the issue became whether a third party's presence or conduct could constitute a "condition on the land."[181] This issue was resolved affirmatively based on *Glen Park Democratic Club, Inc. v. Kylsa*,[182] in which a defendant tavern owner was found to have a duty to protect one patron from another patron known to be violent, even though no defect or dangerous condition existed in the premises themselves.[183] Consistent with the disjunctive language of section 315 of the Restatement, the court held that a tort duty could be found on the facts of the case based on Rex's relation to either Vontris or Linda, or both.

The court only briefly examined the other two factors of the *Webb* approach: foreseeability and public policy. The foreseeability factor focuses on whether the person actually harmed was a foreseeable victim, and whether the type of harm actually inflicted was reasonably foreseeable.[184] The facts in *Kinsey* readily satisfied both criteria.[185] In premises liability cases, public policy concerns which favor the imposition of a duty include the willingness to hold a possessor of land liable because he ordinarily is in the best position to discover dangers associated with his property and is often responsible for creating them.[186] In this case, Rex invited Linda and Vontris to his premises despite Linda's violent tendencies and past threats to harm Vontris. On these facts, the court found it reasonable and within public policy considerations to impose on Rex the burden to warn Vontris, or to order Linda from his premises.[187]

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179. *Burrell* held that social guests qualify as invitees. 569 N.E.2d at 643.

180. *Kinsey*, 596 N.E.2d at 941.

181. *Id.*

182. 213 N.E.2d 812 (1966).

183. *Kinsey*, 596 N.E.2d at 942.

184. *Id.* at 943.

185. Vontris was a foreseeable victim because Rex knew that Linda had threatened to physically harm Vontris. The type of harm — physical injury by Linda — was thus reasonably foreseeable as well.

186. *Kinsey*, 596 N.E.2d at 943 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 57, at 386 (5th Ed. 1984)).

187. *Id.* The court also rejected Rex's contention, based on section 343(b) of the Restatement, that Vontris could not prove that Rex should have expected that she could "not discover or realize the danger or [would] fail to protect herself against it." *Id.* at 944. The court noted that Vontris produced evidence that Rex did not inform her of Linda's threats and did not tell her he had invited Linda to his premises when she was also to be present. *Id.*

Kinsey is a good example of the need to consider all three factors of the *Webb* test in determining the existence of a duty in tort. Unfortunately, because all three factors were so readily satisfied, the case sheds little light on the appropriate weight to accord each factor in the balance. As the following discussion reveals, other significant premises liability cases did not incorporate the *Webb* balancing approach in determining the existence of a tort duty, but, instead explored the impact of *Burrell v. Meads* on tort duty.

In *Jump v. Bank of Versailles*,[188] the appellate court applied both prongs of the invitation test adopted in *Burrell* to determine whether the claimant was a public invitee of one defendant and a business visitor of the second defendant.[189] Judy Jump slipped on ice accumulated on steps which led from a parking area to a sidewalk which funneled into a cross-alley between two buildings, one owned by defendant Bank of Versailles and the other by defendant Hunter. Jump worked for a tenant in Hunter's building. Although a customer of the bank, Jump traversed the steps the morning of the incident in order to enter her place of employment. The bank owned the entire sidewalk area between the buildings and had maintained the steps and sidewalk for the ten years the cross-alley had existed. Jump noticed that the parking lot and railing were icy, but had observed a co-worker safely use an adjacent set of steps. The court's analysis as to both defendants focused on Jump's status while on the steps. The analysis as to the bank's liability seemed to presume a tort duty existed and, accordingly, the court relied on *Burrell* to determine the scope of that duty. As to defendant Hunter, the court focused on whether Hunter owed a duty in tort. The court's failure to use the *Webb* approach is thus troublesome.

The court first found that Jump did not qualify as a business visitor of the bank.[190] The court then reiterated that Jump may qualify as a

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188. 586 N.E.2d 873 (Ind. Ct. App. 1992).

189. The RESTATEMENT (SECOND) OF TORTS § 332 (1965) provides that the following persons qualify as invitees:

> (1) An invitee is either a public invitee or a business visitor;
>
> (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public;
>
> (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

190. *Jump*, 586 N.E.2d at 877. The court explained that if Jump had intended to use the cross-alley to reach the front of the bank to use an automatic teller machine or to make a night deposit, the Restatement test might have been satisfied; i.e., her purpose would have been "'directly or indirectly connected with business dealings with the possessor of land as required by § 332(3).'" *Id.* (citing Burrell v. Meads, 569 N.E.2d 637, 642 (Ind. 1991)).

public invitee if she was "invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public."[191] Following *Burrell*, the court noted that a necessary first step is to scrutinize the bank's explicit and implicit invitation to the public to use the steps.[192] The general public had used the steps for many years; the bank had never posted signs restricting access to the cross-alley; and the bank had maintained the steps to assure safe passage through the years. Accordingly, the court readily found that the bank's invitation was sufficiently broad to encompass all pedestrians using the steps and the cross-alley, irrespective of the purpose,[193] and held that Jump qualified for invitee status as a public invitee.[194]

The court next addressed whether Jump qualified as a business invitee of Hunter even though Hunter did not own the land upon which her accident occurred.[195] The court distinguished a number of cases in finding that Hunter owed no duty to Jump. *Snyder Elevators, Inc. v. Baker*[196] held that a business owner may owe a duty to a member of the general public *off* its business premises when the owner maintains a hazardous condition or conducts a hazardous activity on the premise beyond the mere operation of the business which causes an off-premise injury.[197] The court readily distinguished *Snyder* because Hunter did not maintain a hazardous condition or conduct an activity which caused the injury.[198] *Ember v. B.F.D., Inc.*[199] held that a business owner's duty of care may extend off-premises only when it is reasonable for the invitees to believe that the invitor controls the adjacent premises or knows that his invitees customarily use the adjacent premises in connection with the invitation.[200] *Ember* was more relevant to Jump's action since Hunter impliedly encouraged Jump to use the steps by providing access into the building through a door on the cross-alley. The court distinguished *Ember*, however, because it involved a criminal assault by a third person in a parking lot adjacent to a tavern and thus had greater public policy implications.[201]

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191. *Id.* at 877 (quoting RESTATEMENT (SECOND) OF TORTS § 332(2) (1965)).

192. *Id.* at 877. *Burrell* stressed that it is first necessary to examine the invitation itself. 569 N.E.2d at 642.

193. *Jump*, 586 N.E.2d at 877-78.

194. *Id.* at 878.

195. The issue therefore was whether a landowner may be held liable to an employee of a lessee for an injury which occurs on adjoining property.

196. 529 N.E.2d 855 (Ind. Ct. App. 1988).

197. *Id.* at 858.

198. *Jump*, 586 N.E.2d at 879.

199. 490 N.E.2d 764 (Ind. Ct. App. 1986).

200. *Id.* at 772.

201. *Jump*, 586 N.E.2d at 879. The court in *Jump* also readily distinguished two other cases. In Smith v. Syd's, Inc, 570 N.E.2d 126 (Ind. Ct. App. 1992), *aff'd*, 598

The court then adopted the persuasive reasoning from other jurisdictions where courts have held: (1) a landowner has no duty to maintain adjacent lands simply because the public chooses to use such lands if the landowner provides a safe means of ingress and egress,[202] (2) the duty to provide safe ingress and egress includes a duty to warn of hazards located near property boundaries,[203] and (3) the duty to warn of hazards includes the duty to warn of unsafe ways of ingress and egress beyond the premises.[204] The court then concluded that Hunter owed Jump no duty while on the bank's property, and further, that even if Hunter did assume such a duty by furnishing Jump with a key to the side door of Hunter's building, Hunter fulfilled that duty by providing a separate means of ingress and egress through the steps on Hunter's property.[205] Although the court agreed that *Burrell* significantly expanded the concept of premises liability, the court declined to extend the protection afforded by invitee status to include a landowner's patrons, or lessees' employees, who are injured on adjoining property, where the landowner has "not created a dangerous condition affecting the adjoining property *and* invited their invitees to use such property."[206]

C. The Duty Owed to Child Invitees

The scope of the duty owed to child invitees was clarified in *Johnson v. Pettigrew*.[207] In *Johnson*, the parents of a thirteen year old son, Jeff, sought recovery from landowners who were parents of Jeff's friend, Joel. Because Jeff's injury occurred when Jeff visited the Pettigrew's farm as a social guest, Jeff readily qualified as an invitee. The court first reiterated

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N.E.2d 1065 (Ind. 1992), persons injured while using a staircase jointly owned and maintained qualified as invitees in relation to both owners. Although common usage was a factor in *Smith*, the court in *Jump* found that actual ownership and maintenance were determinative of Smith's invitee status; and the Bank and Hunter did not share ownership or maintenance expenses. *Jump*, 586 N.E.2d at 879. And Justice v. CSX Transp., Inc., 908 F.2d 119 (7th Cir. 1990) (construing Indiana law), was distinguished as involving a man-made condition on the owner's property which obstructed the view of a plaintiff off-premises who then collided with an oncoming train.

202. *Jump*, 586 N.E.2d at 880 (citing Chimente v. Adam Corp., 535 A.2d 528 (N.J. Super. Ct. 1987)).

203. *Id.* (citing Rockefeller v. Standard Oil Co., 523 P.2d 1207 (Wash. Ct. App. 1974)).

204. *Id.* at 880-81 (citing Piedalue v. Clinton Elementary Sch. Dist., 692 P.2d 20 (Mont. 1984); Carter v. City of Houma, 536 So.2d 573 (La. App. 1988) (no duty to warn of dangers on abutting property unless landowner creates or causes the defect and invites others to use the adjoining property)).

205. *Jump*, 586 N.E.2d at 881.

206. *Id.* at 882 (emphasis in original).

207. 595 N.E.2d 747 (Ind. Ct. App. 1992).

that a child licensee or invitee is entitled to a higher standard of care than a child trespasser.[208] The court then determined that the duty owed to adult invitees, as set forth in section 343 of the Restatement and applied by the court in *Burrell* to social guests, is properly applicable to child invitees, taking into account the abilities, age, experience, and maturity of the child invitee.[209] The Johnsons alleged that the Pettigrew's breached this duty.

In *Johnson*, the Pettigrews instructed Jeff and Joel to burn debris, under the supervision of a hired hand and Joel's eighteen year old brother, while they ran errands off the premises. The boys grew bored with the task and started a separate fire out of sight of their supervisors. They then filled a plastic jug partly full of gasoline from an unlocked pump on the farm, laid the jug on its side, and took turns stomping on it to propel the gasoline into the fire, causing small explosions. Gasoline splattered onto Jeff, and he caught fire and sustained second and third-degree burns. The Johnsons alleged that, by allowing a gas pump on the farm to remain unlocked while they left the premises, the Pettigrews failed to exercise reasonable care to protect Jeff against the danger of fire.

In determining whether the Pettigrews breached their duty of care to Jeff, the court drew upon the doctrine of open and obvious dangers. That doctrine provides that a landowner is not liable to invitees for physical harms caused to them by any activity or condition on the land whose danger is known or obvious to them.[210] When applied to a child invitee, the doctrine narrows its protection to the landowner: "The child's ignorance of [a condition that would appear open and obvious to an adult] . . . would trigger the duty to warn on the part of the occupier of land, even though there might be no duty to warn an adult in the same position."[211] The record revealed that Jeff had been instructed about

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208. *Id.* at 750 (quoting RESTATEMENT (SECOND) OF TORTS §§ 343B and § 339 (1965)). The court stated:

> Our courts have extended greater protection to child licensees than to child trespassers, requiring the landowner to factor the child's youth and lack of experience in the assessment of the ability of a child to perceive and avoid danger. Swanson v. Shroat (1976), 345 N.E.2d 872, 877 *reh'g denied*. Thus, if the landowner can anticipate that a child will not perceive a danger obvious to adults, in the exercise of reasonable care he may be required to take additional precautions to protect his child licensees.

Id.

209. *Id.* at 751. "The child's ignorance of [a condition that would appear open and obvious to an adult] . . . would trigger the duty to warn on the part of the occupier of land, even though there might be no duty to warn an adult in the same position." *Id.* (quoting Collier v. Necaise, 522 So.2d 275, 278-79 (Ala. 1988)).

210. *Id.* at 751 (quoting RESTATEMENT (SECOND) OF TORTS § 343A (1965)).

211. *Id.* at 751 (quoting Collier v. Necaise, 522 So.2d 275, 278-79 (Ala. 1988)).

the dangers of fire and of the perils of throwing gasoline into fire. Further, the boys had testified that they engaged in the activity precisely to witness the resulting explosions.

Although the Johnsons argued that Jeff did not fully understand the risks of his actions, the court determined that the law did not require the Pettigrews to protect Jeff from a danger on their premises of which he was fully aware, yet consciously disregarded.[212] Thus, the court in *Johnson* clarified that landowners owe a higher duty of care to child invitees, even as to open and obvious dangers. At the same time, the decision rather harshly reaffirms that children will be held accountable for reckless conduct, such as engaging in a hazardous activity despite a minimum understanding of its dangerousness.

VII. Indiana Tort Claims Act

A. Incapacity Under the Tort Claims Act

In 1989, the Indiana General Assembly amended the Tort Claims Act to redefine persons exempt from the stringent requirement that governmental entities be given notice of a tort claim within 180 days.[213] The 1989 amendments replaced the term "incompetent" with the term "incapacity."[214] Under the previous version of the Tort Claims Act, "incompetent" was defined to include "a person who is under the age of eighteen (18) years . . . ."[215]

In *South Bend Community Schools Corp. v. Widawski,*[216] the Indiana Court of Appeals construed the recent amendments to the Tort Claims Act, which substituted the term "incapacity"[217] for "incompetency." In *Widawski,* a minor was injured while participating in school gym class. Notice of the minor's tort claim was not served upon the defendant until two years after the injury. The *Widawski* court held that the 180 day

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212. *Id.* at 752 (citing Restatement (Second) of Torts § 343A (1965); Collier v. Necaise, 522 So.2d 275 (Ala. 1988)); Sampson by Sampson v. Zimmerman, 502 N.E.2d 846 (Ill. App. Ct. 1986)). As to the Johnson's claim for negligent failure to supervise, the court also held that it could not state, as a matter of law, that the Pettigrews fulfilled their duty to exercise ordinary care which arose when the Johnsons entrusted them with Jeff.

213. Ind. Code § 34-4-16.5-8 (Supp. 1992).

214. *Id.*

215. South Bend Comm. Sch. Corp. v. Widawski, 602 N.E.2d 1045, 1045 (citing Ind. Code § 34-4-16.5-2(d) (1988)).

216. *Id.*

217. As used in the amendments to the Indiana Tort Claims Act, incapacity has the meaning found in Indiana Code section 29-3-1-7.5. *See* Ind. Code § 34-4-16.5-2(d) (Supp. 1992).

notice requirement of the Indiana Tort Claims Act[218] was not tolled by reason of the plaintiff's minority, and her action was therefore barred against the school.[219]

The court of appeals reasoned that the General Assembly's removal of the express reference to minors from the Tort Claims Act[220] and substitution of a definition of incapacity,[221] which did not explicitly include minors, led to the conclusion that minors were not to be considered "incapacitated" and could no longer rely upon a tolling of the Tort Claims Act notice requirements for preservation of a claim against a governmental entity.[222]

The current statutory definition of an "incapacitated person" includes "persons who are unable to manage in whole or in part their property or self-care or both, as a result of" insanity, mental illness, mental deficiency, physical illness, infirmity, habitual drunkenness, excessive use of drugs, incarceration, confinement, detention, duress, fraud, undo influence of others on the individual, *or "other incapacity."*[223] The *Widawski* decision specifically refused to qualify minors as "incapacitated persons" under the catch-all category of "other incapacity" causing inability to manage in whole or in part the individual's property or self-care.[224]

The potential ramification of *Widawski* is that a two year old child is now required to give tort claims notice within 180 days or waive a claim against the governmental entity causing injury. Certainly, such a result is not consistent with our society's protection of minors.[225] Further, the *Widawski* decision creates a conflicting result between actions subject to tort claims notice and actions subject only to a statute of limitation. Statutes of limitation are tolled during minority,[226] while after *Widawski*, Tort Claims Act notice requirements are not tolled. The application of two contradictory rules, depending on whether the defendant is a governmental entity or not, creates unnecessary confusion in the law.[227]

Yet, the most disturbing aspect of the court of appeals' unwillingness to extend the protection of "other incapacity" to minors is that they

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218. IND. CODE § 34-4-16.5-8 (1988).

219. *South Bend Community Sch. Corp.*, 602 N.E.2d at 1045.

220. IND. CODE § 34-4-16.5-2(d) (Supp. 1992).

221. *Id.*

222. 602 N.E.2d at 1045-46.

223. IND. CODE § 29-3-1-7.5 (Supp. 1992).

224. 602 N.E.2d at 1046.

225. Arguably, the *Widawski* opinion does at least leave room for creation of an exception for infants.

226. *E.g.*, IND. CODE §§ 34-1-2-5 and 1-1-4-5-21 (1988).

227. It must be noted that the Tort Claims Act's notice requirement is not *per se* a statute of limitation, but rather a "procedure precedent." City of Fort Wayne v. Cameron, 370 N.E.2d 338 (Ind. 1977). However, regardless of the arbitrary nomenclature assigned, the practical effect is that of a statute of limitation.

are *per se* unable to manage *at least* in part their property or self-care because of *legal incapacity*. The law of Indiana is replete with examples of the undeniable legal incapacity under which minors operate. Minors[228] are not competent to enter into contracts,[229] may not initiate litigation on their own behalf[230] or settle legal disputes,[231] and may not consent to an abortion,[232] or any medical or health care.[233] It is difficult to perceive of a broad class of persons that more definitively qualifies under the catch-all language of "other incapacity" causing inability to manage in "whole or in part" their property or self-care.[234] Hopefully, the supreme court will ultimately have the final word on construction of the recent amendments to the Tort Claims Act concerning the requirement of minors to give notice within 180 days.

B. Immunity Under the Tort Claims Act

Another significant development under the Tort Claims Act is the supreme court's narrowing of the immunity conferred on law enforcement officers and their employers in *Tittle v. Mahan*.[235] The court consolidated two cases involving allegedly negligent treatment of pre-trial detainees to determine the scope of the immunity provision exempting negligent enforcement of a law under Indiana Code section 34-4-16.5-3(7).[236] The case provides an excellent history of the law of sovereign immunity in Indiana. In particular, the supreme court wished to revisit the issue addressed in *Seymour National Bank v. State*,[237] where the court concluded that the state was immune from liability for the alleged negligence of a state trooper in operating his police car during a high speed chase. In *Seymour*, the court's dicta suggested that any act within the scope of a law enforcement official's employment is immune under section 3(7) of

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228. A minor is a person less than eighteen (18) years of age. IND. CODE § 1-1-4-5(6) (Supp. 1992).

229. Mullen v. Tucker, 510 N.E.2d 711 (Ind. Ct. App. 1987). *See also* IND. CODE §§ 34-1-25.5 and 27-1-12-15 (1988). Actually, a minor is not *per se* incompetent under the common law, but rather may simply void the contract at her option. However, the practical implication is exactly the same to the extent third parties would refuse to do business with a minor based upon her status.

230. IND. CODE § 34-2-3-1 (1988).

231. *Id.* §§ 29-3-9-7 and 29-3-3-1 (Supp. 1992)).

232. *Id.* § 35-1-58.5-2 (1988).

233. *Id.* § 16-8-12-2 (1992).

234. *Id.* § 29-3-1-7.5 (Supp. 1992).

235. 582 N.E.2d 796 (Ind. 1991)

236. The court also addressed the same immunity provision in the companion case of City of Wakarusa v. Holdeman, 582 N.E.2d 802 (Ind. 1991).

237. 422 N.E.2d 1223 (Ind. 1981), *modified on reh'g.*, 428 N.E.2d 203 (Ind. 1981).

the Tort Claims Act.[238] The supreme court did not agree with the broad application of *Seymour* in numerous appellate court decisions.[239]

In *Tittle*, the supreme court held that the legislature did not intend section 3(7) of the Tort Claims Act to provide immunity co-extensive with the statutory obligations placed on law enforcement officials.[240] The court invoked two rules of statutory construction to reach that conclusion: (1) a statute such as the Tort Claims Act which is in derogation of the common law must be strictly construed against limitations on a claimant's right to bring suit; and (2) when a legislature enacts a statute in derogation of the common law, courts presume that the legislature is aware of the common law and thus does not intend to make changes beyond what it expressly declares.[241] The court concluded that the plain meaning of "enforcement of the law" does not include activities associated with the administration of pre-trial detainees—rather, the phrase is limited to those activities attendant to effecting the arrest of those who may have broken the law.[242]

That interpretation of section 3(7) of the Tort Claims Act was applied in the companion case of *City of Wakarusa v. Holdeman*,[243] where the supreme court held that a deputy was not "enforcing the law" when he rear-ended a motorist while watching in his rear view mirror for license plate violations. Similarly, in *City of Valparaiso v. Edgecomb*,[244] the supreme court held that section 3(7) does not confer immunity to a police officer who negligently causes a collision while engaged in leading a funeral procession. In *City of Wakarusa*, the court stated that "absent immunity, the controlling question becomes whether defendants owed plaintiff a private duty for the breach of which the law permits a recovery. It is undisputed that a person operating a motor vehicle on a public

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238. 428 N.E.2d at 204.

239. *Tittle*, 582 N.E.2d at 800 (citing Indiana State Police v. May, 469 N.E.2d 1183 (Ind. Ct. App. 1984) (plaintiff's home damaged by canisters of tear gas fired while apprehending fleeing murder suspect); Weber v. City of Fort Wayne, 511 N.E.2d 1074 (Ind. Ct. App. 1987) (protected act of assisting another officer in investigation of personal injury accident); City of Gary v. Cox, 512 N.E.2d 452 (Ind. Ct. App. 1987) (failure to guard a prisoner who escaped and shot bystander); McFarlin v. State, 524 N.E.2d 807 (Ind. Ct. App. 1988) (giving flares at scene of accident to driver who was struck while setting out flares)).

240. *Id.* at 800-01.

241. *Id.* at 800 (citing Collier v. Prater, 544 N.E.2d 497, 498 (Ind. 1989); State Farm Fire & Cas. Co. v. Structo Div., King Secley Thermos Co., 540 N.E.2d 597, 598 (Ind. 1989)).

242. *Id.* at 801. The court distinguished *Seymour* as a case in which the phrase "enforcement of the law" was not ambiguous because the defendant officer was in fact engaged in effecting an arrest. *Id.* at 800-01.

243. 582 N.E.2d 802 (Ind. 1991).

244. 587 N.E.2d 96 (Ind. 1992).

roadway has a duty to operate such vehicle with reasonable care."[245] Accordingly, it is now clear that courts will narrowly construe the immunity granted to law enforcement officers under the Tort Claims Act: immunity extends only to negligent commission of "activities attendant to effecting [an] arrest." Beyond administrative duties, many activities conducted in the course of daily law enforcement must conform with the tort duty of reasonable care.

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245. 582 N.E.2d at 804.