TORT LAW REFORM (?) AND OTHER DEVELOPMENTS IN INDIANA TORT LAW

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INTRODUCTION

After several large, and in some minds unjustified, jury verdicts,[1] "Tort Reform" became a national theme in 1995. The big news in Indiana tort law was the passage of the Tort Reform Act[2] which made several changes in Indiana tort law and raised many questions. In addition to tort reform, several Indiana cases resolved ambiguities in the law and answered questions of first impression in areas such as governmental immunity, the Fireman's Rule, and Dram Shop Liability.

I. TORT LAW REFORM

On April 26 and 27, 1995, the General Assembly of the State of Indiana enacted House Enrolled Act Number 1741, overriding the veto of Governor Evan Bayh. Commonly called the "tort reform" statute[3] (the "Act"), it substantially modified existing law in the tort and products liability fields. Although the latter is beyond the scope of this Article,[4] several aspects of the Act, as well as several provisions that promise to have the most significant effect on Indiana law will be discussed herein.

A. Retroactive or Prospective Application of the Act

Although it is certainly only one of many tort reform issues sure to be litigated in upcoming years, the first issue to make its way through Indiana's federal and state courts is the applicability of the provisions of the Act to pending cases, as well as cases which accrued prior to its passage. The possible retroactive

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1. *See, e.g.*, BMW of North America, Inc. v. Gore, 646 So. 2d 619 (Ala. 1994) (reducing $4 million punitive damage award to $2 million), *rev'd*, BMW of North America, Inc. v. Gore, 64 U.S.L.W. 4335 (U.S. May 20, 1996) (holding $2 million punitive damage award unconstitutionally excessive in light of compensatory damages of only $4,000); Leibeck v. McDonald's Corp., CV-93-2419 (2d Jud. Dist. Ct. N.M. Aug. 18, 1994) (jury award of $2.9 million to woman who spilled hot coffee on her lap).

2. 1995 Ind. Acts 278.

3. Ind. H. Enrolled Act No. 1741, Pub. L. No. 278-1995 (codified at scattered sections of the Indiana Code). The Act is reproduced in the Appendix to this Article.

4. For a complete discussion of the Act's changes in the area of products liability, see Timothy C. Caress, *Recent Developments in the Indiana Law of Products Liability*, 29 IND. L. REV. 979 (1996).

application of the Act, each section and possibly each subsection, must be analyzed separately. For example, section 16 specifically provides that the sections which create "new" statutory provisions[5] are to "apply to a cause of action that accrues after June 30, 1995."

This specific prospective application of certain portions of the Act, however, has also provided support for the argument (primarily from defense counsel) that the legislature intended the other portions of the Act to be applied retroactively. This argument is based upon the doctrine of *expressio unius est exclusio alterius*.[6] Additionally, parties favoring retroactive application argue that the remedial purpose of the amendments indicate the legislature's intent for those amendments to apply to pending cases.

Under Indiana law, amendments that are procedural or remedial in nature may be retroactively applied to pending cases unless doing so would impair some vested right or constitutional guarantee.[7] This raises the substantial question of whether the amendment in question is procedural or remedial in nature. Legislation is "procedural" when it provides "a substantially similar remedy while delineating more clearly the procedure to be followed in determining and enforcing the right."[8] A statute is considered "remedial" in two instances: if it provides the means by which rights are enforced; *or* if it is designed to cure a defect in a statute, or remedy some mischief that existed in the statute.[9] Even if "a new remedy is afforded for the enforcement of an existing right, the statutes

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5. IND. CODE §§ 33-1-1.5-4.5, 33-1-1.5-9, 33-1-1.5-10, 34-4-34-3, 34-4-34-4, 34-4-34-5, 34-4-34-6 & 34-4-44.6 (Supp. 1995).

6. *Expressio unius est exclusio alterius* means "the expression of one thing implies the exclusion of any others." *See* City of Peru v. Utility Serv. Bd., 507 N.E.2d 988, 992 (Ind. Ct. App. 1987); Health & Hosp. Corp. of Marion County v. Marion County, 470 N.E.2d 1348, 1355 (Ind. Ct. App. 1984) ("It is important to recognize what statutes do not say as well as what they do say. When certain words are specified in a statute, then, by implication, other words not specified are excluded.").

7. *See* The Pantry, Inc. v. Stop-N-Go Foods, Inc., 777 F. Supp. 713, 719 (S.D. Ind. 1991); Malone v. Connor, 189 N.E.2d 590 (Ind. App. 1963); Connecticut Mut. Life Ins. Co. v. Talbot, 14 N.E. 586 (Ind. 1887).

8. Tarver v. Dix, 421 N.E.2d 693, 696 (Ind. Ct. App. 1981).

> Where no new rights are given or existing rights taken away, and the new legislation only provides a new remedy for the enforcement of an existing right, retroactive operation may be given to a remedial statute where such construction is necessary to carry out the purpose of the new law.

McGill v. Muddy Fork of Silver Creek, 370 N.E.2d 365, 370 (Ind. App. 1977). *See also In re* Smith, 60 N.E.2d 147, 149 (Ind. App. 1945).

Moreover, under Indiana law "[i]t is recognized that the legislature may, by a subsequent statute, correct any omission or irregularity in a proceeding which it might have dispensed with by a prior statute." W.H. Dreves, Inc. v. Osolo School Tp., 28 N.E.2d 252, 254 (Ind. 1940) (citing Follett v. Sheldon, 144 N.E. 867 (Ind. 1924)).

9. RLJ v. TLE, 454 N.E.2d 1268, 1270 (Ind. Ct. App. 1983).

may be given retroactive application."[10]

A statute that would otherwise be applied retroactively may not be so applied if its application would violate vested rights.[11] Classifying the amendments as violating the vested right of the particular plaintiff in question has also been

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10. *Id.* (quoting Malone v. Conner, 189 N.E.2d 590 (Ind. App. 1963)). *See also* Hine v. Wright, 36 N.E.2d 972, 976 (Ind. App. 1941); Hiatt v. Howard, 8 N.E.2d 136, 138 (Ind. App. 1937).

11. *See McGill*, 370 N.E.2d at 370; *The Pantry, Inc.*, 777 F. Supp. at 719.

> [I]n order for a right to vest . . . it must be immediate, absolute, complete, unconditional, perfect within itself and not dependent upon contingency . . . . Moreover, it is well settled a mere expectance of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right.

Foley v. Consolidated City of Indianapolis, 421 N.E.2d 1160, 1168 (Ind. Ct. App. 1981) (citations omitted); *accord*, Bailey v. Menzie, 542 N.E.2d 1015, 1019 (Ind. Ct. App. 1989). The term "vested" has been defined as follows:

> To be "vested," a right must be more than a mere expectation based on an anticipation of the continuance of existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand, or a legal exemption from the demand of another.

BLACK'S LAW DICTIONARY 1401 (5th. ed. 1979).

It has long been established in Indiana that a plaintiff does not have a "vested right" in any particular remedy. Rather, the legislature is empowered to modify existing remedies. Davis v. Rupe, 17 N.E. 163, 165 (Ind. 1888); Railway Express Agency v. Harrington, 88 N.E.2d 915, 915 (Ind. App. 1949). In *Davis*, the court stated:

> As has often been declared, there can be no vested right in remedies, provided they are not so changed as to be rendered nugatory. Hence, it is that whatever belongs to the remedy merely is within the control of the legislature, subject only to the limitation that an adequate and reasonable mode of enforcing the right must remain or be provided which leaves the value of the contract without substantial depreciation or impairment.

Davis, 17 N.E. at 165.

A party's "right" to any particular remedy does not become "vested" until a judgment is entered that specifically grants that remedy to the party. *See generally* Glick v. Department of Commerce, 387 N.E.2d 74 (Ind. Ct. App. 1979). In *Glick*, the provision of the Tort Claims Act removing the plaintiff's ability to collect interest on his judgment against the state was enacted prior to the judgment, but after the cause of action accrued. Under the doctrine pronounced in *Davis*, the court held that the statute should apply to the case, because the plaintiff was not being denied a remedy to which he ever had a vested right. *Id.* at 77.

Likewise, in Tarver v. Dix, 421 N.E.2d 693 (Ind. Ct. App. 1981), a paternity action was filed in 1978 because the defendant denied being the father of his paramour's child. In 1979, the legislature passed Indiana Code section 31-6-6.1-9 that codified a common law presumption that a child born to a married couple was the child of the husband. The trial took place in 1980 and the court applied the new statutory section, although it was not enacted until after the cause of action accrued and was filed. The Indiana Court of Appeals held that the statute was properly retroactively applied to pending cases because the new legislation "did not impair or take away any previously existing rights, nor did it deny a remedy for the enforcement of such rights." *Id.* at 696.

extensively litigated in Indiana trial courts following passage of the Act.

The Indiana Court of Appeals recently held that the nonparty provisions of the Act amending Indiana Code section 34-4-33-2 should not have been applied retroactively by a trial court.[12] In *Chestnut*, the trial court allowed the defendant to name the plaintiff's father, who was the driver of the vehicle, as a nonparty. Because Indiana's Guest Statute[13] precluded the father from being named as a defendant, the prior version of the Indiana Comparative Fault Act would have barred the naming of the father as a nonparty. The trial court found such a bar to be a defect of the prior law, because the father driver who was not technically liable could have been ninety-nine percent at fault, with the defendant driver being only one percent at fault and yet forced to pay one-hundred percent of the damages.[14] The trial court further found that the amendment cured this defect.

The Indiana Court of Appeals reversed the trial court's decision.[15] In addressing retroactivity, the *Chestnut* court placed great weight on the presumption that absent an express legislative intent to apply the statute retroactively, it is presumed that the legislature intended prospective application.[16]

The defendant argued that because the nonparty provisions were not listed in section 16's express statement of prospective application, the legislature must have intended retroactive application. The court rejected this "silence is deafening" argument, finding that it was not sufficiently explicit to overcome the presumption of prospective application. The court then concluded that the portion of the Act amending Indiana Code section 34-4-33-2 had prospective application only. Although the decision limited its holding to this portion of the Act, it is clear that the court's rationale would also apply to the remaining portions of the Act that are not specifically delineated by section 16.[17]

B. Intentional Acts as "Fault"

Section 8(1) of the Act amends Indiana Code section 34-4-33-2 to include intentional acts and omissions as potential fault. This is a significant change in Indiana tort law, particularly in regard to claims based upon a failure to protect others from harm. The appropriateness of this change depends on who one feels

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12. Chestnut v. Roof, 665 N.E.2d 7 (Ind. Ct. App. 1996).

13. IND. CODE § 34-4-40-3 (1993).

14. *Chestnut*, 665 N.E.2d at 8.

15. In rejecting the defendant's argument that the application sought was actually prospective because it was applied to a jury instruction which had not occurred, the court of appeals held that the amendment was not related to procedure at trial. Instead, it changed substantive law by altering the definition of a nonparty.

16. The *Chestnut* court cited Brane v. Roth, 590 N.E.2d 587, 590 (Ind. Ct. App. 1992), and Turner v. Town of Speedway, 528 N.E.2d 858, 863 (Ind. Ct. App. 1988).

17. Two federal district courts in Indiana have also found that the products liability amendments of the Act should not be applied retroactively. *See* Smith v. Ford Motor Co., No. 1:93CV0143 (N.D. Ind. Nov. 2, 1995); Brashear v. Leprino Foods Co., 897 F. Supp. 1167, 1169 (N.D. Ind. 1995).

should bear the risk of being injured by a judgment proof defendant. If, for example, a plaintiff bank customer is injured by a bank robber, partially caused by inadequate bank security, the judgment proof (presumably due to a lack of assets) bank robber will certainly receive a high percentage of the fault in the case. Although plaintiff's counsel will argue that the victim of the shooting cannot be fully compensated under the new definition of fault, defense counsel will point out that one of the prime purposes of the comparative fault act was to limit defendant's financial responsibility to the degree of the fault, and that the amendment accomplishes this purpose.

C. Expansion of the Definition of "Nonparties"

Section 8(2) of the Act amends Indiana Code section 34-4-33-2(a)(2) to eliminate the requirement that a nonparty be potentially liable to the claimant, and that a nonparty cannot be the employer of the claimant. Like section 8(1), this section will have a significant impact on Indiana cases. How one views the appropriateness of this change will depend upon how one views the importance of full claimant compensation versus limiting the defendants' liability to their respective percentage of fault. It is clear that the legislature has made the decision that defendants should not have to bear the financial burden of governmental immunities and other factors that might prevent the naming of a person or entity at fault as a defendant.

Section 8(2) will also likely allow defendants to generally identify nonparties whose precise identity may not be known. For example, if one of the vehicles fled the scene of an automobile accident, this amendment would likely allow their being named as a nonparty through a general description. While a contrary argument would likely be made that Indiana Code section 34-4-33-6 requires the verdict form to disclose the *name* of the nonparty, section 8(2) would likely be seen as the controlling, substantive provision.

D. Jury Instructions

Section 9 of the Act makes it clear that juries are not to be informed of any immunity defense that might be available to a nonparty, and that in assessing percentage of fault, it is not to consider whether the person could or could not have been named as a party in the case. This is consistent with the other provisions of the Comparative Fault Act amendments. Knowledge of the immunity could only serve to prejudice jurors who wish to insure full compensation for a plaintiff and therefore provide a defendant with a disproportionately high percentage of fault.

E. Punitive Damage Limitation

Section 10 of the Act prohibits juries from being informed of the punitive damage limitation or partial assignment to the treasurer of the State. Section 11 of the Act creates a punitive damages cap of three times the amount of compensatory damages awarded in the action, or $50,000, whichever is greater. This punitive damage limitation will likely operate in a similar manner as the

damage limitation of the Indiana Tort Claims Act,[18] in that no mention of the limitation will occur until an award is made in excess of the limitation, which would then be subject to remittitur. Although this limitation will likely be subject to a constitutional challenge, a successful challenge would most likely have to characterize the punitive damage claim as a "vested right," a dubious claim at best. While it is unlikely a federal or state constitutional challenge to the punitive damage limitation would succeed,[19] a number of difficult procedural and substantive questions will likely arise from the Act's procedure for allocating punitive damages between plaintiffs and the treasurer of the State of Indiana, who deposits a share of the funds into the violent crime victims compensation fund established by Indiana Code section 5-2-6.1-40. These latter issues will be discussed in the following subpart.

F. Part of Punitive Damage Award to State

Section 13 of the Act creates Indiana Code section 34-4-34-6, which provides that, except as provided in Indiana Code section 13-7-8.7-10, when a judgment that includes a punitive damage award is entered in a civil action, the defendant shall pay the punitive damage award to the clerk of the court where the action is pending. The clerk shall then pay the person to whom the punitive damages were awarded twenty-five percent of the punitive damage award and the remaining seventy-five percent of the punitive damage award is paid to the state treasurer, who shall deposit the funds into the violent crime victims compensation fund.

These provisions may have several effects. First, plaintiffs may not file or may dismiss punitive damage claims. This could be caused by the decreased proportional amount of punitive damages available to plaintiffs (and possibly their counsel on contingency fee cases, as the statute makes no mention of any deduction for attorney's fees from the seventy-five percent that is deposited into the violent crime victims compensation fund). Plaintiffs may decide that aggravating factors which might otherwise justify punitive damages could be used instead to increase compensatory damages. As the threat of punitive damages has historically been used to coerce (or encourage, depending on one's viewpoint) the settlement of compensatory damage claims, it is unlikely that the number of punitive damage claims filed will drop. Instead they will be dismissed on the eve of trial if settlement efforts fail.

Another issue involves the question of when, if at all, the successful plaintiff can dismiss the punitive damage judgment in exchange for full satisfaction (and possibly even more than full satisfaction) of an accompanying compensatory damage award. Once the punitive damage judgment is entered, does the State of Indiana have an enforceable property interest sufficient to preclude such a dismissal or compromise without its consent? If so, how does the original and the

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18. IND. CODE §§ 34-4-16.5-1 to -22 (1993).

19. *See, e.g.*, Smith v. Department of Ins., 507 So. 2d 1080 (Fla. 1987) (striking down limit on noneconomic damages as unconstitutional but upholding constitutionality of punitive damage limitations).

"new" governmental plaintiff coordinate settlement/appellate efforts?

In order for these provisions to be applied in a predictable way to Indiana litigants, the appellate courts will need to provide substantial guidance as to the various parties' rights and responsibilities in regard to the prosecution and distribution of punitive damage awards.

G. Qualified Settlement Offers

Section 14 of the Act creates Indiana Code section 34-4-44.6, which establishes a detailed procedure for defendants making offers of settlement, termed "qualified settlement offers." Qualified settlement offers may be made at any time after a complaint has been filed in a civil action, but may not be made less than thirty days before a trial of the action. Qualified settlement offers must resolve all claims and defenses at issue in the civil action between the offeror and the recipient before the qualified settlement offer may be accepted.

In order to invoke the provisions of the statute, the requirements of making a qualified settlement offer must be satisfied. The qualified settlement offer must be in writing, signed by the offeror's attorney, be designated as a qualified settlement offer, be delivered to each recipient or recipient's attorney by registered or certified mail or by any method verifying the date of receipt, set forth the complete terms of the settlement proposal in sufficient detail to allow the recipient to decide whether to accept or reject it, include the name and address of the offeror and the offeror's attorney, and expressly revoke all prior qualified settlement offers.

Similarly, an acceptance of a qualified settlement offer must be unconditional, in writing, signed by the accepting recipient or the accepting recipient's attorney and delivered by registered or certified mail or by a means that verifies the date of receipt to the offeror or the offeror's attorney not more than thirty days after the recipient receives the qualified settlement offer. If a recipient does not accept the qualified settlement offer and the final judgment is less favorable to the recipient than the terms of the qualified settlement offer, the court shall award attorney's fees, costs, and expenses to the offeror upon the offeror's motion, up to $1,000. Additionally, the attorney's fees shall not exceed a rate of $100 per hour. The statute also creates certain procedural and timing requirements.[20]

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20. IND. CODE § 34-4-44.6 (Supp. 1996) reads as follows:

A motion for an award of attorney's fees, costs, and expenses under this section must be filed not more than thirty (30) days after entry of judgment. The motion must be accompanied by an affidavit of the offeror or the offeror's attorney establishing the amount of the attorney's fees and other costs and expenses incurred by the offeror after the date of the qualified settlement offer, constituting prima facie proof of the reasonableness of the amount.

Where appropriate, the trial court may order a judgment entered against the offeror and in favor of the recipient reduced by the amount of attorney's fees, costs, and expenses awarded to the offeror under this section.

Because the offeror's refund of attorney's fees, costs, and expenses is limited if the offeree receives less than the offer at trial or other final judgment, it is unlikely that the qualified settlement offer will substantially affect the way Indiana cases are litigated. Perhaps the greatest impact will be seen in questionable claims that might be subject to summary judgment. If these provisions are held to apply to any type of judgment, including summary judgment, defendants may begin to offer minimal, token settlement offers in order to recover some of their attorney's fees, costs, and expenses if the summary judgment is granted. If the plaintiff concludes that it is unlikely he or she may survive the summary judgment motion, more cases may be dismissed pursuant to agreement once the motion and settlement offer are filed. Such situations, however, are unlikely to ever amount to more than a small percentage of cases in the civil litigation system.

II. CASE LAW DEVELOPMENTS

A. Governmental Immunity

1. Prosecutorial Immunity.—One question of first impression decided during this survey period was the extent of prosecutorial immunity for conduct during civil child support actions. In *Clifford v. Marion County Prosecuting Attorney*,[21] a father alleged that the prosecutor's office had engaged in harassment in its attempts to collect child support from him.[22] The prosecutor's office had allegedly filed income withholding orders in violation of court orders, mistakenly determined that he was in arrears, refused to correct errors when they were discovered, and failed to notify the IRS and credit bureaus that he was no longer in arrears.[23]

In holding that the prosecutor's office was immune from liability, the court determined that the public policy reasons for granting immunity to prosecutors in child support actions were as compelling as the reasons for granting immunity in the criminal context.[24] "[V]igorous enforcement of child support obligations increases the probability both that children's physical and educational needs will be met and that such occurs with minimal additional burden on the taxpayers."[25] In addition, even though some of the acts were allegedly done in bad faith and in violation of court orders, the acts were not outside the scope of prosecutorial immunity. Just as prosecutors are immune from liability for claims arising from filing criminal charges in bad faith, they are immune from claims of enforcing child support orders in bad faith.[26] "In view of the fact that the primary tort which arises from initiating legal proceedings necessarily includes the element of bad faith, the presence of bad faith cannot remove the conduct from the very protection

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21. 654 N.E.2d 805 (Ind. Ct. App. 1995).
22. *Id.* at 807.
23. *Id.* at 807-08.
24. *Id.* at 809.
25. *Id.*
26. *Id.*

envisioned by the Act."[27]

2. *Immunity for Delegated Functions.*—The Court of Appeals reemphasized the need for municipalities to exercise caution when delegating responsibility for activities normally considered discretionary functions. In *Jacobs v. Board of Commissioners*,[28] a woman brought a personal injury action against the Morgan County Board of Commissioners, the County Council, and the County Highway Department after she was injured in a car accident on a county road. She alleged that the county was negligent in failing to place a warning sign before a ninety degree curve in the road.[29] The county moved for summary judgment on the basis that placement of warning signs was a discretionary function and it was immune from liability pursuant to Indiana Code section 34-4-16.5-3.[30]

Under the "planning-operational" test set forth in *Peavler v. Board of Commissioners*,[31] the county would be immune if the decision resulted from "a policy-oriented decision-making process."[32] The court determined that the county did not undertake a systematic process for deciding which improvements to make and whether to place signs or other traffic control devices on the roads.[33] Instead, the county delegated the decision to the County Highway Engineer.[34] He drove around the county and, when he determined a need for a sign, he informed the sign installer.[35] He did not engage in any systematic balancing or cost-benefit analysis nor did he follow-up with the Board of Commissioners concerning the sign placement.[36] Because there was no showing that the county assessed priorities or weighed budgetary considerations, there was no discretionary decision-making and, under the *Peavler* analysis, no immunity.[37]

3. *Fire Department Liability.*—In *Willis v. Warren Township Fire Department*,[38] the court limited the discretionary function immunity of a fire department under the Tort Claims Act.[39] The Willis family brought an action against the fire department alleging negligence after a fire at their home. The department believed that it had extinguished the fire and left. Apparently, however, some embers were still smoldering and erupted into flames again.[40] The court noted:

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27. *Id.* (citing Jacobs v. City of Columbus, 454 N.E.2d 1253 (Ind. Ct. App. 1983)).
28. 652 N.E.2d 94 (Ind. Ct. App. 1995).
29. *Id.* at 96.
30. *Id.*
31. 528 N.E.2d 40 (Ind. 1988).
32. *Jacobs*, 652 N.E.2d at 98.
33. *Id.* at 100.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. 650 N.E.2d 321 (Ind. Ct. App. 1995).
39. IND. CODE § 34-4-16.5-3(6) (Supp. 1995).
40. *Willis*, 650 N.E.2d at 323.

> that most, if not all, of the actions undertaken and decisions made by fire departments during the course of actually fighting a fire involve allocation of resources, the balancing of risks and benefits, and cannot adequately be reviewed by resort to traditional tort standards. Such decisions thus exemplify exercises of the policy-formulation discretion which is shielded by immunity under I.C. 34-4-16.5-3(6).[41]

However, the Willis' complaint was not based on the decisions made while fighting the fire.[42] Instead, the fire department was following a predetermined policy of remaining at the scene until the fire was extinguished, rather than making decisions concerning the allocation of resources.[43] That decision was not a planning decision and, thus, not afforded immunity under the statute.[44] The court concluded that while a fire department is immune from liability for decisions concerning how to fight a fire, it is not immune for failing to properly extinguish it.

4. Constitutionality of Tort Claim Limit.—In the recent case of *In re Train Collision at Gary*,[45] the Indiana Court of Appeals addressed an appeal of an order partially dismissing claims brought by passengers, spouses, next of kin, and personal representatives of deceased passengers who were involved in a commuter railway accident. The court first concluded that the Commuter Transportation Districts Act[46] was not an unconstitutional special law, did not unconstitutionally regulate business, and did not otherwise violate the Indiana Constitution. The court then addressed the issue of whether the liability limitations of the Indiana Tort Claims Act violated Article I, Sections 12 or 23 of the Indiana Constitution.

Indiana Code section 34-3-16.5-4 provides a limitation of liability in the amount of $300,000.00 for the injury to or death of one person in any one occurrence and $5,000,000.00 for injury to or death of all persons in that occurrence. The plaintiff class contended that these liability limitations, as applied to them, violated Article I, Section 23 of the Indiana Constitution.[47] The court of appeals then discussed *Collins v. Day*,[48] which adopted a three part analysis of a statute's potential unconstitutionality under this Section. First, in order to be constitutional, the disparate treatment accorded by the statute must be reasonably related to inherent characteristics that distinguish the unequally treated classes. Second, the preferential treatment must be uniformly and equally applicable to all persons similarly situated. Third, this test also acknowledges that in conducting

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41. *Id.* at 325.

42. *Id.* at 326.

43. *Id.* at 325.

44. *Id.*

45. 654 N.E.2d 1137 (Ind. Ct. App. 1995).

46. IND. CODE §§ 8-5-15-1 to -26 (1993).

47. IND. CONST. art. I, § 23 provides that "[t]he general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

48. 644 N.E.2d 72 (Ind. 1994).

the analysis courts must exercise substantial deference in favor of the legislative act in question.[49]

The plaintiff class essentially maintained that the statute was unconstitutional as applied to the class because travelers on other railways in the state would not be subject to the liability limitations of the Tort Claims Act. After acknowledging that the legislative purpose of Tort Claims Act was to limit the financial responsibility of governmental entities by restricting potential tort damages and discouraging excessive litigation, the court acknowledged that the intent of the transportation act was to maintain the availability and accessibility of interstate commuter transportation in Indiana. By applying the Tort Claims Act limitations on liability to commuter transportation districts, the legislature furthered these overall purposes. The court then concluded that application of the liability limitations to the plaintiff class' claims was rationally related to the state interest, and that the liability limitations were constitutional under the first prong of the *Collins* test.[50] The court then held that because the liability limitations apply equally and uniformly to all persons injured on railways operated by commuter transportation districts, the second prong of the *Collins* test was also satisfied.[51] In light of the substantial deference that must be given to statutes, the application of the liability limitations was constitutional.

The plaintiff class also argued that the liability limitations violated Article I, Section 12 of the Indiana Constitution.[52] The court recognized that although the constitutionality of the liability limitations of the Tort Claims Act under this provision was a question of first impression, it noted that the Indiana Supreme Court had previously upheld statutes that limited a litigants right to recover damages in other ways.[53] The court of appeals concluded that a citizens right to sue a governmental entity derived not from constitutional rights but from rights of common law. Thus, the right to sue a governmental entity for damages as provided in the Tort Claims Act was a right granted at common law that could also be restricted by legislative act. The court then concluded that the legislative purpose behind these liability limitations could not be deemed constitutionally repugnant simply because they restricted the amount of damages available to the plaintiff class. The liability restrictions were within the authority of the legislature to enact and did not violate Article I, Section 12 of the Indiana Constitution.

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49. *In re Train Collision*, 654 N.E.2d at 1146.

50. *Id.*

51. *Id.* at 1147.

52. IND. CONST. art. I, § 12 provides that: "All courts shall be open; and every person; for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase, completely, and without denial; speedily, and without delay."

53. *See* State v. Rendleman, 603 N.E.2d 1333, 1335 (Ind. 1992); Johnson v. St. Vincent Hosp., 404 N.E.2d 585, 594 (Ind. 1980); Sidle v. Majors, 341 N.E.2d 763 (Ind. 1976).

B. Fireman's Rule

Two cases were decided this survey period regarding the scope of the Fireman's Rule. First, granting transfer in a case decided last survey period,[54] the Indiana Supreme Court clarified the application of the Fireman's Rule. In *Heck v. Robey*,[55] the court agreed that professional rescue workers, such as paramedics, do not come within the scope of the rescue doctrine.[56] However, it disagreed with the court of appeals that the rule acts as a complete bar to recovery.[57]

Heck was driving while intoxicated and was injured when his truck went into a ditch. While Robey and his partner attempted to lift Heck out of the ditch, Heck became violent. Robey's partner had to restrain Heck which left most of the lifting to Robey. Robey alleged that he injured his back due to Heck's actions.[58]

The supreme court noted that Indiana first recognized the Fireman's Rule in 1893.[59] Originally the doctrine "held that a landowner owed no duty to a firefighter responding to a fire on the landowner's property except 'to abstain from positive wrongful acts.'"[60] The rule was expanded by the court of appeals to "'[provide] that professionals, 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.'"[61] However, the *Heck* court determined that the Fireman's Rule was not an *absolute* bar to a claim by a professional rescuer.[62] The court of appeals had determined that Robey incurred the risk of injury when he chose to pursue a career as a paramedic. However, the supreme court recognized that the defense of incurred risk as a complete defense was no longer viable under the current comparative fault scheme.[63] Instead, any risk incurred was to be considered by the fact finder when apportioning fault.[64] Thus, although the Fireman's Rule barred a claim for injuries resulting from Heck's need to be rescued, it did not bar a claim arising from any positive wrongful acts committed by Heck during the rescue attempt.

In the second case involving the Fireman's Rule,[65] the court of appeals declined to extend application of the rule to include building inspectors. In *Sam v. Wesley*, a building inspector was injured when he slipped and fell down a flight

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54. Heck v. Robey, 630 N.E.2d 1361 (Ind. Ct. App. 1994). For a discussion of this case, see Andrew P. Wirick & Ann Marie Waldron Piscione, *Survey of Tort Law Developments in 1994: The Good, The Bad and The Ugly*, 28 IND. L. REV. 1097, 1105-06 (1995).

55. 659 N.E.2d 498 (Ind. 1995).

56. *Id.* at 502.

57. *Id.* at 503.

58. *Id.* at 500.

59. *Id.* at 503 (citing Woodruff v. Bowen, 34 N.E. 1113 (Ind. 1893)).

60. *Id.* (quoting *Woodruff*, 34 N.E. at 1113).

61. *Id.* (quoting Koehn v. Devereaux, 495 N.E.2d 211, 215 (Ind. Ct. App. 1986)).

62. *Id.* at 503-04.

63. *Id.* at 505.

64. *Id.*

65. Sam v. Wesley, 647 N.E.2d 382 (Ind. Ct. App. 1995).

of stairs while inspecting a house. The court noted that "'the rule's scope and our application is narrow.'"[66] The court concluded that because building inspectors were not subject to the risks of responding to emergencies and rescuing people that were present in the other occupations included within the Fireman's Rule (i.e., police officers, fire fighters, and paramedics), they were not included within the scope of the Fireman's Rule.[67]

C. Dram Shop Act Violations

Two cases were decided this survey period concerning liability for a violation of the Dram Shop Act.[68] In *National Railroad Passenger Corp. v. Everton*,[69] the court considered the duration of the duty owed by a supplier of alcohol to an intoxicated person and how that duty could be discharged. Everton was a passenger on a train owned by National Railroad Passenger Association ("Amtrak"). Everton became intoxicated while on the train and the railroad employees allegedly continued to serve him. When he was found unconscious on the train, the railroad contacted the Montgomery County Sheriff's Office and had him removed from the train. Everton attempted to stand in his jail cell and fell, injuring his head. The jail employees summoned medical assistance. Everton later attempted to stand again and struck his head on the floor. He suffered brain damage as a result of the fall.[70]

Everton's guardian sought damages from Amtrak and the sheriff's department. Amtrak moved for judgment on the pleadings asserting that it owed no duty to Everton after the sheriff's department took custody of him. The court, however, disagreed. It reasoned that simply because the sheriff's department also owed Everton a duty of care, this did not extinguish Amtrak's duty.[71] Instead, Amtrak's duty was to refrain from serving Everton alcohol after he was intoxicated and the duty had already been breached when Amtrak turned him over to the sheriff's department.[72] Liability was not cut off at the tavern door.[73] Instead, Amtrak and the sheriff's department jointly owed a duty to Everton.[74] The court left the issue of proximate cause to the jury.[75]

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66. *Id.* at 385 (quoting Kennedy v. Tri-City Comprehensive Community Mental Health Ctr., 590 N.E.2d 140, 143 (Ind. Ct. App. 1992)).

67. *Id.* at 385-86.

68. IND. CODE § 7.1-5-10-15.5(a) (1993) provides:

> It is unlawful for a person to sell, barter, deliver, or give away an alcoholic beverage to another person who is in a state of intoxication if the person knows that the other person is intoxicated.

69. 655 N.E.2d 360 (Ind. Ct. App. 1995).

70. *Id.* at 362.

71. *Id.* at 366.

72. *Id.* at 365.

73. *Id.* at 366.

74. *Id.* at 365.

75. *Id.* at 366-67.

The dissent argued that Amtrak's duty ended when it gave custody of Everton to the sheriff's department because it relinquished control of Everton's actions.[76] The dissent noted that without a right to control his actions, no duty could exist. Given its broad language, however, this case appears to hold that once a supplier of alcohol violates the Dram Shop Act, it is powerless to limit its liability for injury.

The second case involving liability under the Dram Shop Act focused on the definition of the term "furnish" in the Act. In *Estate of Cummings v. PPG Industries, Inc.*,[77] employees of PPG organized a party at a local tavern. The management of PPG was not involved in planning the party or negotiating the agreement with the tavern. The company did allow the employees to post flyers about the party at the plant and contributed some money toward the cost of the party. The tavern, however, was responsible for checking identification to ensure that no minors attended the party and for serving the alcoholic beverages.[78] An underage employee, Duffy, obtained admittance to the party and became intoxicated. Although his supervisor was at the party and knew he was underage, he was not able to prevent Duffy from leaving the party intoxicated. On his way home, Duffy was involved in an accident in which Cummings was killed.[79] Cummings' estate brought an action against PPG alleging a violation of the Dram Shop Act that resulted in Cummings' death.

The court held that PPG was not liable under the Dram Shop Act because it did not furnish Duffy with the alcohol. Simply supplying money that would be used for alcohol was not furnishing alcohol.[80] Instead, the court concluded that the term "furnish" contemplated an active means by which a person obtains alcohol.[81] In order to be an active means, PPG would have had to exercise some control over the alcohol which it did not.[82] Therefore, PPG had no liability under the Dram Shop Act.[83]

D. Miscellaneous Clarifications and Questions of First Impression

1. Viability of the Last Clear Chance Doctrine.—One question that has been left unanswered is whether the last clear chance doctrine survived the enactment of the Comparative Fault Act.[84] In *Hull v. Taylor*,[85] the court answered the question in the negative. The doctrine of last clear chance arose in order to alleviate the harshness of contributory negligence under the former tort system that

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76. *Id.* at 368.
77. 651 N.E.2d 305 (Ind. Ct. App. 1995).
78. *Id.* at 307.
79. *Id.*
80. *Id.* at 308 (citing Rauck v. Hawn, 564 N.E.2d 334 (Ind. Ct. App. 1990)).
81. *Id.*
82. *Id.*
83. *Id.*
84. IND. CODE §§ 34-4-33-1 to -14 (1993).
85. 644 N.E.2d 622 (Ind. Ct. App. 1994).

prevented a plaintiff who was even minimally negligent from recovering.[86] The last clear chance doctrine allowed the fact finder to weigh the relative negligence of each party.[87] However, the *Hull* court reasoned that because weighing of fault is now accomplished under the Comparative Fault Act, there is no need for the last clear chance doctrine.[88]

2. Definition of Brother and Sister in the Guest Statute.—The Indiana Guest Act[89] bars claims by certain individuals for injuries resulting from an accident involving a motor vehicle absent willful or wanton conduct.[90] In *Akers v. Sebren*[91] and *Murphy v. Cole*,[92] the court determined that half-siblings are not included within the terms of the Guest Act. Because the Act is unambiguous, the words are to be given their plain meaning.[93] The primary meaning of the term sister is "a female human being related to another person having the same parents as another."[94] Because half-sisters do not have the same parents, they are not included under the terms of the Guest Act and are not barred from bringing a claim.[95]

3. Negligent Hiring of an Independent Contractor.—Last survey period, in a divided opinion, the court of appeals held that Indiana recognized a separate tort for the negligent hiring of an independent contractor.[96] The Indiana Supreme

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86. *Id.* at 624.

87. *Id.*

88. *Id.*

89. IND. CODE § 34-4-40-3 (1993).

90. IND. CODE § 34-4-40-3 (1993) provides:

> The owner, operator, or person responsible for the operation of a motor vehicle is not liable for loss or damage arising from injuries to or the death of:
> (1) the person's parent;
> (2) the person's spouse;
> (3) the person's child or stepchild;
> (4) the person's brother;
> (5) the person's sister; or
> (6) a hitchhiker;
> resulting from the operation of the motor vehicle while the parent, spouse, child or stepchild, brother, sister or hitchhiker was being transported without payment in or upon the motor vehicle unless the injuries or death are caused by the wanton or willful misconduct of the operator, owner, or person responsible for the operation of the motor vehicle.

91. 639 N.E.2d 370 (Ind. Ct. App. 1994).

92. 647 N.E.2d 387 (Ind. Ct. App. 1995).

93. *Akers*, 639 N.E.2d at 371; *Murphy*, 647 N.E.2d at 389.

94. *Akers*, 639 N.E.2d at 372.

95. *Id.* The *Murphy* court applied the reasoning of *Akers* to come to the same conclusion with regard to half-brothers. *Murphy*, 647 N.E.2d at 389.

96. *See* Bagley v. Insight Communications, 623 N.E.2d 440 (Ind. Ct. App. 1993). For a discussion of the court of appeals decision, see also Wirick & Piscione, *supra* note 54, at 1121-22.

Court clarified this matter in *Bagley v. Insight Communications Co.*[97] The supreme court agreed that other jurisdictions have accepted the theory of negligent hiring of an independent contractor as an independent cause of action and that the *Restatement (Second) of Torts* also recognizes this as a separate tort.[98] However, recognition of an independent cause of action for negligently hiring an independent contractor is not necessary in Indiana.[99] Although Indiana's general rule is that a principal is not liable for the negligence of an independent contractor, five exceptions exist to this general rule.[100] Those exceptions are:

> (1) where the contract requires the performance of intrinsically dangerous work; (2) where the principal is by law or contract charged with performing the specific duty; (3) where the act will create a nuisance; (4) where the act to be performed will probably cause injury to others unless due precaution is taken; and (5) where the act to be performed is illegal.[101]

The policies and rules found in *Restatement (Second) of Torts*, section 411 are already embodied in the five exceptions to the general rule of non-liability.[102] Therefore, the court found it unnecessary to recognize a separate cause of action for negligent hiring of an independent contractor.

4. Action for Trespass for Discharge of Noxious Substance.—In *Lever Brothers Co. v. Langdoc*,[103] the court held that a business could be liable for negligent trespass when it discharged oil into the sewer system that backed up into an adjacent landowner's basement.[104] The court noted that although no Indiana decision had determined the issue, "other jurisdictions ha[d] determined that a trespass action [would] exist if there [was] a direct causal relation between the conduct of the actor and the intrusion of foreign matter upon the possessor's land causing harm."[105] Applying section 165 of the *Restatement (Second) of Torts*,[106]

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97. 658 N.E.2d 584 (Ind. 1995).

98. *Id.* at 587. Section 411 of the *Restatement (Second) of Torts* states:

> An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor
>
> (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
>
> (b) to perform any duty which the employer owes to third persons.

99. *Bagley*, 658 N.E.2d at 587.

100. *Id.* at 586.

101. *Id.* (citing Perry v. Northern Indiana Pub. Serv. Co., 433 N.E.2d 44, 47 (Ind. Ct. App. 1982)).

102. *Id.* at 587.

103. 655 N.E.2d 577 (Ind. Ct. App. 1995).

104. *Id.* at 582.

105. *Id.* (citing Scottish Guarantee Ins. Co. v. Dwyer, 19 F.3d 307, 311 (7th Cir. 1994); Dial v. City of O'Fallon, 411 N.E.2d 217, 220 (Ill. 1980)).

106. Section 165 provides:

> One who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing or third person so to enter is

the court determined that "Lever Brothers' actions prompted foreign matter to enter property possessed by Langdoc causing her property damage; this constitute[d] a negligent trespass."[107]

5. "Public Thoroughfare" Immunity.—The court of appeals clarified the applicability of the immunity provided by Indiana Code section 34-4-16.5-3(3) in the case of *Yerkes v. Heartland Career Center.*[108] Subsection 3 of the immunity section of the Indiana Tort Claims Act immunizes governmental entities and employees for claims arising from losses which result from "[t]he temporary condition of a public thoroughfare which results from weather." After concluding that the defendant, Heartland Career Center, was a school corporation pursuant to the Act and therefore a political subdivision entitled to the protections of the Act, the court addressed the question of whether the loss resulted from the temporary condition of the public thoroughfare due to weather.

In *Yerkes*, the plaintiff filed a negligence action against Heartland for injuries she allegedly received after she slipped and fell on a patch of ice on a sidewalk outside of the career center. Although the plaintiff attempted to argue that the sidewalk was not a public thoroughfare because it was located next to a parking lot rather than a public street, the court concluded that there was no requirement that the sidewalk be adjacent to a public street or within the right-of-way of the public street in order to be considered a thoroughfare.[109] The court further rejected Yerkes' assertion that the sidewalk was not a public sidewalk because it led only to the school. The court stated that sidewalks which provide ingress and egress exclusively to public facilities (such as schools) are public even though not every member of the public uses them.[110] The court specifically concluded "where the entity is public, the sidewalk which serves it is a public thoroughfare."[111]

6. Recreational Use Immunity Statute.—In *Drake v. Mitchell Community Schools*,[112] the Indiana Supreme Court clarified the meaning of the Recreational Use Statute.[113] The Recreational Use Statute provides immunity to landowners who allow their land to be used for recreational purposes.[114] In *Drake*, a bank

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subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor, or a thing or a third person in whose security the possessor has a legally protected interest.

RESTATEMENT (SECOND) OF TORTS § 165 (1965).

107. *Lever Brothers*, 655 N.E.2d at 582.

108. 661 N.E.2d 558 (Ind. Ct. App. 1995).

109. *Id.* at 561-62.

110. *Id.* at 562.

111. *Id.*

112. 649 N.E.2d 1027 (Ind. 1995).

113. IND. CODE § 14-2-6-3 (1993).

114. The statute provides:

Any person who goes upon or through the premises including, but not as a limitation, lands, caves, waters, and private ways of another with or without permission to hunt, fish, swim, trap, camp, hike, sightsee, or for any other purposes, with or without payment of monetary consideration, or with the payment of monetary consideration

allowed a school to use its silo for a haunted house. One of the students became ill after she contracted histoplasmosis from the dust in the silo.[115] The bank argued that it was immune from liability because the use of the silo constituted a recreational use.[116] The court disagreed. It held that under the rules of statutory construction, the language "for any other purposes" was limited by the language preceding it in the statute. Thus, it only applied to activities similar to hunting, fishing, sightseeing and hiking.[117] Allowing the silo to be used by the students for a haunted house was not the type of recreation contemplated under the statute and the bank was not afforded immunity under it.[118]

7. Parental Failure to Control Child.—In *Wells v. Hickman*,[119] the court of appeals addressed, as a matter of first impression, the issue of whether Indiana common law recognized parental failure to control a child as a basis for a cause of action against the parent. In *Wells*, the plaintiffs' son was killed by the minor child of a neighbor. The plaintiffs then sued the minor's mother and grandparents for negligent failure to control the minor, who had exhibited prior acts of violence. The Indiana Court of Appeals first addressed the issue of whether Indiana Code section 34-4-31-1[120] limited parental liability to $3,000 and precluded recovery for additional damages under a common law negligence theory. After concluding that the statute was in derogation of the common law, which generally held that a parent was not liable for the tortious acts of their minor children, the court concluded that the statute made a parent strictly liable for the knowing, intentional

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directly or indirectly on his behalf by an agency of the state or federal government, is not thereby entitled to any assurance that the premises are safe for such purpose. The owner of such premises does not assume responsibility for nor incur liability for any injury to person or property caused by an act or failure to act of other persons using such premises. The provisions of this section shall not be construed as affecting the existing case law of Indiana of liability of owners or possessors of premises with respect to business invitees in commercial establishments nor to invited guests nor shall this section be construed as to affect the attractive nuisance doctrine. Nothing in this section contained shall excuse the owner or occupant of premises from liability for injury to persons or property caused by the malicious or illegal acts of the owner or occupant.

Id.

115. *Drake*, 649 N.E.2d at 1027.

116. *Id.* at 1029-30.

117. *Id.* at 1030.

118. *Id.*

119. 657 N.E.2d 172 (Ind. Ct. App. 1995).

120. IND. CODE § 34-4-31-1(1) (1993) states in relevant part:

(a) As used in this section, "child" means an unemancipated person who is less than eighteen (18) years of age.

(b) A parent is liable for not more than three thousand dollars ($3,000) in actual damages arising from harm to a person or damage to property knowingly, intentionally, or recklessly caused by the parents' child if: (1) the parent has custody of the child; and (2) the child is living with the parent.

or reckless acts of the parents' minor child.[121]

The court then acknowledged that in addition to this statutory remedy, there were four common law exceptions to the general rule that a parent is not liable for the tortious acts of his or her child.[122] After examining the relationship between the statute creating strict parental liability for certain acts of their minor child and the fact that common law parental liability under any of the four exceptions is based, in some form, upon the negligent act or omission of the parent or the parents' direct control over the child creating the opportunity for the child to create injury, the court concluded that it did not believe the legislature intended to place a $3,000 limit on a parent's liability when it created the strict liability statute.[123] The court of appeals instead concluded that the common law causes of action are separate and distinct from the strict liability claim under the statute, and any damages that may be recovered under the common law exceptions were not limited by the statute. The court of appeals then determined that a parents' liability is not limited to $3,000 when the parent is found to be liable under one of the four common law exceptions.[124] The court of appeals did, however, conclude that any payment under the statute would reduce the damage award received under one of the common law exceptions.[125]

The court then addressed the issue of whether the parent had a duty to control her minor son because she knew or should have known that injury to the plaintiffs' decedent was possible. In addressing this issue, the court of appeals focused on foreseeability, and concluded that a duty attaches where there has been a failure to control and the parent knows or should have known that injury to another was reasonably foreseeable. The court of appeals specifically concluded that the parent, to be liable, must know or should have known that the child had a habit of engaging in the particular act or course of conduct that led to the plaintiff's injury.[126] The court concluded that the critical issue in *Wells* was whether the parent knew or with due care should have known that the child would injure the

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121. *Wells*, 657 N.E.2d at 176.

122. *Id.* (citing K.C. v. A.P., 577 So. 2d 669, 671 (Fla. App. 1991); Ross v. Lowe, 605 N.E.2d 786, 790-91 (Ind. Ct. App. 1992), *vacated on other grounds*, 619 N.E.2d 911 (Ind. 1991)). The court identified these four exceptions:

> 1) where the parent entrusts the child with an instrumentality which, because of the child's lack of age, judgment, or experience, may become a source of danger to others; 2) where the child committing the tort is acting as the servant or agent of its parents; 3) where the parents consents, directs, or sanctions the wrongdoing; and 4) where the parent fails to exercise control over the minor child although the parent knows or with due care should know that injury to another is possible.

Id. The plaintiffs' claim in *Wells* proceeded under the fourth common law exception.

123. *Id.* at 177.

124. *Id.*

125. *Id.*

126. *Id.* at 178 (citing *K.C.*, 577 So. 2d at 671; Parsons v. Smithey, 504 P.2d 1272, 1276 (Ariz. 1973)).

specific victim in this case.[127] While the record indicated that the parent knew the child was troubled and could anticipate the same type of conduct he had exhibited in the past, the child's past cruelty to animals and suicidal comment did not make his subsequent killing of a neighborhood friend reasonably foreseeable.[128]

The plaintiff in *Wells* also attempted to extend the common law failure to control exception to the grandparents on the theory that they had assumed parental control over the minor grandchild. The court of appeals refused to expand this common law exception and instead analyzed the case under a negligent entrustment theory. The court concluded that because the minor child was not specifically entrusted to the grandparents' care and, in fact, the grandparents were unaware even of his presence on their property, there was nothing in the relationship between the grandparents and the child that gave rise to a negligent entrustment theory.[129] The court of appeals also rejected the plaintiffs' attempt to invoke a premises liability theory against the grandparents.[130]

8. Unincorporated Associations.—In *McDonald v. Maxwell*,[131] the court of appeals addressed a claim by a church member who was injured when she slipped and fell on the church floor. The church member brought a negligence claim against the church's janitor. The court of appeals found that a genuine issue of material fact existed as to whether the janitor breached a duty of care in waxing the floor, and that this issue precluded summary judgment. Of more significance in this case, however, is the court's footnote discussing the appropriateness of the long existing general rule in Indiana that members of an unincorporated association cannot sue the association for the tortious acts of one or more of its members.[132] Although the court acknowledged the continued viability of this rule, it specifically questioned the appropriateness of this rule as applied to a part-time, non-member employee of the unincorporated association, who, as a result of the rule, was exposed to liability as the sole defendant.

Because the rule was originally adopted as an attempt to prevent collusive suits between members of the association, the court concluded that "it may be time to take another look at the rule and particularly the rule's impact on the employees of unincorporated associations and injured plaintiffs."[133] Because the issue was not raised during the appeal, however, the court simply left such a possible determination for another date. This dicta, however, must certainly give pause to any practitioner who must rely on the applicability of this rule to defend an unincorporated association against a negligence suit brought by a member,

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127. *Id.*

128. *Id.* It was particularly significant to the court that the two minors had played together previously without incident and there were no indicators of any intent to harm the decedent. The court then concluded as a matter of law that the parent had no duty to control the child because the harm subsequently done to the victim was not reasonably foreseeable. *Id.* at 179.

129. *Id.*

130. *Id.* at 179-80.

131. 655 N.E.2d 1249 (Ind. Ct. App. 1995).

132. *Id.* at 1251 n.1.

133. *Id.* at 1251.

particularly where an employee of the association is intentionally given a disproportionate share of liability. An additional issue in this regard would be the ability of an employee defendant to name the unincorporated association as a nonparty. Under the recent amendments to the Comparative Fault Act, naming the unincorporated association as a nonparty would be allowed, although under prior case law, the association could not be named as a nonparty because it could not be named as a defendant.[134]

9. Other Cases of Note.—

a. Nobles v. Cartwright.[135]—The Indiana Court of Appeals discussed the four theories recognized under Indiana law as the tort of public disclosure of private facts.

b. Frye v. Rumbletown Free Methodist Church.[136]—The Indiana Court of Appeals heard the appeal of a plaintiff who had sued the defendant church after he sustained injuries from a fall on the steps of the church's parsonage. The plaintiff's vehicle had stalled on a nearby highway, and the man approached the parsonage for help because it was the nearest residence. In reversing the trial court's grant of summary judgment, the court of appeals declined to characterize the plaintiff's status as either a public invitee or a trespasser. Instead, the court concluded, in a matter of first impression in Indiana, that the stranded motorist was a licensee because he had the implied privilege of entering the land as a matter of general or local custom. The court relied heavily on the *Restatement (Second) of Torts*, section 330 in reaching this conclusion, which created a duty on the part of the church to warn of latent or hidden dangers. The court's conclusion in this case may well cause a dramatic reduction in the number of plaintiffs classified as trespassers in premises liability actions and practitioners should be aware of this significant holding.

c. State v. Eaton.[137]—The Indiana Court of Appeals determined that the $300,000.00 governmental liability limitation of Indiana Code section 34-4-16.5-4 "for injury to or death of one (1) person in any one occurrence" did not preclude a separate recovery to the parents in a case brought for the wrongful injury of a minor for loss of services. The court concluded that because there were two separate causes of action, each cause of action involved a separate injury as defined by Indiana Code section 34-4-16.5-4, thus giving rise to a separate $300,000.00 cap.[138]

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134. *See* IND. CODE § 34-4-33-2(a) (1993); Templin v. Fobes, 617 N.E.2d 541, 544 (Ind. 1993); Cornell Harbison Excavating, Inc. v. May, 546 N.E.2d 1186, 1187 (Ind. 1989).

135. 659 N.E.2d 1064 (Ind. Ct. App. 1995).

136. 657 N.E.2d 745 (Ind. Ct. App. 1995).

137. 659 N.E.2d 232 (Ind. Ct. App. 1995).

138. *Id.* at 237.

APPENDIX

[new text appears in **bold**, deleted text not included]

SECTION 1. IC 33-1-1.5-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: Sec. 1. This chapter governs all actions **brought by a user or consumer against a manufacturer or seller for physical harm caused by a product regardless of the substantive legal theory or theories upon which the action is brought.**

SECTION 2. IC 33-1-1.5-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: Sec. 2. As used in this chapter:

(1) "User or consumer" means a purchaser, any individual who uses or consumes the product, or any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question, or any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.

(2) "Physical harm" means bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property. The term does not include gradually evolving damage to property or economic losses from such damage.

(3) "Manufacturer" means a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer. For purposes of this chapter, "manufacturer" includes a seller who:

(A) has actual knowledge of a defect in a product;

(B) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process;

(C) alters or modifies the product in any significant manner after the product comes into the seller's possession and before it is sold to the ultimate user or consumer;

(D) is owned in whole or significant part by the manufacturer; or

(E) owns in whole or significant part the manufacturer.

A seller who discloses the name of the actual manufacturer of a product is not a manufacturer under this section merely because the seller places or has placed a private label on a product.

(4) "Product liability action" means any action brought against a manufacturer or seller of a product, regardless of the substantive legal theory or theories upon which the action is brought, for or on account of physical harm.

(5) "Seller" means a person engaged in **the** business **of selling or leasing a product for resale, use, or consumption.**

(6) "Product" means any item or good that is personalty at the time it is

conveyed by the seller to another party. It does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.

(7) "Unreasonably dangerous" refers to any situation in which the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases it with the ordinary knowledge about the product's characteristics common to the community of consumers.

SECTION 3. IC 33-1-1.5-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: Sec. 3. (a) **Except as provided in subsection (c), a person** who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to **the user's or consumer's** property is subject to liability for physical harm caused by that product to the user or consumer or to **the user's or consumer's** property if that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition, and if:

(1) the seller is engaged in the business of selling such a product; and

(2) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which it is sold by the person sought to be held liable under this chapter.

(b) The rule stated in subsection (a) applies although:

(1) the seller has exercised all reasonable care in the **manufacture and** preparation of **the** product; and

(2) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

However, in any action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.

(c) A product liability action based on the doctrine of strict liability in tort may not be commenced or maintained against any seller of a product that is alleged to contain or possess a defective condition unreasonably dangerous to the user or consumer unless the seller is a manufacturer of the product or of the part of the product alleged to be defective.

(d) Nothing in this chapter shall be construed to limit any other action from being brought against any seller of a product. If a court is unable to hold jurisdiction over a particular manufacturer of a product or part of a product alleged to be defective, then that manufacturer's principal distributor or seller over whom a court may hold jurisdiction shall be considered, for the purposes of this section, the manufacturer of the product.

SECTION 4. IC 33-1-1.5-4 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: Sec. 4. (a) The defenses in this section are

defenses to **an action brought under this chapter.** The burden of proof of any defense raised in **an** action **under this chapter** is on the party raising the defense.

(b) With respect to any action **brought under this chapter:**

(1) It is a defense that the user or consumer bringing the action knew of the defect and was aware of the danger **in the product** and nevertheless proceeded to make use of the product and was injured.

(2) It is a defense that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.

(3) It is a defense that a cause of the physical harm is a modification or alteration of the product made by any person after its delivery to the initial user or consumer if such modification or alteration is the proximate cause of physical harm where such modification or alteration is not reasonably expectable to the seller.

SECTION 5. IC 33-1-1.5-4.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: **Sec. 4.5. In a product liability action, there is a rebuttable presumption that the product that caused the physical harm was not defective and that the manufacturer or seller of the product was not negligent if, before the sale by the manufacturer, the product:**

(1) was in conformity with the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured, packaged, and labeled; or

(2) complied with applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or by Indiana, or by any agency of the United States or Indiana.

SECTION 6. IC 33-1-1.5-9 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: **Sec. 9. In a product liability action where liability is assessed against more than one (1) defendant, a defendant is not liable for more than the amount of fault, as determined under section 10 of this chapter, directly attributable to that defendant. A defendant in a product liability action may not be held jointly liable for damages attributable to the fault of another defendant.**

SECTION 7. IC 33-1-1.5-10 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: **Sec. 10. (a) As used in this chapter, "fault" means an act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term includes the following:**

(1) Unreasonable failure to avoid an injury or to mitigate damages.

(2) A finding under IC 33-1-1.5-3 that a person is subject to liability for physical harm caused by a product, notwithstanding the lack of negligence or willful, wanton, or reckless conduct by the manufacturer or seller.

(b) In a product liability action, the fault of the person suffering the physical harm, as well as the fault of all others who caused or contributed to cause the harm, shall be compared by the trier of fact in accordance with IC 34-4-33-5.
(c) In assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm.

SECTION 8. IC 34-4-33-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: Sec. 2. (a) As used in this chapter:

(1) "Fault" includes any act or omission that is negligent, willful, wanton, reckless, **or intentional** toward the person or property of others. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages.

(2) "Nonparty" means a person who **caused or contributed to cause the alleged injury, death, or damage to property** but who has not been joined in the action as a defendant.

(b) For purposes of sections 4 and 5 of this chapter, a defendant may be treated along with another defendant as a single party where recovery is sought against that defendant not based upon **the defendant's** own alleged act or omission but upon **the defendant's** relationship to the other defendant.

SECTION 9. IC 34-4-33-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: Sec. 5. (a) In an action based on fault that is brought against one (1) defendant or two (2) or more defendants who may be treated as a single party, and that is tried to a jury, the court, unless all the parties agree otherwise, shall instruct the jury to determine its verdict in the following manner:

(1) The jury shall determine the percentage of fault of the claimant, of the defendant, and of any person who is a nonparty. **The jury may not be informed of any immunity defense that is available to a nonparty. In assessing percentage of fault, the jury shall consider the fault of all persons who caused or contributed to cause the alleged injury, death, or damage to property, tangible or intangible, regardless of whether the person was or could have been named as a party.** The percentage of fault of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from a nonparty or nonparties.

(2) If the percentage of fault of the claimant is greater than fifty percent (50%) of the total fault involved in the incident which caused the claimant's death, injury, or property damage, the jury shall return a verdict for the defendant and no further deliberation of the jury is required.

(3) If the percentage of fault of the claimant is not greater than fifty percent (50%) of the total fault, the jury then shall determine the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded.

(4) The jury next shall multiply the percentage of fault of the defendant by the amount of damages determined under subdivision (3) and shall then enter a verdict for the claimant in the amount of the product of that multiplication.

(b) In an action based on fault that is brought against two (2) or more defendants, and that is tried to a jury, the court, unless all the parties agree otherwise, shall instruct the jury to determine its verdict in the following manner:

(1) The jury shall determine the percentage of fault of the claimant, of the defendants, and of any person who is a nonparty. **The jury may not be informed of any immunity defense that might be available to a nonparty. In assessing percentage of fault, the jury shall consider the fault of all persons who caused or contributed to cause the alleged injury, death, or damage to property, tangible or intangible, regardless of whether the person was or could have been named as a party.** The percentage of fault of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from a nonparty or nonparties.

(2) If the percentage of fault of the claimant is greater than fifty percent (50%) of the total fault involved in the incident which caused the claimant's death, injury, or property damage, the jury shall return a verdict for the defendants and no further deliberation of the jury is required.

(3) If the percentage of fault of the claimant is not greater than fifty percent (50%) of the total fault, the jury shall then determine the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded.

(4) The jury next shall multiply the percentage of fault of each defendant by the amount of damages determined under subdivision (3) and shall enter a verdict against each such defendant (and such other defendants as are liable with the defendant by reason of their relationship to such defendant) in the amount of the product of the multiplication of each defendant's percentage of fault times the amount of damages as determined under subdivision (3).

(c) In an action based on fault that is tried by the court without a jury, the court shall make its award of damages according to the principles specified in subsections (a) and (b) for juries.

(d) In the case of an intentional tort, the plaintiff may recover one hundred percent (100%) of the compensatory damages in a civil action for intentional tort from a defendant who was convicted after a prosecution based on the same evidence.

SECTION 10. IC 34-4-34-3 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: **Sec. 3. A jury in a case subject to this chapter may not be advised of:**

(1) the limitation on the amount of a punitive damage award under section 4 of this chapter; or

(2) the requirement under section 6 of this chapter concerning allocation of money received in payment of a punitive damage award.

SECTION 11. IC 34-4-34-4 IS ADDED TO THE INDIANA CODE AS A

NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: **Sec. 4. A punitive damage award may not be more than the greater of:**

(1) three (3) times the amount of compensatory damages awarded in the action; or

(2) fifty thousand dollars ($50,000).

SECTION 12. IC 34-4-34-5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: **Sec. 5. If a trier of fact awards punitive damages that exceed the limitation under section 4 of this chapter, the court shall reduce the punitive damage award to not more than the greater of:**

(1) three (3) times the amount of compensatory damages awarded in the action; or

(2) fifty thousand dollars ($50,000).

SECTION 13. IC 34-4-34-6 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]: **Sec. 6. (a) Except as provided in IC 13-7-8.7-10, when a judgment that includes a punitive damage award is entered in a civil action, the party against whom the judgment was entered shall pay the punitive damage award to the clerk of the court where the action is pending.**

(b) Upon receiving the payment described in subsection (a), the clerk of the court shall:

(1) pay the person to whom punitive damages were awarded twenty-five percent (25%) of the punitive damage award; and

(2) pay the remaining seventy-five percent (75%) of the punitive damage award to the treasurer of the state, who shall deposit the funds into the violent crime victims compensation fund established by IC 5-2-6.1-40.

SECTION 14. IC 34-4-44.6 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1995]:

Chapter 44.6 Offers of Settlement

Sec. 1. This chapter applies only to actions in tort brought under title 33 and this title, and does not apply to small claims actions.

Sec. 2. As used in this chapter, "offeror" means a party to a civil action who makes a qualified settlement offer to a recipient who is an opposing party in the civil action.

Sec. 3. As used in this chapter, "recipient" means a party to a civil action who receives a qualified settlement offer from an offeror who is an opposing party in the civil action.

Sec. 4. As used in this chapter, "qualified settlement offer" means an offer of full and final settlement to resolve all claims and defenses at issue between the offeror and the recipient.

Sec. 5. A qualified settlement offer may be made at any time after a complaint has been filed in a civil action, but may not be made less than thirty (30) days before a trial of the action.

Sec. 6. A qualified settlement offer must resolve all claims and

defenses at issue in the civil action between the offeror and the recipient before the qualified settlement offer may be accepted by the recipient.

Sec. 7. A qualified settlement offer must:

(1) be in writing;

(2) be signed by the offeror or the offeror's attorney of record;

(3) be designated on its face as a qualified settlement offer;

(4) be delivered to each recipient or recipient's attorney of record by registered or certified mail or by any method that verifies the date of receipt;

(5) set forth the complete terms of the settlement proposed by the offeror to the recipient in sufficient detail to allow the recipient to decide whether to accept or reject it;

(6) include the name and address of the offeror and the offeror's attorney of record, if any; and

(7) expressly revoke all prior qualified settlement offers made by the offeror to the recipient.

Sec. 8. An acceptance of a qualified settlement offer must be:

(1) unconditional;

(2) in writing;

(3) signed by the accepting recipient or the accepting recipient's attorney of record; and

(4) delivered:

(A) by registered or certified mail or by a means that verifies the date of receipt to the offeror or the offeror's attorney of record; and

(B) not more than thirty (30) days after the recipient receives the qualified settlement offer.

Sec. 9. (a) If a recipient does not accept a qualified settlement offer and the final judgment is less favorable to the recipient than the terms of the qualified settlement offer, the court shall award attorney's fees, costs, and expenses to the offeror upon the offeror's motion.

(b) An award of attorney's fees, costs, and expenses under this section shall consist of attorney's fees at a rate of not more than one hundred dollars ($100) per hour and other costs and expenses incurred by the offeror after the date of the qualified settlement offer. However, the award of attorney's fees, costs, and expenses may not total more than one thousand dollars ($1,000).

(c) A motion for an award of attorney's fees, costs, and expenses under this section must be filed not more than thirty (30) days after entry of judgment. The motion must be accompanied by an affidavit of the offeror or the offeror's attorney establishing the amount of the attorney's fees and other costs and expenses incurred by the offeror after the date of the qualified settlement offer, constituting prima facie proof of the reasonableness of the amount.

(d) Where appropriate, the court may order a judgment entered against the offeror and in favor of the recipient reduced by the amount of attorney's fees, costs, and expenses awarded to the offeror under this

section.

SECTION 15. IC 34-4-33-13 IS REPEALED [EFFECTIVE JULY 1, 1995].

SECTION 16. [EFFECTIVE JULY 1, 1995] **IC 33-1-1.5-4.5, IC 33-1-1.5-9, IC 33-1-1.5-10, IC 34-4-34-3, IC 34-4-34-4, IC 34-4-34-5, IC 34-4-34-6, and IC 34-4-44.6, all as added by this act, apply to a cause of action that accrues after June 30, 1995.**