

# Indiana Law Review

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Volume 50

2017

Number 4

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## A LOOK BACK: DEVELOPING INDIANA LAW POST-BENCH REFLECTIONS OF AN INDIANA SUPREME COURT JUSTICE

### SELECTED DEVELOPMENTS IN INDIANA TORT LAW (1993-2012)

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As a Justice of the Indiana Supreme Court (“Court”) for almost nineteen years (from November 1, 1993, until July 31, 2012), I participated in the adjudication of many cases alleging physical, emotional, dignitary, and economic injuries that presented a panoply of common, statutory, and even constitutional law issues. In this Article, I will not attempt to cover everything that happened over those two decades. I will begin by discussing the evolution of tort law generally and some Indiana exemplars of that history. I will then identify two major areas where Indiana tort law differs from that of other jurisdictions. Beyond that, I will discuss some selected developments in Indiana tort law that I believe to be noteworthy. I will conclude with some observations about an unappreciated relationship between tort and workers’ compensation law. For the most part, my discussion and analysis ends as of my departure from the Court but in a few selected instances, I comment on decisions of the Court since that time.<sup>1</sup>

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\*\* This Article is dedicated to Donald W. Ward, a legendary lawyer, husband, and father and a generous friend and mentor to all who seek his aid or counsel. Three times the lawyers of Indiana elected him to serve on the Indiana Judicial Nominating and Qualifications Commission.

\*\*\* I express my appreciation to Kevin H. VanDenBerg for his research assistance on Part I of this Article. I also acknowledge Jessica Dickinson, a research assistant in the library of the Indiana University Robert H. McKinney School of Law, for her help in compiling materials for this Article; and Peter M. Elliott, Justin B. McGiffen, Dylan A. Pittman, and Andrea Kochert Townsend for their helpful comments on this Article. Finally, a special word of thanks to Justice Brent E. Dickson, Ellen M. Bublick, Dan B. Dobbs Professor of Law at the University of Arizona James E. Rogers College of Law, and all of the other judges, lawyers, and professors from whom I have learned about tort law.

1. See discussion *infra* of *Hughley v. State*, 15 N.E.3d 1000 (Ind. 2014), Part II.A; *Myers v. Crouse-Hinds Division of Cooper Industries, Inc.*, 53 N.E.3d 1160, 1165-66 (2016), *reh’g denied*, (Apr. 28, 2016), accompanying footnote 108; and *Goodwin v. Yeakle’s Sports Bar & Grill, Inc.*, 62 N.E.3d 384 (Ind. 2016), accompanying footnotes 182-87.

I ask the reader to appreciate that this Article contains some highly personal reflections. It is not an argument but neither is it entirely objective.

I. INTRODUCTION: STATUTES IN AGES OF COMMON LAW; CONSTITUTIONAL LAW IN AGES OF STATUTES<sup>2</sup>

“Tort law is predominantly common law. That is, judges rather than legislatures usually define what counts as an actionable wrong and thus as a tort; they also determine how compensation is to be measured and what defenses may defeat the tort claim.”<sup>3</sup>

Among the central questions in tort law are

whether some types of parties are better able to bear the costs of inevitable accidents (for example, businesses that can pay the damages and raise the prices of goods or services, thus spreading the costs), or are better able to insure against the risks of accidental injury, or are better placed to reduce injuries by prudent conduct.<sup>4</sup>

These are all questions on which political constituencies—workers, consumers, businesses, etc.—have views. And so it should not be surprising that from time to time, the political process in the form of the legislature intervenes to replace judge-made common law with statutes.

Nevertheless, it will be judges who interpret those statutes. And the *Marbury* power of judicial review subjects not only the interpretation but the very validity of statutes to judicial scrutiny: “[T]he duty of the Court is imperative, and its authority is unquestionable, to declare any part of a statute null and void that expressly contravenes the provisions of the constitution, to which the legislature itself owes its existence.”<sup>5</sup>

To set this Article in historical context, this Introduction discusses several common law principles of tort law, examines legislation that overruled those principles, and then challenges to the interpretation and constitutionality of that legislation. It will do this in chronological order, using four basic time periods:

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2. The title of this section borrows from the title of a book written by former Yale Law School Dean and Second Circuit Judge Guido Calabresi: *A Common Law for the Age of Statutes* (Harv. Univ. Press 1982). Calabresi argues that when interpreting statutes, courts should treat the statutes as if they were essentially common law. *See generally id.* The implications of this are at first glance startling—that judges can essentially modify statutes. But the constraints of stare decisis on common law are so strong that the prospect of a court making radical changes to statutes is not likely. In any event, this section of this Article has an entirely different purpose: it briefly surveys the evolution of tort law over the last century, identifying instances where common law has been supplanted by statutory law and then statutory law subjected to constitutional review.

3. Dan B. Dobbs et al., *THE LAW OF TORTS* § 1, at 2 (2d ed. 2011).

4. ANDREW L. KAUFMAN, *CARDOZO* 244 (1998).

5. *City of S. Bend v. Kimsey*, 781 N.E.2d 683, 696 (Ind. 2003) (quoting *Dawson v. Shaver*, 1 Blackf. 204, 206-07 (1822) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803))).

- A “Conservative Common Law Era” of “judge made” law that began with the English common law roots and that set the basis for developing law in the United States, early on in our country’s history.
- The “Progressive Era” of American history—from the late 1800s through the early 20th century—in which state legislatures began to enact progressive statutes that were socially focused and primarily centered on consumer safety, employee well-being, and other social objectives. We will see the interpretation and constitutional validity of these statutes were challenged in court and a quantum of these challenges were successful.
- A “Progressive Common Law Era,” encompassing roughly the middle of the 20th century, where judges and courts rendered progressive decisions in tort cases, recognizing new theories of recovery for injured plaintiffs, consumers, and employees.
- A “Tort Reform Era” of the last quarter of the 20th century and into the 21st century in which many legislatures began passing “tort reform” statutes designed to rein in the recently-recognized progressive common law. And—not surprisingly—the interpretation and constitutional validity of these statutes have been challenged in court and a quantum of these challenges too were successful.

If we group the first two eras together as a “Historical Age” and the last two as a “Modern Age,” there are two major similarities and a major difference between them. In each Age, the legislature reacted to court decisions with statutes that pointed in the opposite ideological direction—and then the interpretation and constitutional validity of these statutes were immediately challenged in court. The difference—perhaps even irony—between the two ages is that in the Historical Age, the legislature reacted to conservative court decisions with progressive legislation (which was then subjected to conservative challenge in court) whereas in the Modern Age, the legislature reacted to progressive court decisions with conservative legislation (which was then subjected to progressive challenge in court)!

#### *A. Conservative Common Law*

Compensation for workplace injuries is a good example of a common law doctrine with harsh consequences that was subsequently modified by legislative action—workers’ compensation statutes—during the era of progressive legislation.

Three common law doctrines recognized in the United States in the late 1800s made it very difficult for a worker injured on the job to be awarded compensation from an unwilling employer.

The doctrine of contributory negligence held that an employer had no legal fault or liability for a workplace injury where the injured employee was in any way responsible for the injury.<sup>6</sup>

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6. See *Atlee v. Union Packet Co.*, 88 U.S. 389, 395 (1874); *Brown v. Kendall*, 60 Mass. 292,

A second doctrine, the fellow servant doctrine, first recognized in *Farwell v. Boston & Worcester Railway Corp.*,<sup>7</sup> held an employer had no legal responsibility for any workplace injury caused by a fellow employee of the injured employee.<sup>8</sup>

A third doctrine, assumption of risk, provided an employer had no legal responsibility for any workplace injury where an employee knew of the risks or hazards of a particular job when entering the employment contract.<sup>9</sup>

Professor Kenneth S. Abraham, a scholar in this field, refers to the fellow-servant rule, contributory negligence, and assumption of risk as the “unholy trinity” of defenses because of their harshness.<sup>10</sup>

These three doctrines are good examples of conservative common law principles applied by courts at the end of the 19th and into the 20th century. Other tort examples (and examples in property, contract, and family law) could also be marshaled to demonstrate a general pro-property, pro-employer, conservative thrust to the law. This Conservative Common Law Era was followed by one of progressive legislation.

#### *B. Progressive Legislation and the Courts' Response*

During what historians now call the “Progressive Era,” which we might think of as starting around 1910, states began to pass legislation designed to protect workers in a particular way.<sup>11</sup> Progressives like Louis D. Brandeis criticized the Conservative Common Law Era for: (1) favoring business and wealth over workers, consumers, and plaintiffs;<sup>12</sup> (2) elevating national power over states' rights, impinging upon state sovereignty;<sup>13</sup> (3) anti-democratically rejecting duly enacted legislation;<sup>14</sup> and (4) relying on natural law when positivism was beginning to catch hold.<sup>15</sup>

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297 (1850) (Shaw, C.J.).

7. 45 Mass. 49 (1842).

8. *Id.* at 60.

9. Dilan A. Esper & Gregory C. Keating, *Abusing “Duty,”* 79 S. CAL. L. REV. 265, 291 (2006).

10. KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11* 42 (2008).

11. The Progressive Era arguably began as early as the late nineteenth century when several states enacted statutes designed to abrogate the common law defenses that had often stymied railroad employees in their efforts to sue their employers for injuries suffered in the course of their employment. These statutes—known as ‘employers’ liability acts—abrogated the fellow servant rule. Most of them also “substantially modified defenses based on assumption of risk or contributory negligence. Clyde Spillenger, *Risk Regulation, Extraterritoriality, and Domicile: The Constitutionalization of American Choice of Law, 1850-1940*, 62 UCLA L. REV. 1240, 1288 (2015).

12. EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 66 (2000).

13. *Id.* at 67.

14. *Id.* at 165-68.

15. *Id.* at 67-69.

The state statutes enacted consistent with this progressive critique covered child labor, minimum wage, maximum hour, factory safety, employer liability, and workers' compensation.<sup>16</sup> Workers' compensation legislation is a particularly apt example because it eliminated the unholy trinity of an employer's common law defenses discussed above. It did so by enacting a mandatory and exclusive strict liability-no fault regime in which employees are entitled to recover from their employers for workplace injuries—but only to the level set forth in a fixed benefits schedule.

American constitutionalism gives statutes precedence over conflicting principles of common law. But the constitutional order also gives to judges the power to determine whether, in any particular case, common law and statute do in fact conflict and, as noted earlier, the *Marbury* power to pass on statutes' constitutionality. The progressive statutes were subjected to challenges requiring courts to make just such determinations.

One technique courts used to preserve the doctrines of the Conservative Common Law Era in the face of progressive legislation was to interpret the statutes using the “derogation” canon of statutory construction: “[L]egislative enactments in derogation of common law must be strictly construed and narrowly applied.”<sup>17</sup> The canon, in other words, recognizes the legislature has the power to change the common law. But if the legislature does undertake to change the common law by enacting a new statute, the court is going to be very strict in reading that statute so as to change the common law as little as possible.<sup>18</sup>

One of the great progressive legal thinkers, Roscoe Pound, was skeptical of the derogation canon:

[N]o statute of any consequence dealing with any relation of private law can be anything but in derogation of the common law, the social reformer and the legal reformer, under this doctrine, must always face the situation that the legislative act which represents the fruit of their labors will find no sympathy in those who apply it, will be construed strictly, and will be made to interfere with the status quo as little as possible.<sup>19</sup>

A second way in which courts held on to the doctrines of the Conservative Common Law Era in the face of progressive legislation was, of course, through the use of the *Marbury* power. Constitutional challenges were leveled at the

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16. Melvin I. Urofsky, *State Courts and Protective Legislation during the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63, 63-64 (1985).

17. *State Farm Fire & Cas. Co. v. Structo Div., King Seeley Thermos Co.*, 540 N.E.2d 597, 598 (Ind. 1989).

18. The policy justification for this narrow interpretation of statutory construction is rooted in the presumption that the legislature knows the existing common law prior to enacting a statute and therefore applying the statute narrowly should meet the intent of the legislature. *Id.* The idea is that when the legislature enacts a statute in derogation of common law, it is presumed that the legislature did not intend to make any change in the common law beyond what it declares either in express terms or by unambiguous implication. *Id.*

19. Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 387 (1908).

statutory reforms of the Progressive Era in both federal and state court, and although the consensus of historians is that the statutes by-and-large survived the challenges,<sup>20</sup> there were exceptions.

The basis of the constitutional challenges was that the statutes violated the substantive right to freedom of contract guaranteed by the Due Process Clause of the Fourteenth Amendment. First articulated in *Allgeyer v. Louisiana*,<sup>21</sup> the United States Supreme Court said the proscription on states depriving a person of liberty without due process of law protects the right "to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."<sup>22</sup>

*Allgeyer*, invalidating a Louisiana ban on out-of-state insurance contracts,<sup>23</sup> was the genesis of the substantive due process right of freedom of contract. *Lochner v. New York*,<sup>24</sup> decided within a decade, was its apotheosis: *Lochner* famously invalidated a state limitation on the working hours of bakers over the classic dissent of Justice Oliver Wendell Holmes, Jr.<sup>25</sup>

State courts, too, subjected progressive legislation to *Marbury* review. Keeping with our general theme of workers' compensation, the New York Court of Appeals invalidated that state's workers' compensation act in 1911 on substantive due process grounds: "When our Constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another."<sup>26</sup>

It is important not to overstate the point. There was substantial criticism during the Progressive Era itself of courts' propensity to preserve the status quo of the Conservative Common Law Era.<sup>27</sup> Theodore Roosevelt wrote extensively on this issue.<sup>28</sup> But Melvin I. Urofsky, the great biographer of Brandeis, has written that scholarship (including his own) demonstrates that despite cases like *Lochner*, the U.S. Supreme Court "in fact upheld the vast majority of progressive statutes it reviewed."<sup>29</sup> And Urofsky has studied the attitude of state courts to

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20. Urofsky, *supra* note 16, at 63 n.2.

21. 165 U.S. 578 (1897).

22. *Id.* at 589.

23. *Id.* at 583.

24. 198 U.S. 45 (1905).

25. *Id.* at 74-76 (Holmes, J., dissenting). Justice Holmes's dissent in *Lochner* "is probably the most famous dissent ever written." BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 195 (1993).

26. *Ives v. S. Buffalo Ry. Co.*, 201 N.Y. 285, 293 (1911).

27. Urofsky, *supra* note 16, at 63 & n.1 (citing examples, including Roscoe Pound and Louis D. Brandeis).

28. *Id.* (citing Theodore Roosevelt, *Criticism of the Courts*, *OUTLOOK*, Sept. 24, 1910, at 149-53; Theodore Roosevelt, *Right of the People to Review Judge-Made Law*, *OUTLOOK*, Aug. 8, 1914, at 843-56; Theodore Roosevelt, *Judges and Progress*, *OUTLOOK*, Jan. 6, 1912, at 40-48).

29. *Id.* at 63 & n.2 (citing, inter alia, Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, in *YEARBOOK OF THE SUPREME COURT*

progressive legislation and found, “with only a few exceptions, state courts moved consistently toward approval of a wide range of [progressive] reform legislation,”<sup>30</sup> including, in particular, workers’ compensation statutes.<sup>31</sup>

Nevertheless, viewed broadly, the sweep of the Historical Age shows conservative common law doctrines modified by progressive legislation, the effect of which was to some extent limited by courts employing techniques like the derogation canon and even the *Marbury* power. Now we turn to the Modern Age and see the converse: progressive common law doctrine modified by conservative legislation—and such legislation then limited by courts employing techniques like the derogation canon and even the *Marbury* power.

### *C. Progressive Common Law*

One era does not necessarily end where the next begins. Instead, they overlap, sometimes for several decades. Such is the case with our Historical and Modern Eras. While courts made *Lochner*-like decisions well into the 1930s, one could trace the Modern Age and the Progressive Common Law Era back as far as 1916—when the New York Court of Appeals decided *MacPherson v. Buick Motor Co.*,<sup>32</sup> abolishing the requirement of privity of contract to recover for personal injury in tort.<sup>33</sup>

In discussing the Progressive Common Law Era, I will focus on developments in products liability law.<sup>34</sup> Other examples of progressive common law will be discussed later in this Article.<sup>35</sup>

In Judge Benjamin N. Cardozo’s famous *MacPherson* opinion, the plaintiff had purchased a car from a dealer and was then injured in an accident due to a defective wheel.<sup>36</sup> *MacPherson* rejected Buick’s argument that there was no basis for the imposition of liability on a manufacturer to a third person who was not a party to the contract between the manufacturer and the actual seller of a dangerous product.<sup>37</sup> *MacPherson*’s rule—which eliminated the need for privity

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HISTORICAL SOCIETY (1983)).

30. *Id.* at 64. “The majority of state court decisions, however, did go against laws that attempted to support unions.” *Id.* at 90.

31. *Id.* at 87.

32. 217 N.Y. 382 (1916).

33. *Id.* at 389.

34. Professor Priest argues the developments in products liability law about to be described are “among the most dramatic ever witnessed in the Anglo-American legal system” in the way they “render[ed] contract law obsolete and leapfrog[ed] existing negligence law entirely. The liability of manufacturers for product-related losses was vastly increased and the obligations of consumers vastly diminished.” George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 461-62 (1985).

35. See discussion *infra* of the collateral source rule at Part IV and the abrogation of sovereign immunity at Part V.

36. 217 N.Y. at 385.

37. *Id.*

between a manufacturer and an individual suffering personal injury from a defectively made product—became the majority rule in the United States and a fundamental principle of product liability law.<sup>38</sup>

Another example of a Progressive Common Law Era decision was the establishment of the concept of strict liability in tort. This dates to 1944 and California Supreme Court Justice Roger Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co. of Fresno*.<sup>39</sup> A waitress, injured by an exploding Coca-Cola bottle she was carrying, acknowledged that she had no evidence of negligence on Coke's part; the court allowed her lawsuit be allowed to proceed on the doctrine of *res ipsa loquitur*.<sup>40</sup>

Now the doctrine of *res ipsa loquitur* relieves the plaintiff of the obligation of proving negligence, but the factfinder still must find the defendant negligent in order for the plaintiff to recover. In his concurring opinion, Justice Traynor took the position that a finding of negligence should no longer be required for a plaintiff to recover in such a case.<sup>41</sup> Thus was born the progressive common law principle of strict liability in tort—a plaintiff could recover in certain circumstances without any showing of fault on the part of the defendant.

In 1965, Judge Jesse E. Eschbach, a distinguished federal district court judge in Indiana, was presented with the *Escola* question under Indiana law. In *Greeno v. Clark Equipment Co.*,<sup>42</sup> an employee had been injured on the job at Dana Corp. using a forklift manufactured by Clark Equipment Co.<sup>43</sup> The forklift was defective.<sup>44</sup> The plaintiff was not in privity of contract with Clark Equipment.<sup>45</sup>

Judge Eschbach starts by making clear his duty to apply the law the Indiana Supreme Court would apply.<sup>46</sup> Beginning with *MacPherson* and *Escola*, he traces with some care the development of products liability.<sup>47</sup> He discusses the fact that the American Law Institute, the great explicator of American common law, relied on cases like *MacPherson* and *Escola*, in recognizing that a seller of an unreasonably dangerous product in a defective condition is liable for harm caused by the product without regard for either privity or negligence.<sup>48</sup> And Judge

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38. KAUFMAN, *supra* note 4, at 274-75; BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 478 (1993).

39. 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring).

40. *Id.* at 438 (majority opinion).

41. *Id.* at 440.

42. 237 F. Supp. 427 (N.D. Ind. 1965).

43. *Id.* at 428.

44. *Id.* at 428-29.

45. *Id.* at 428.

46. *Id.* at 429-30.

47. *Id.*

48. *Id.* at 430 (discussing RESTATEMENT (SECOND) TORTS § 402A (1966)). The Restatement Second § 402A provides:

**Special Liability of Seller of Product for Physical Harm to User or Consumer**

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby



Eschbach predicted the Indiana Supreme Court would adopt the American Law Institute's Restatement (Second) section 402A in such a circumstance.<sup>49</sup> By doing so, Judge Eschbach firmly placed Indiana products liability law in the progressive common law camp.<sup>50</sup>

#### D. "Tort Reform" Legislation and the Courts' Response

Earlier we saw that progressives were critical of Conservative Common Law Era decisions because they saw the legal doctrine used by the courts as antithetical to their values and interests. So too with conservatives of Progressive Common Law Era decisions. First, conservatives criticized the tort system as rewarding greedy plaintiffs and unscrupulous "ambulance chasing" lawyers at the expense of largely blameless defendants for which it was cheaper to settle than to fight.<sup>51</sup> Second, conservatives expressed alarm that tort risk was driving up insurance premiums for health care providers, manufacturers, and businesses in general.<sup>52</sup> Third, some economists contended that tort costs produced inefficiencies that damaged American competitiveness.<sup>53</sup> And fourth, much like the progressive critique of conservative common law, conservatives saw judge-made progressive common law as undemocratic.<sup>54</sup>

These criticisms took on partisan patina with Republicans embracing a "tort reform" agenda. In 1994, the Republican "Contract with America" platform included a commitment to pass the "Common Sense Legal Standards Reform

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caused to the ultimate user or consumer, or to his property, if

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

- (a) the seller has exercised all possible care in the preparation and sale of his product, and
- (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

49. *Greeno*, 237 F. Supp. at 433.

50. See *Accord Ayr-Way Stores, Inc. v. Chitwood*, 261 Ind. 86, 92-93 (1973); *Galbreath v. Eng'g Constr. Corp.*, 149 Ind. App. 347, 356-57 (1971).

51. Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 733, 747, 749 (1998) (citing, inter alia, Thomas J. Donohue, *American Business: The Next Agenda*, VITAL SPEECHES OF THE DAY, Dec. 1, 1997 (address to National Press Club, Wash. D.C., Oct. 1, 1997)).

52. Ronald Christensen, *Behind the Curtain of Tort Reform*, 2016 B.Y.U. L. REV. 261, 267.

53. PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 15, 230 (1988); Dan Quayle, *Civil Justice Reform*, 41 AM. U.L. REV. 559, 560-61 (1992).

54. Sheldon H. Jaffe, *What A Long Strange Trip It's Been: Court-Created Limitations on Rights of Action for Negligently Furnishing Alcohol*, 72 WASH. L. REV. 595, 610 (1997). But see, e.g., Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533 (1999).

Act” that limited punitive damages; abolished joint and several liability; and arguably discouraged frivolous lawsuits by implementing a British-style “loser pays” attorney fee regime.<sup>55</sup>

The conservative critique of progressive common law had tremendous influence and by 1991, nearly all fifty states had enacted some form of tort reform.<sup>56</sup> Indiana has been part of the “tort reform” movement. The Indiana Products Liability Act,<sup>57</sup> to be discussed in this Part of this Article, was initially passed in 1978. The Indiana Medical Malpractice Act, to be discussed in Part III of this Article, was adopted in 1975.<sup>58</sup> The Indiana Collateral Source Statute, to be discussed in Part IV of this Article, became law in 1986. Other tort reform initiatives are described in the footnotes.<sup>59, 60</sup>

55. “*Common Sense*” Legislation: *The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1768 (1996).

56. *Id.* at 1768 n.35 (citing JAMES A. HENDERSON, JR. & AARON D. TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 859-62 (2d ed. 1992) (describing state tort reform proposals from 1986 to 1991)).

57. Indiana Products Liability Act, Pub. L. No. 141-1978, § 28, 1978 Ind. Acts 1308 (codified at IND. CODE § 34-20 (2016)). For more information on the legislative history of this and other Indiana tort reform statutes, see *infra* note 60.

58. Indiana Medical Malpractice Act, Pub. L. No. 146-1975, § 1, 1975 Ind. Acts 854 (codified at IND. CODE § 34-18 (2016)). For more information on the legislative history of this and other Indiana tort reform statutes, see *infra* note 60.

59. The Indiana Punitive Damages Act, changing the burden of proof, was adopted in Pub. L. No. 172-1984, § 3, 1984 Ind. Acts 1462; punitive damage limitations and allocations were adopted in Pub. L. No. 278-1995, §§ 11-13, 1995 Ind. Acts 4051; these provisions are now codified at Indiana Code section 34-51-3. Though arguably not a tort reform statute, the Indiana Comparative Fault Act, was adopted in Pub. L. No. 317-1983, § 1, 1983 Ind. Acts 1930, now codified at Indiana Code section 34-51-2. The Indiana Tort Claims Act was adopted in Pub. L. No. 142-1974, § 1, 1974 Ind. Acts 599, now codified at Indiana Code section 34-13-3. For more information on the legislative history of this and other Indiana tort reform statutes, see *infra* note 60.

60. Note on Legislative History and Codification of Indiana Tort Reform Statutes.

The Indiana General Assembly periodically “recodifies” portions of the Indiana Code and in the process of doing so, renumbers sections without changing their substance. This Article cites to the Indiana Code as in effect at the time this Article was written, thereby streamlining the discussion. In the opinion of the author, any changes in numbering and language over time is not material to the substantive discussion in the text.

The following table sets forth, for each of the six tort reform statutes mentioned in this Article, the initial enactment and subsequent recodifications:

The Indiana Products Liability Act<sup>61</sup> (“IPLA”) governs all product liability actions that are brought by a user or consumer against the manufacturer or seller alleging physical harm caused by a product, regardless of the substantive legal theory or theories upon which the action is brought.<sup>62</sup> That is, if the claim is brought by a user or consumer against the manufacturer or seller for physical harm caused by a product, IPLA will govern the lawsuit whether the lawsuit is written up as a products liability claim, a negligence claim, or a breach of warranty claim—or any other legal theory.

The Act starts with the general notions of *Greeno* and Restatement Second section 402A<sup>63</sup> but provides that certain circumstances do not give rise to liability. For example, the burden is on the plaintiff to show the defective condition existed at the time the product at issue left the defendant’s control.<sup>64</sup> A plaintiff must establish actual negligence when alleging design defects<sup>65</sup> or failure to provide

<b>Tort Reform Act</b>	<b>Initial Enactment</b>	<b>First Recodification</b>	<b>Second Recodification</b>
Tort Claims	IC 34-4-16.5 (PL 142-1974, § 1)	<b>IC 34-13-3</b> (PL 1-1998, § 8)	
Medical Malpractice	IC 16-9.5 (PL 146-1975, § 1)	IC 27-12 (PL 2-1993, § 153)	<b>IC 34-18</b> (PL 1-1998, § 13)
Products Liability	IC 33-1-1.5 (PL 297-1983, § 28)	<b>IC 34-20</b> (PL 1-1998, § 15)	
Comparative Fault	IC 34-4-33 (PL 317-1983, § 1)	<b>IC 34-51-2</b> (PL 1-1998, § 47)	
Punitive Damages (Burden of Proof)	IC 34-4-34 (PL 172-1984, § 3)	<b>IC 34-51-3</b> (PL 1-1998, § 47)	
Collateral Source	IC 34-4-36 (PL 201-1986, § 3)	<b>IC 34-44-1</b> (PL 1-1998, § 40)	
Punitive Damages (Limitations and Allocations)	IC 34-4-34 (PL 278-1995, §§ 11-13)	<b>IC 34-51-3</b> (PL 1-1998, § 47)	
Current codification shown in bold.			

61. IND. CODE § 34-20-1 (2016).

62. *Id.* § 34-20-1-1.

63. *See id.* § 34-20-2-1; RESTATEMENT (SECOND) TORTS § 402A (1966).

64. IND. CODE § 34-20-4-1 (2016); *Ford Motor Co. v. Rushford*, 868 N.E.2d 806, 810 (Ind. 2007).

65. IND. CODE § 34-20-2-2 (2016).

adequate warnings.<sup>66</sup> The Act protects a defendant where a plaintiff uses a defective product while aware of the defect and its danger;<sup>67</sup> misuses the product;<sup>68</sup> or modifies or alters the product.<sup>69</sup>

Particularly potent are IPLA's statute of limitations, barring lawsuits filed more than two years after a cause of action accrues,<sup>70</sup> and statute of repose, barring lawsuits filed more than ten years after a product has been sold or comes to rest in the hands of its first purchaser.<sup>71</sup>

In addition, IPLA has a special section for asbestos cases. A product liability action for damages from exposure to asbestos may be commenced within two years after the action accrues, without regard to the ten-year statute of repose.<sup>72</sup> But the exception applies only to: (1) "persons who mined and sold commercial asbestos"; and (2) bankruptcy and similar funds created to pay asbestos damage claims.<sup>73</sup>

History repeats itself. In the Historical Age, we saw lawsuits filed challenging the reach of progressive statutes enacted to overrule conservative common-law decisions. So too in the Modern Age. Lawsuits have challenged the reach of tort reform statutes enacted, as we have just seen, to overrule progressive common law decisions.

The repetition does not stop there. The theories of Modern Age attacks on tort reform statutes are pretty much the same as those of Historical Age attacks on progressive statutes: the derogation canon and substantive due process! Several constitutional challenges to IPLA will be discussed here. Constitutional challenges to the Indiana Medical Malpractice Act will be discussed in Part III of this Article. And derogation canon and constitutional litigation involving the Indiana Collateral Source Statute will be discussed in Part IV of this Article.

Prior to my appointment to the Court in 1993, the Indiana Supreme Court had twice (and the Indiana Court of Appeals ("Court of Appeals")) at least once upheld the constitutionality of IPLA against challenges that the enactment violated various provisions of the Indiana Constitution.<sup>74</sup> The biggest such case was *McIntosh v. Melroe Co., A Division of Clark Equipment Co., Inc.*<sup>75</sup>

The plaintiff had been injured in an accident involving a machine akin to a forklift, manufactured by the defendant and placed in service approximately thirteen years before the accident.<sup>76</sup> The plaintiff did not dispute that his claim

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66. *Id.* § 34-20-4-2.

67. *Id.* § 34-20-6-3.

68. *Id.* § 34-20-6-4.

69. *Id.* § 34-20-6-5.

70. *Id.* § 34-20-3-1(b)(1).

71. *Id.* § 34-20-3-1(b)(2).

72. *Id.* § 34-20-3-2(a).

73. *Id.* § 34-20-3-2-(d)(1)-(2).

74. *Dague v. Piper Aircraft Corp.*, 275 Ind. 520 (1981); *State v. Rendleman*, 603 N.E.2d 1333 (Ind. 1992); *Beecher v. White*, 447 N.E.2d 622 (Ind. Ct. App. 1983).

75. 729 N.E.2d 972 (Ind. 2000).

76. *Id.* at 974.

had been brought outside the ten-year statute of repose, but maintained that the statute of repose violated the Indiana Constitution's open courts and right to remedy clause<sup>77</sup> by denying a remedy to those injured by defective products in service more than ten years,<sup>78</sup> and the equal privileges and immunities clause<sup>79</sup> by providing remedies to some persons injured by defective products but not to others.<sup>80</sup>

Justice Boehm's plurality opinion concluded because the legislature had determined that injuries occurring ten years after a product is placed in service are not legally cognizable, the plaintiff was not entitled to a remedy under article 1, section 12, of the Indiana Constitution.<sup>81</sup> "Thus, the statute of repose does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action from ever arising."<sup>82</sup> Nor did the Court find a violation of article 1, section 23, finding the statute of repose was reasonably related to the inherent characteristics of the affected class and did not distinguish among members of the class.<sup>83</sup>

Justice Brent E. Dickson, joined by Justice Rucker, wrote a stirring dissent that began with what I find to be the most memorable assertion of judicial authority written by any member of the Court during my tenure: "This case presented us with an opportunity to restore to Indiana's jurisprudence important principles of our state constitution. By doing so, we could have vividly exemplified the Rule of Law notwithstanding the allure of pragmatic commercial interests."<sup>84</sup>

The dissent went on to make a strong case that the ten-year statute of repose provision in IPLA violated both the open courts and right to remedy and the equal privileges and immunities clauses of the Indiana Constitution.<sup>85</sup> As was his style, Justice Boehm methodically responded to each of the dissenters' claims.

A second case during my tenure implicated the asbestos provisions of IPLA. In *AlliedSignal, Inc. v. Ott*,<sup>86</sup> a man alleged that he contracted lung cancer by exposure to asbestos-containing products while working for various employers from 1949 to 1983.<sup>87</sup> His diagnosis came well after IPLA's ten-year statute of repose had run and, unable to avail himself of the exemption from the statute of

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77. IND. CONST. art. 1, § 12 ("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.").

78. *McIntosh*, 729 N.E.2d at 974.

79. IND. CONST. art. 1, § 23 ("The 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.").

80. *McIntosh*, 729 N.E.2d at 980.

81. *Id.*

82. *Id.* at 978 (internal quotation marks and citation omitted).

83. *Id.* at 984.

84. *Id.* at 985 (Dickson, J., dissenting).

85. *Id.* at 985-94.

86. 785 N.E.2d 1068 (Ind. 2003). I was the author of this opinion.

87. *Id.* at 1069-70.

repose that IPLA provides in some asbestos cases,<sup>88</sup> the plaintiff maintained the IPLA operated to deprive him of his state constitutional rights to open courts and remedy and equal privileges and immunities under article 1, sections 12 and 23, of the Indiana Constitution.<sup>89</sup>

Now these were the same two provisions that had been at issue in *McIntosh*. As had been the case in *McIntosh*, Justice Dickson wrote a strong dissent.<sup>90</sup>

As to article 1, section 12, the plaintiff argued that he had been deprived of his right to remedy because, since cancer from asbestos has such a long period of latency, it would be impossible for a plaintiff ever to file suit within the repose time frame.<sup>91</sup> The Court first said that if a plaintiff's first exposure to asbestos is not until more than the ten years after the asbestos has been sold or come to rest in the hands of its first purchaser, the defendant will be protected by the statute of repose.<sup>92</sup> This was a straightforward application of *McIntosh*. But the Court acknowledged that because of the latency of asbestos-caused cancers, a plaintiff could develop the cancer within the ten-year time period, yet have had no reason to know of the condition until after the repose period.<sup>93</sup> Applying the statute of repose in such a circumstance would, the Court said, violate article 1, section 12.<sup>94</sup>

Now the special asbestos provision of IPLA provides that an asbestos "product liability action . . . accrues on the date when the injured person knows that the person has an asbestos related disease or injury."<sup>95</sup> The Court said that

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88. The Court resolved a hotly debated issue of statutory construction on this point. The Court held the only asbestos cases to which the statute of repose did not apply were those in which the defendant "produce[d] raw asbestos—'persons who mine[ ] and s[ell] commercial asbestos.'" *Id.* at 1073 (quoting IND. CODE § 34-20-3-2(d)(1) (2016)). Where defendants had only sold "asbestos-containing products" (as opposed to producing raw asbestos), the ten-year statute of repose applied. *Id.* This had been the position taken by Judge Michael P. Barnes in a particularly good opinion for the Indiana Court of Appeals. *Jurich v. Garlock, Inc.*, 759 N.E.2d 1066 (Ind. Ct. App. 2001), *rev'd*, 785 N.E.2d 1093 (Ind. 2003). Justice Dickson in dissent in *Ott* and three other panels of the Indiana Court of Appeals interpreted the asbestos provision to apply to any defendant that mined or sold raw asbestos or asbestos products. *Ott*, 785 N.E.2d at 1078-79 (Dickson, J., dissenting); *Harris v. A.C. & S., Inc.*, 766 N.E.2d 383 (Ind. Ct. App. 2002), *rev'd*, 785 N.E.2d 1087 (Ind. 2003); *Allied Signal, Inc. v. Herring*, 757 N.E.2d 1030 (Ind. Ct. App. 2001), *rev'd*, *AlliedSignal, Inc. v. Herring*, 785 N.E.2d 1090 (Ind. 2003); *Black v. ACandS, Inc.*, 752 N.E.2d 148 (Ind. Ct. App. 2001), *rev'd*, 785 N.E.2d 1084 (Ind. 2003).

89. *Ott*, 785 N.E.2d at 1070, 1073.

90. *Id.* at 1093 (Dickson, J., dissenting).

91. *Id.* at 1073-75 (majority opinion). Plaintiff's argument here tracks *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999), a challenge to the constitutionality under article 1, section 23, of the Medical Malpractice Act's statute of limitations. *Martin* will be discussed *infra* in Part III.B.

92. *Ott*, 785 N.E.2d at 1074.

93. *Id.* at 1074-75.

94. *Id.* at 1075.

95. IND. CODE § 34-20-3-2(b) (2016) (emphasis added).

this made it “difficult to reconcile science and law.”<sup>96</sup> While the discovery-based statutory definition of “accrue” is the relevant point at which the statute of limitations is triggered, an earlier point in time is needed to determine whether the cancer developed before the statute of repose had run.<sup>97</sup> For this purpose, the Court said that an asbestos product liability action accrues at the point the cancer could have been diagnosed.<sup>98</sup> Having found that the IPLA statute of repose would violate article 1, section 12, in such a circumstance, the Court remanded for fact-finding on this issue.<sup>99</sup>

Justice Dickson’s dissent declared that article 1, section 12, is violated because the operation of the statute of repose closes courts to all asbestos claims.<sup>100</sup> He quoted the findings of the trial court, Judge Stanley A. Levine, on this point: “[A]sbestos caused cancer takes between ten (10) and twenty-five (25) years to manifest itself. Even with the utmost amount of diligence [the plaintiff] would not have been able to meet the time restrictions of [the statute of repose]. No one would have.”<sup>101</sup>

Justice Dickson specifically challenged the Court’s diagnosis-based definition of “accrual,” emphasizing its deviation from the statute.<sup>102</sup> This seems surprising since the Court’s definition permits some plaintiffs to pursue claims who would be unable to do so under the statutory definition. I think his point is that, for the reason just stated, the statute operates to preclude all claims; that it is so pernicious that no asbestos claims at all can be pursued.

As to article 1, section 23, the plaintiff argued that he had been deprived of his right to equal privileges and immunities in that IPLA created a distinction between victims of asbestos and other victims of other defective products.<sup>103</sup> The Court acknowledged the existence of the distinction, but found it unnecessary to determine whether the distinction is constitutionally permissible because, to the extent that asbestos plaintiffs were treated differently by the distinction, the classification worked in favor of asbestos plaintiffs, i.e., they received the benefit of no statute of repose.<sup>104</sup>

Justice Dickson responded that the Court had not described the plaintiff’s claim accurately.<sup>105</sup> It was not asbestos and non-asbestos plaintiffs that constituted “the set of unequally treated classes identified in the plaintiff’s

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96. *Ott*, 785 N.E.2d at 1075.

97. *Id.*

98. The Court defined “accrue” in this context to mean the “point at which a physician who is reasonably experienced at making such diagnoses could have diagnosed the individual with an asbestos-related illness or disease.” *Id.* at 1075.

99. *Id.*

100. *Id.* at 1081 (Dickson, J., dissenting).

101. *Id.*

102. *Id.* at 1082.

103. *Id.* at 1077 (majority opinion).

104. *Id.* Justice Dickson’s dissent framed the article 1, section 23, issue differently. *Id.* at 1083 (Dickson, J., dissenting).

105. *Id.* at 1083 (Dickson, J., dissenting).

appeal,” he maintained.<sup>106</sup> “To the contrary, the plaintiff allege[d] that . . . the statute of repose unconstitutionally grants unequal treatment to those employees who contract asbestos-related diseases from exposure to raw asbestos in contrast to those whose diseases result from exposure to asbestos-containing products.”<sup>107, 108</sup>

Justice Dickson then argued that that were “no inherent characteristics that distinguish workers with asbestos-related diseases caused by exposure to raw asbestos from those with the same diseases brought about by exposure to manufactured products containing asbestos. Thus,”<sup>109</sup> he concluded, “the unequal treatment accorded to each class cannot be reasonably related to any inherent differences” and so violates article 1, section 23.<sup>110</sup>

As with his dissent on McIntosh, Justice Dickson’s dissent in *Ott* was joined by Justice Rucker. That is, the IPLA survived both challenges to its constitutionality—but only by 3-2 votes.

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106. *Id.*

107. *Id.*

108. *Id.* After I left the court, a major clash on this point erupted. In *Myers v. Crouse-Hinds Division of Cooper Industries, Inc.*, the court adopted Justice Dickson’s position (indeed, Justice Dickson wrote *Myers*) that the “unequal treatment” accorded raw-asbestos and asbestos-related products claims did, in fact, violate article 1, section 23. 53 N.E.3d 1160, 1165-66 (Ind. 2016). Because the plaintiff in *Ott* had raised a different claim, *Ott*’s holding was not precedent, the court maintained. *Id.* at 1164. Justice Massa wrote a dissent on this point, excoriating the majority for insisting that

stare decisis has not been offended, claiming it resolves the case on grounds not decided in *Ott*. But not only were those grounds raised in *Ott*, they were properly rejected as a matter of law. Through artful reasoning, the majority has engaged in stealth overruling, to the detriment of the public, confusing the law and eliminating transparency and predictability.

*Id.* at 1172 (Massa, J., dissenting).

Justice Massa also gives a thoroughly convincing analysis of why the “unequal treatment” asserted by the Court does not violate article 1, section 23. *Id.* at 1171.

Contrary to Justice Massa’s view, I do not believe that majority opinion in *Ott* addressed whether treating raw-asbestos and asbestos-containing-products plaintiffs differently violated article 1, section 23, and so I think it was eligible for consideration in *Myers*. But I agree with Justice Massa that Justice Dickson was wrong to say in *Myers* that such claim had not been raised in *Ott*, *id.* at 1164, when, in fact, Justice Dickson himself had said exactly the opposite—that the claim had been raised—in *Ott*. *Ott*, 785 N.E.2d at 1083 (Dickson, J., dissenting). I think that Justice Dickson should have acknowledged in *Myers* that he had changed his mind and then explained why he had done so. And I agree with Justice Massa’s analysis and disposition of the substance of the article 1, section 23, issue.

109. *Ott*, 785 N.E.2d at 1083 (Dickson, J., dissenting).

110. *Id.*



*E. An Introduction Concluded*

This lengthy Introduction has viewed two periods of time arbitrarily called the Historical and Modern Ages and examined that in both periods there was legislative reaction to common law decisions of courts: Laws were passed that varied or directly overruled the common law decisions. In both Ages, courts were then called upon to interpret those statutes and using both the derogation canon and the constitution, sometimes did so, thereby limiting the reach of the legislative enactments.

We have seen, in other words, legal history repeating itself. But ironically enough, the ideology of the common law and the legislative enactments in these two Ages was reversed: In the Historical Age, courts rendered conservative common law decisions (e.g., claims barred by contributory negligence), the legislatures enacted progressive statutes (e.g., workers' compensation acts), and then courts were asked to and sometimes did limit the reach of those progressive statutes using the derogation canon and substantive due process. But when it came to the Modern Era, courts rendered progressive common law decisions (e.g., recognizing strict liability), the legislatures enacted conservative "tort reform" statutes (e.g., IPLA), and then courts were asked to and sometimes did limit the reach of those "tort reform" statutes using the derogation canon and substantive due process.

These themes will permeate this entire Article and are returned to with particular emphasis in Parts III, IV, and V when examining medical malpractice, the use of collateral source evidence, and sovereign immunity, three areas of Indiana tort law in which there have been many common law decisions, tort reform enactments, and judicial review of such statutes.

## II. TWO OVERARCHING TOPICS IN INDIANA TORT LAW

*A. Summary Judgment: Hughley's High Hurdle*

Although the deviation of Indiana's summary judgment standard from the federal one is a matter of civil procedure, not tort law, the standard's centrality in tort litigation is so pervasive that I need to start with it.

In 1994, the Court decided *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*,<sup>111</sup> a defendant's request for summary judgment on the plaintiff's promissory estoppel claim.<sup>112</sup> Justice Dickson famously wrote:

Under Indiana's standard, the party seeking summary judgment must demonstrate the absence of any genuine issue of fact as to a determinative issue, and only then is the non-movant required to come forward with contrary evidence.

In this respect, Indiana's summary judgment procedure abruptly diverges

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111. 644 N.E.2d 118 (Ind. 1994).

112. *Id.* at 120.

from federal summary judgment practice. Under the federal rule, the party seeking summary judgment is not required to negate an opponent's claim. The movant need only inform the court of the basis of the motion and identify relevant portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).<sup>113</sup>

Justice Dickson continued: "The burden then rests upon the non-moving party to make a showing sufficient to establish the existence of each challenged element upon which the non-movant has the burden of proof. Indiana does not adhere to *Celotex* and the federal methodology."<sup>114</sup>

Chief Justice Randall T. Shepard and Justices Roger O. DeBruler and Richard M. Givan concurred.<sup>115</sup> There were no dissents.<sup>116</sup>

The next big event was *Lenhardt Tool & Die Co. v. Lumpe*<sup>117</sup> in 2000. By then the court had changed with the retirements of Justices DeBruler and Givan. Their seats were now held by Justices Theodore R. Boehm and Robert D. Rucker.

The plaintiff had been injured in a workplace accident when a mold exploded.<sup>118</sup> Because the mold had been destroyed and there were no records as to where the mold had originated, there was no way of establishing that the defendant had manufactured the mold.<sup>119</sup> The trial court had denied summary judgment sought by the defendant and the Court of Appeals had affirmed.<sup>120</sup> Justice Boehm argued summary judgment should have been granted.<sup>121</sup> "[I]n my view under Indiana Trial Rule 56, as under federal practice, it is sufficient for summary judgment to establish on undisputed facts either: (1) the non-movant will be unsuccessful as a matter of law or (2) the non-movant will be unable at trial to establish an essential fact on which the non-movant carries the burden of proof."<sup>122</sup>

However, only Chief Justice Shepard joined Justice Boehm in voting to grant

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113. *Id.* at 123 (citation form modified).

114. *Id.* (citation omitted). Justice Dickson added that "Indiana is not the only state to take exception to the federal *Celotex* standard." *Id.* at 123 n.3 (citing *Berner v. Caldwell*, 543 So.2d 686, 688 (Ala. 1989)).

115. *Id.*

116. I filed a cryptic "concurring in result" vote without writing a separate opinion. *Id.* (Sullivan, J., concurring in result without separate opinion). I do not remember what my thinking was at the time but it likely was that summary judgment was appropriately denied under the more relaxed *Celotex* standard and so it was not necessary to explicate a heightened standard in this case.

117. 735 N.E.2d 221 (Ind. 2000) (order denying transfer) (Rucker, J., not participating); *see also* *Lenhardt Tool & Die Co. v. Lumpe*, 722 N.E.2d 824 (Ind. 2000) (Boehm, J., dissenting from denial of transfer).

118. *Lenhardt*, 722 N.E.2d at 825.

119. *Id.*

120. *Id.*

121. *Id.* at 828.

122. *Id.* at 826-27.

transfer and reversed the trial court and Court of Appeals.<sup>123</sup> Justice Dickson and I voted to deny transfer, not issuing (in accordance with custom) any written explanation.<sup>124</sup> Justice Rucker did not participate in the vote.<sup>125</sup>

Now there are two ways to read what happened in *Lumpe*.

Justice Boehm's opinion can be read not as a call to overrule *Jarboe* but simply as an argument that on the facts of *Lumpe*, where it would be impossible for the defendant to prove it was not the manufacturer of the now-non-existent mold, it would be sufficient for the defendant to meet its burden by proving *Lumpe* would be unable to establish the defendant had manufactured the mold. In other words, Justice Boehm's opinion can be read to distinguish *Jarboe*, not overrule it.

The other way of reading Justice Boehm's opinion is to say that he (and Chief Justice Shepard, who concurred in his dissent) thought Indiana should follow *Celotex*; and that at least Justices Dickson and Sullivan were content with the status quo. I think most observers walked away from *Lumpe* thinking *Jarboe*, not *Celotex*, was the Indiana rule. But nowhere in Justice Boehm's opinion does he explicitly say *Jarboe* should be overruled and replaced by *Celotex*.

The reason I make such a fine distinction is that in 2012, the Court of Appeals issued an opinion on this subject that had some absolutely startling language.

In a medical malpractice case, *Commissioner of Indiana Department of Insurance v. Black*,<sup>126</sup> a panel of the Court of Appeals consisting of Judges Patricia A. Riley, Ezra H. Friedlander, and Paul D. Mathias, said *Jarboe* had been criticized over the years as requiring a movant for summary judgment to prove a negative; and then described Justice Boehm's *Lumpe* dissent, including his discussion of *Celotex*.<sup>127</sup>

Then the Court said this: "Today, we accept Justice Boehm's views on this subject . . . as the *better reasoned interpretation* of Indiana Trial Rule 56 and explicitly adopt it to apply it to the unique circumstances before us."<sup>128</sup>

Better reasoned than what? Better than *Jarboe*? How could that be; how could the Court of Appeals overrule Indiana Supreme Court precedent? Yet if you were of the view that "Justice Boehm's views on the subject" was that *Jarboe* should be replaced by *Celotex*, that is what the Court of Appeals seemed to be saying.

But we were never to find out what the Court thought about all this. The

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123. *Id.* at 828.

124. *See generally id.*

125. Justice Rucker had been a member of the panel of the Court of Appeals that had decided *Lumpe* and had concurred in the decision. *Lenhardt Tool & Die Co. v. Lumpe*, 703 N.E.2d 1079 (Ind. Ct. App. 1998).

126. 962 N.E.2d 675 (Ind. Ct. App.), *trans. granted, opinion vacated*, 969 N.E.2d 86 (Ind. 2012).

127. *Id.* at 680-81.

128. *Id.* at 681 (emphasis added).

Court quickly granted transfer of the case<sup>129</sup> but then, some months later, unanimously dismissed the appeal after the parties advised the court that a settlement agreement had been reached.<sup>130</sup> The *Black* opinion has been “vacated and is not precedent.”<sup>131</sup>

On September 9, 2014, Chief Justice Loretta Rush authored *Hughley v. State*,<sup>132</sup> about as full-throated an endorsement of *Jarboe* as one could possibly imagine.

The case is not a big tort dispute or high-dollar commercial matter. Instead, the State had sought civil forfeiture of some property owned by a man convicted of drug dealing. To be entitled to the property, the State needed to show the property—some cash and vehicles—were the proceeds of or used to facilitate the drug dealing.<sup>133</sup> The State moved for summary judgment on this point and the defendant countered with an extremely flimsy affidavit.<sup>134</sup> Was the flimsy affidavit enough to defeat summary judgment?<sup>135</sup>

Yes it was, wrote the Chief Justice of Indiana for a unanimous Court.<sup>136</sup>

Now sometimes it is hard to understand what an appellate court is saying but there is no misunderstanding *Hughley*. Chief Justice Rush began by reciting Indiana’s historic divergence from federal summary judgment practice under *Jarboe*<sup>137</sup> and then acknowledged that the *Jarboe* standard has been criticized for allowing summary judgment to be defeated with a “self-serving affidavit.”<sup>138</sup> And then she lets the reader have it, right between the eyes:

That observation [that summary judgment can be defeated with a self-serving affidavit] is accurate, but using it as the basis for criticism overlooks the policy

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129. *Comm’r of Ind. Dep’t of Ins. v. Black*, 969 N.E.2d 86 (Ind. June 4, 2012) (order granting transfer; no vote line shown).

130. *Comm’r of Ind. Dep’t of Ins. v. Black*, 973 N.E.2d 1116 (Ind. Sept. 11, 2012) (order dismissing appeal) (“[T]he Court of Appeals’ opinion, reported as *Comm’r. of Ind. Dep’t. of Ins. v. Black*, 962 N.E.2d 675 (Ind. Ct. App. 2012), remains vacated and is not precedent.”). All Justices concurred; the four members of the Court were Chief Justice Dickson and Justices Rucker, David, and Massa. There was one vacancy.

131. *Id.* Now-superseded Appellate Rule 11(B)(3) provided that when the Indiana Supreme Court granted “transfer” of a case from the Court of Appeals, the decision of the Court of Appeals was “vacated and held for naught.” Effective January 1, 2001, a new set of Indiana Appellate Rules were adopted that now provide “[i]f transfer is granted, the opinion or memorandum decision of the Court of Appeals shall be automatically vacated”; the “held for naught” language has been jettisoned. *See* IND. APP. R. 58(A). The Court’s order in *Black* explicitly provides that “the Court of Appeals’ opinion, reported as *Comm’r. of Ind. Dep’t. of Ins. v. Black*, 962 N.E.2d 675 (Ind.Ct.App.2012), remains vacated and is not precedent.” *Black*, 973 N.E.2d at 1116.

132. 15 N.E.3d 1000 (Ind. 2014).

133. *Id.* at 1002.

134. *Id.*

135. *Id.* at 1004.

136. *Id.*

137. *Id.* at 1003.

138. *Id.*

behind that heightened standard. Summary judgment is a desirable tool to allow the trial court to dispose of cases where only legal issues exist. . . . We have therefore cautioned that summary judgment is not a summary trial, and the Court of Appeals has often rightly observed that it is not appropriate merely because the non-movant appears unlikely to prevail at trial. In essence, Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims.<sup>139</sup>

Turning to the merits, the Chief Justice wrote,

[b]ecause Defendant designated competent evidence in response to the State's motion for summary judgment, weighing it—no matter how decisively the scales may seem to tip—was a matter for trial, not summary judgment. The trial court's judgment is therefore reversed, and we remand this matter with instructions to deny the State's motion for summary judgment.<sup>140</sup>

All Justices concurred.<sup>141</sup>

The debate between *Jarboe* and *Celotex* is over. *Hughley* has quickly become the lodestar of Indiana's summary judgment law and any litigant or judge considering a motion for summary judgment today must clear *Hughley*'s high hurdle.<sup>142</sup>

#### *B. The Webb of Foreseeability*

My predecessor on the Court, Justice Jon D. Krahulik, served only briefly but left an important legacy of opinions,<sup>143</sup> including *Webb v. Jarvis*.<sup>144</sup> *Webb* presented the knotty problem of the liability, as a matter of law, of a physician to a third person injured by the physician's patient as a result of treatment.<sup>145</sup> After having been shot by Dr. Webb's patient, Jarvis sought recovery from Webb on the theory that the shooting had been caused by Webb's overprescribing of anabolic steroids which had turned his patient "into a toxic psychotic who was unable to control his rages."<sup>146</sup>

The four elements of a negligence action have long been recited by courts in Indiana and elsewhere as duty, breach, causation, and harm,<sup>147</sup> and at issue in

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139. *Id.* at 1003-04 (internal quotations and citations omitted).

140. *Id.* at 1005-06.

141. *Id.* at 1006.

142. Since *Hughley* was decided on September 9, 2017, it has been cited in 164 Indiana appellate court decisions, an average of slightly more than one per week. (Statistics compiled by the author using Westlaw search conducted July 2, 2017.)

143. See Frank Sullivan, Jr., *A Tribute to Justice Jon D. Krahulik*, 39 IND. L. REV. 719 (2006).

144. 575 N.E.2d 992 (Ind. 1991).

145. *Id.* at 994.

146. *Id.*

147. *Miller v. Griesel*, 261 Ind. 604, 610-11 (1974).

*Webb* was the element of duty.<sup>148</sup> If *Webb* did not have a “duty” to *Jarvis*, then *Webb* had no liability to *Jarvis*.<sup>149</sup> Justice Krahulik’s opinion set forth a methodology for determining whether a defendant had a duty to a plaintiff in a particular case. That methodology consisted of balancing<sup>150</sup> three factors: (1) the relationship between the parties,<sup>151</sup> (2) the reasonable foreseeability of harm to the person injured,<sup>152</sup> and (3) public policy concerns.<sup>153</sup>

The methodology produced a slam dunk in favor of Dr. *Webb*.<sup>154</sup> On the “relationship between the parties” factor, the Court erected a knowledge standard—a professional has no liability to a third person who relies on the professional’s conclusions or opinions unless the professional had actual knowledge of the third person’s reliance.<sup>155</sup> As to the “foreseeability” factor, the Court concluded, “as a matter of law,” it was “not reasonably foreseeable that Dr. *Webb*’s prescribing of the medication would put [his patient] in such a state that he would use a weapon to cause harm to another.”<sup>156</sup> And on the “public policy” factor, the Court focused on not impinging upon a physician’s loyalty to the physician’s patient which, the Court said, must be undivided. It would be “untenable” and “unacceptable,” the Court said, to put a physician in the position of having to “weigh[ ] . . . personal risk of exposure to liability from third persons . . . against his patient’s need for the medication.”<sup>157</sup>

Whatever one might think of the *Webb v. Jarvis* test generally or the “relationship of the parties” and “public policy” factors in particular,<sup>158</sup> treating

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148. *Webb*, 575 N.E.2d at 995.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 996-97.

153. *Id.* at 997.

154. *Id.* at 998. All justices concurred. *Id.* Justice Dickson wrote a concurring opinion in which he wrote that there might be circumstances where physicians could be found to have a duty to “unknown third persons foreseeably at risk of injury resulting from the negligent administration or prescription of medication.” *Id.* (Dickson, J., concurring). From the language of the Court’s opinion, it is very hard to see how this could ever be so.

155. *Id.* at 996 (majority opinion).

156. *Id.* at 997.

157. *Id.*

158. Immediately after it was decided, *Webb v. Jarvis* was severely criticized in a law review article written by Jay Tidmarsh. Jay Tidmarsh, *Tort Law: The Languages of Duty*, 25 IND. L. REV. 1419, 1425-27 (1992) (“In spite of its apparent simplicity, this new test for duty suffers from three serious flaws. The first is that the court provided less than two paragraphs of discussion and no precedential or theoretical analysis for its new test. The lack of analysis and justification robbed this new framework of much of its prescriptive power and force. The second weakness of the test is a problem shared by all multifactor balancing tests: lack of certainty and undue pliability. . . . [T]he third weakness of *Webb* [is] whether in fact the new test of duty will be taken seriously.”). Professor Tidmarsh’s third point was a little bit of a cheap shot; *Webb v. Jarvis* has been taken seriously. But, as I think was probably his actual point, *Webb* has not been followed consistently.

the foreseeability factor as a matter of law was problematic. An early and highly significant articulation of this difficulty came from Judge James S. Kirsch of the Indiana Court of Appeals in the 1996 decision, *Goldsberry v. Grubbs*.<sup>159</sup> Judge Kirsch observed there had been inconsistent application and results when applying the *Webb* three-factor balancing test—even on similar facts.<sup>160</sup> He argued this occurred because of a failure to distinguish between foreseeability in the context of duty and foreseeability in the context of proximate cause.<sup>161</sup>

Judge Kirsch's opinion explained:

[T]he foreseeability component of the duty analysis must be something different than the foreseeability component of proximate cause. More precisely, it must be a lesser inquiry; if it was the same or a higher inquiry it would eviscerate the proximate cause element of negligence altogether. If one were required to meet the same or a higher burden of proving foreseeability with respect to duty, then it would be unnecessary to prove foreseeability a second time with respect to proximate cause. Additionally, proximate cause is normally a factual question for the jury, while duty is usually a legal question for the court. As a result, the foreseeability component of proximate cause requires an evaluation of the facts of the actual occurrence, while the foreseeability component of duty requires a more general analysis of the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence.<sup>162</sup>

When the Court of Appeals decided *Goldsberry*, it “entered a decision in conflict with another decision of the Court of Appeals on the same important issue.”<sup>163</sup> The Court of Appeals had earlier decided *North Indiana Public Service Co. v. Sell*,<sup>164</sup> which, as Judge Ezra H. Friedlander wrote in dissent in *Goldsberry*, compelled the opposite result.<sup>165</sup> I voted to grant transfer but none of my colleagues joined me.<sup>166</sup>

In 2003, Justice Boehm would observe that Judge's Kirsch view of foreseeability proposed in *Goldsberry* (which Justice Boehm called “schizophrenic”<sup>167</sup>) had “been embraced by some panels of the Indiana Court of

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See *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 387 (Ind. 2016); Hon. Theodore R. Boehm, *A Tangled Webb-Reexamining the Role of Duty in Indiana Negligence Actions*, 37 IND. L. REV. 1, 5 (2003).

159. 672 N.E.2d 475 (Ind. Ct. App. 1996).

160. *Id.* at 478.

161. *Id.* at 478-79.

162. *Id.* at 479 (citations omitted).

163. IND. APP. R. 57(H)(1).

164. 597 N.E.2d 329 (Ind. Ct. App. 1992).

165. *Goldsberry*, 672 N.E.2d at 481 (Friedlander, J., dissenting).

166. *Goldsberry v. Grubbs*, 726 N.E.2d 306 (Ind. 1999) (denying transfer from *Goldsberry*, 672 N.E.2d at 479) (all justices concurring except Sullivan, J., who voted to grant transfer).

167. Boehm, *supra* note 158, at 12.

Appeals,<sup>168</sup> rejected by others,<sup>169</sup> and noted by some without taking sides.”<sup>170</sup> The most interesting thing Justice Boehm tells us about this split in the Court of Appeals over *Goldsberry* is that in one of those cases, *Bush v. NIPSCO*,<sup>171</sup> then-Court of Appeals Judge Robert D. Rucker dissented, expressly agreeing with *Goldsberry*.<sup>172</sup>

These observations from Justice Boehm about *Goldsberry* came not in an opinion of the Indiana Supreme Court but in a law review article in which he argued for excising the term “duty”—and the various baggage the term carries with it—from the analysis of negligence actions.<sup>173</sup>

Justice Boehm’s argument to abandon the term “duty” is subtle and complex. He would neither increase nor reduce the difficulty of establishing liability for negligence.<sup>174</sup> Rather, he maintained the term “duty” is misleading, “add[ing] nothing to the analysis of a negligence action.”<sup>175</sup> Justice Boehm’s formulation of the negligence action would not use the word “duty” but would “incorporate the same principle” in what he maintains would be “a clearer line of reasoning.”<sup>176</sup> And the principle is this: Policy considerations sometimes preclude imposing liability even where a defendant has not taken reasonable steps to avoid harm to others in an activity the defendant undertook and could control.<sup>177</sup>

Justice Boehm saw *Goldsberry* as an attempt to achieve the same clarifying objective. He quoted with approval Judge L. Mark Bailey’s characterization of *Goldsberry* as an effort to address “some of the confusion created by the *Webb* decision.”<sup>178</sup> If “foreseeability” is the same for both duty and proximate cause, Judge Bailey said, “deciding the duty question would subsume the entire law of negligence, i.e., duty, breach and proximate cause, into the duty question.”<sup>179</sup> But with *Webb* distinguishing the two, *Goldsberry* was a worthy attempt, Justice

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168. *Id.* at 12 n.80 (citing *City of Gary v. Smith & Wesson*, 776 N.E.2d 368, 386 (Ind. Ct. App. 2002); *City of Indianapolis v. Pippin*, 726 N.E.2d 341, 346 (Ind. Ct. App. 2000); *Franklin v. Benock*, 722 N.E.2d 874, 879 (Ind. Ct. App. 2000); *King v. Northeast Sec., Inc.*, 732 N.E.2d 824, 834 (Ind. Ct. App. 2000)).

169. *Id.* at 12 n.81 (citing *Hammock v. Red Gold, Inc.*, 784 N.E.2d 495, 501 n.10 (Ind. Ct. App. 2003); *Bradtmiller v. Hughes Prop., Inc.*, 693 N.E.2d 85, 89 (Ind. Ct. App. 1998); *Bush v. NIPSCO*, 685 N.E.2d 174, 179 (Ind. Ct. App. 1997) (Rucker, J., dissenting)).

170. *Id.* at 12 n.82 (citing *Ousley v. Bd. of Comm’rs of Fulton Cty.*, 734 N.E.2d 290 (Ind. Ct. App. 2000)).

171. 685 N.E.2d 174 (Ind. Ct. App. 1997) (Rucker, J., dissenting).

172. *Id.* at 179.

173. Boehm, *supra* note 158, at 12 n.82.

174. *Id.* at 18.

175. *Id.* at 12.

176. *Id.* at 17.

177. *Id.* at 19.

178. *Id.* at 11-12 (quoting *Hammock v. Red Gold, Inc.*, 784 N.E.2d 495, 507 (Ind. Ct. App. 2003) (Bailey, J., dissenting)).

179. *Id.* at 11 (quoting *Hammock*, 784 N.E.2d at 507 (Bailey, J., dissenting)).



Boehm said, “to explain how the two can coexist.”<sup>180</sup>

But, Justice Boehm said, “the logic of this situation drives us not to find two concepts of foreseeability, but rather to recognize that [the use of the term “duty”] adds nothing to the analysis of a negligence action.”<sup>181</sup>

Justice Boehm’s views were expressed in a law review article, never in an opinion of the Court. As he explained it,

I see no point to writing separately in judicial opinions as to methodology. In the first place, because *Webb* is existing precedent, the parties usually brief their cases in *Webb* terms, and no one argues for the approach I suggest. Moreover, as already noted, the result in a given case is usually unaffected by choice of methodology. If I agree with the conclusion that the law does or does not permit the plaintiff to recover from the defendant under the circumstances, and the methodology of the opinion is consistent with existing precedent, I expect to concur without elaborating the points made in this Article.<sup>182</sup>

Justice Boehm’s formulation has not been adopted by the Court. Speaking for myself, I pretty much thought his analysis was correct but you had to call the principle he identified something and “duty” was as good a word as any, one with which lawyers and judges are well familiar. And Justice Krahulik’s achievement in *Webb v. Jarvis* has now limped along for a quarter century—not perfect but still useful, still on the books. But never did the Court address the *Goldsberry* issue: whether foreseeability means the same thing as a component of duty as it does as a component of proximate cause.<sup>183</sup>

There has been a recent development. In 2016, Justice Rucker authored *Goodwin v. Yeakle’s Sports Bar & Grill, Inc.*,<sup>184</sup> for a unanimous Court. *Goodwin* involved the persistent question of the duty of the proprietor of a place where people congregate—a store, mall, tavern—for criminal acts committed on the premises.<sup>185</sup> Justice Rucker wrote the opinion and starts with what he calls the

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180. *Id.* at 12. As Boehm says, “Attempting to straighten things out is the most the court of appeals can do when faced with directly applicable Indiana Supreme Court precedent.” *Id.*

181. *Id.*

182. *Id.* at 19. Boehm did once—but only once—deploy his article to criticize the duty analysis in a majority opinion of the Court. *Caesars Riverboat Casino, LLC v. Kephart*, 934 N.E.2d 1120, 1125 (Ind. 2010) (Boehm, J., concurring).

183. In *Estate of Heck v. Stoffer*, 786 N.E.2d 265, 269 (Ind. 2003), the Supreme Court, without citing *Goldsberry*, said, “We decline to take a narrow view of *Webb*’s foreseeability of harm prong and determine that this factor weighs in favor of the establishment of a duty.” This suggested rejection of the *Goldsberry* approach was sufficiently opaque that *Goldsberry* “remained resilient.” *Goodwin v. Yeakle’s Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 391 (Ind. 2016) (citing *Sparks v. White*, 899 N.E.2d 21, 29-30 (Ind. Ct. App. 2008); *Barnard v. Menard, Inc.*, 25 N.E.3d 750, 755 (Ind. Ct. App. 2015)).

184. 62 N.E.3d 384.

185. *Id.* at 387. For other examples of this fact pattern, see *Paragon Family Restaurant v. Bartolini*, 799 N.E.2d 1048, 1052 (Ind. 2003); *Vernon v. Kroger Co.*, 712 N.E.2d 976, 979 (Ind.

“journey” from *Webb v. Jarvis* in determining the existence of duty.<sup>186</sup> It is comprehensive and, to the extent the reader desires a detailed explication of the cases implicated by the duty principle, I commend it. After more than two pages of history, Goodwin turned to the question of foreseeability as a component of duty: “[B]ecause foreseeability is . . . a component of duty, and because whether a duty exists is a question of law for the court to decide, the court must of necessity determine whether the criminal act at issue here was foreseeable.”<sup>187</sup> The Court took up the *Goldsberry* question and almost exactly twenty years after *Goldsberry* was decided, the Court adopted it, “distinguish[ing] between the analytical framework used to determine foreseeability in the context of duty and that used to determine foreseeability in the context of proximate cause.”<sup>188</sup> Henceforth:

In a negligence action, whether a duty exists is a question of law for the court to decide. And in those instances where foreseeability is an element of duty, this necessarily means the court must determine the question of foreseeability as a matter of law. When doing so the court is tasked with engaging in a general analysis of the broad type of plaintiff and harm involved without regard to the facts of the actual occurrence.<sup>189</sup>

### III. MEDICAL MALPRACTICE

#### *A. Indiana’s Signature Tort Reform: The Indiana Medical Malpractice Act*

Part I.D of this Article described how legislatures in the Modern Age responded to progressive common law decisions with “tort reform” statutes. One of the nation’s first and most important tort reform statutes was the Indiana Medical Malpractice Act (“IMMA”),<sup>190</sup> enacted by the Indiana General Assembly in 1975<sup>191</sup> at the behest of Governor Otis R. Bowen.<sup>192</sup> The statute created

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1999); and *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 973 (Ind. 1999).

186. *Goodwin*, 62 N.E.3d at 387.

187. *Id.* at 389.

188. *Id.* at 391.

189. *Id.* at 394. The actual resolution of *Goodwin* was interesting. The trial court had granted summary judgment for the defendant using the discarded methodology for determining foreseeability. But, the Court said, “we review questions of law *de novo*. Engaging in such review we conclude the trial court properly granted summary judgment in the [defendant’s] favor.” *Id.* The Court therefore affirmed the trial court’s judgment. *Id.*

190. IND. CODE § 34-18 (2016).

191. Pub. L. No. 146-1975, § 1, 1975 Ind. Acts 854 (codified at IND. CODE § 34-18 (2016)). For more information on the legislative history of this and other Indiana tort reform statutes, see *supra* note 60.

192. Governor Bowen was a physician, went by the nickname “Doc,” and used his “M.D.” designation as part of his official signature. *Otis R. Brown*, IN.GOV, <https://secure.in.gov/governorhistory/2336.htm> (last visited June 2, 2017) [<https://perma.cc/J8NX-BGJG>]. Following

voluntary state-sponsored liability insurance for doctors and other health care providers, established a patient compensation fund, and subjected negligence claims against health care providers to special controls limiting patient remedies.

The narrative advanced by Governor Bowen and health care providers supporting IMMA was this. In the year or so prior to its enactment,

seven of the ten insurance companies writing the majority of medical malpractice insurance policies in the State ceased or limited writing such insurance because of unprofitability or an inability to calculate an adequate premium. Premiums had increased as much as 1200 percent over a period of fifteen years [ostensibly] because of the increase in the number and size of claims. Physicians practicing high risk specialties such as anesthesiology were hard pressed or totally unable to purchase insurance coverage. . . . Emergency services were discontinued at some hospitals. Health care providers had become fearful of the exposure to malpractice claims and at the same time were unable to obtain adequate malpractice insurance coverage at reasonable prices.

According to the Legislature's appraisal, these conditions implicated the vital interests of the community in the availability of the professional services of physicians and other health care providers. The Legislature responded [by adopting the medical malpractice act] in an effort to preserve those services and thereby to protect the public health and well-being of the community.<sup>193</sup>

Now absent from this narrative is any reference to progressive common law decisions exposing healthcare providers to greater medical malpractice liability. But of course that was implicit in the entire rationale. Insurance premiums would not be going through the roof unless doctors were at risk of being held liable for significant damage awards.

Here are four of the principal features of the Indiana medical malpractice regime:

- First, a state-sponsored patient's compensation fund ("PCF") is established to pay medical malpractice claims against "qualified health care providers" that exceed an annual aggregate amount for that provider.<sup>194</sup> Qualified health care providers must meet statutory criteria,<sup>195</sup> demonstrate financial responsibility,<sup>196</sup> have malpractice

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two terms as governor from 1973-1981, he was appointed by President Ronald Reagan to be Secretary of Health and Human Services. *Id.* He served in that capacity in the Reagan cabinet from 1985 until 1989. *Id.*

193. *Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 374, 379 (1980).

194. IND. CODE § 34-18-6-6(a) (2016).

195. *Id.* § 34-18-2-14.

196. *Id.* §§ 34-18-3-2(1), 34-18-4.

liability insurance,<sup>197</sup> and pay a “surcharge” used to capitalize the PCF.<sup>198</sup>

- Second, the total amount of damages to be paid by a qualified provider (i.e., the aggregate annual amount) and the PCF combined is capped at \$1,650,000, effective July 1, 2017, and at \$1,800,000, effective July 1, 2019.<sup>199</sup>
- Third, no medical malpractice lawsuit can be filed until after a special medical review panel has reviewed the case and issued an opinion as to whether the health care provider complied with the applicable standard of care.<sup>200</sup>
- Fourth, the time in which a malpractice action may be brought is severely limited.<sup>201</sup> These limitations are the principal focus of this section of this Article.

Again following the historical pattern described in Part I, IMMA was subjected to court challenges testing its constitutionality, starting with the critically important 1980 decision of the Indiana Supreme Court, *Johnson v. St. Vincent Hospital, Inc.*<sup>202</sup>

In a comprehensive opinion for a unanimous Court, Justice DeBruler held against the plaintiffs on their contention that IMMA violated multiple provisions of the Indiana Constitution.<sup>203</sup> The Court took the position that

197. *Id.* § 34-18-13-1.

198. *Id.* §§ 34-18-3-2(2), 34-18-5.

199. *Id.* § 34-18-14-3, as amended by Pub. L. No. 182-2016, § 9.

200. *Id.* § 34-18-8-4.

201. *Id.* § 34-18-7-1.

202. 273 Ind. 374 (1980).

203. *See generally id.* The plaintiffs’ claims that the following IMMA provisions violated the Indiana Constitution in the following respects:

1. Medical review panel process alleged to violate: (a) jury trial clause (art. 1, § 20); (b) open courts and right to remedy clause (art. 1, § 12); (c) “due process and equal protection clauses of . . . the Indiana Constitution”; (d) equal privileges and immunities clause (art. 1, § 23); (e) special legislation clauses (art. 4, §§ 22 and 23); and (f) separation of powers clause (art. 3, § 1). *Id.* at 380-81.
2. Cap on damages alleged to violate: (a) open courts and right to remedy clause (art. 1, § 12); and (b) “due process and equal protection clauses of . . . the Indiana Constitution”; (c) equal privileges and immunities clause (art. 1, § 23); and (d) jury trial clause (art. 1, § 20). *Id.*
3. Plaintiff attorney fee limitations alleged to violate: (a) “right to contract and to earn a living”; and (b) “due process and equal protection clauses of . . . the Indiana Constitution.” *Id.* at 401, 380.
4. Occurrence-based two-year statute of limitations alleged to violate “due process and equal protection clauses of . . . the Indiana Constitution.” *Id.* at 380-81.
5. Prohibition on plaintiff’s complaint asking for a specific amount alleged to violate: (a) free speech clause (art. 1, § 9); and (b) separation of powers clause (art. 3, § 1). *Id.* at 381.
6. Patient’s compensation fund alleged to violate: (a) special legislation clause (art. 4, § 23);

[t]hroughout the State premiums for medical malpractice insurance were high and a large number of private companies were withdrawing their product from the market. These circumstances and conditions particularly affected health care providers and created the danger that health care services would not be maintained at their existing level contrary to the public interest.<sup>204</sup>

The Court held these facts to constitute a constitutionally sufficient basis for the legislation notwithstanding the claimed infringements of constitutional rights.<sup>205</sup>

*B. The Malpractice Act's Occurrence-based Statute of Limitations*

One of the toughest provisions of IMMA, alluded to above, was the limitation on the time in which a malpractice action could be brought. In contrast to standard tort statutes of limitation, which measure the time for filing from the date on which the plaintiff discovers the injury, the Act measured the time of filing from the date the injury occurred and then limited that time to two years.<sup>206</sup> In *Johnson*, this “occurrence” statute of limitations was explicitly held not to violate the Indiana Constitution’s open courts and right to remedy clause.<sup>207</sup>

The Indiana Supreme Court revisited the issue almost twenty years later in *Martin v. Richey*.<sup>208</sup> In that case, the plaintiff had consulted a physician after self-detecting a lump in her breast and experiencing “shooting pains” from the lump.<sup>209</sup> The plaintiff contended, after performing certain procedures, the physician advised her “he thought the lump was benign” and the plaintiff “had nothing to worry about.”<sup>210</sup> Her version of the facts was corroborated by the physician’s nurse practitioner who testified she was in the room with the plaintiff and the physician when the foregoing conversation took place.<sup>211</sup>

The “nothing to worry about” conversation occurred on March 20, 1991.<sup>212</sup> In April, 1994, the plaintiff experienced increased pain from the lump; a biopsy resulted in a diagnosis of breast cancer that required both surgery and chemotherapy.<sup>213</sup>

She filed her medical malpractice claim against the physician on October 14, 1994, well beyond the two year period from the March 20, 1991, “occurrence” of the malpractice and the physician sought dismissal of her complaint on that

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and (b) loaning state credit clause (art. 9, § 12). *Id.*

204. *Id.* at 408.

205. *Id.*

206. IND. CODE § 34-18-7-1 (2016).

207. 273 Ind. at 403.

208. 711 N.E.2d 1273 (Ind. 1999).

209. *Id.* at 1276.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 1277.

basis.<sup>214</sup> She replied that to enforce the statute in her circumstances would violate the Indiana Constitution's open courts and right to remedy clause<sup>215</sup> by denying a remedy to those who do not discover they have been the victims of malpractice until after the statute has run,<sup>216</sup> and the equal privileges and immunities clause<sup>217</sup> by providing remedies to some persons injured by malpractice but not others.<sup>218</sup>

Justice Myra C. Selby wrote the opinion of the Court, holding that to enforce the occurrence-based statute of limitations in these circumstances would be unconstitutional.<sup>219</sup> The Court concluded the equal privileges and immunities clause had been violated because the statute precluded this particular plaintiff, "unlike many other medical malpractice plaintiffs," from pursuing a claim because her disease had a long latency period.<sup>220</sup> And it concluded the open courts and right to remedy guarantees had been violated because the "plaintiff [had had] no meaningful opportunity to file an otherwise valid tort claim within the specified statutory time period because, given the nature of the asserted malpractice and the resulting injury or medical condition, [she had been] unable to discover that she ha[d] a cause of action."<sup>221</sup>

Chief Justice Shepard dissented, taking the position that the outcome of the case was dictated by the precedent of *Johnson v. St. Vincent Hospital*.<sup>222</sup> The Court's opinion in *Martin* suggested that Johnson had held the statute constitutional on its face and Martin was only an as-applied challenge.<sup>223</sup> But, Chief Justice Shepard observed, "The statute's purpose is to adopt an event-based limit rather than a discovery-based limit."<sup>224</sup> If *Martin* says the statute is unconstitutional if the event cannot promptly be discovered, that "seems like a facial unconstitutionality."<sup>225</sup> I think Chief Justice Shepard was clearly correct.<sup>226</sup>

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214. *Id.* at 1282.

215. IND. CONST. art. 1, § 12 ("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.").

216. *Martin*, 711 N.E.2d at 1279.

217. IND. CONST. art. 1, § 23 ("The 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.").

218. *Martin*, 711 N.E.2d at 1279.

219. *Id.* at 1277.

220. *Id.* at 1279-82.

221. *Id.* at 1284.

222. *Id.* at 1286 (Shepard, C.J., dissenting) (citing *Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 374, 403 (1980)).

223. *See id.* at 1279 (majority opinion).

224. *Id.* at 1286 (Shepard, C.J., dissenting).

225. *Id.*

226. Although I agreed with Chief Justice Shepard's analysis of the constitutional issue, I concurred in the result of the Court's opinion. *Id.* at 1285 (Sullivan, J., concurring in result). At issue in *Martin* was whether the trial court had properly granted summary judgment for the defendant. *Id.* at 1274. The Court's decision on the statute's constitutionality reversed the trial court's order. *Id.* The plaintiff advanced a second theory that the Court did not address. In prior

Following *Martin*, the Court had to work out the amount of time a plaintiff has to initiate a malpractice claim following discovery. In *Van Dusen v. Stotts*,<sup>227</sup> a companion case to *Martin*, the plaintiff also was unaware he had cancer and it had spread to his lymph nodes until more than two years following the alleged negligent act.<sup>228</sup> The Court used the case to declare that persons “unable to discover the malpractice and their resulting injury within the two-year statutory period . . . [ may] file their claims within two years of the date when they discover the malpractice and the resulting injury or facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury.”<sup>229</sup>

Suppose alleged malpractice was discovered before the limitations period but within two years of its occurrence. Did the plaintiff only have until two years from the date of occurrence to file the claim? Or two years from the date of discovery?

Although I did not agree with *Martin*, its holding, together with *Van Dusen*’s, seemed to constitutionalize a discovery-based, two year statute of limitations. My reasoning, joined by Justice Rucker, in *Boggs v. Tri-State Radiology, Inc.*,<sup>230</sup> was that *Van Dusen* provided the statutory two-year time period within which to file claims to the members of that class of plaintiffs who do not discover malpractice until more than two years after occurrence.<sup>231</sup> And the IMMA itself gives two years within which to file claims to the members of that class of plaintiffs who

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decisions, the courts had recognized a common law doctrine of “fraudulent concealment”:

The doctrine of fraudulent concealment operates to estop a defendant from asserting a statute of limitations defense when that person, by deception or a violation of a duty, has concealed material facts from the plaintiff thereby preventing discovery of a wrong. Thus, equitable estoppel can arise either from active efforts to conceal the malpractice or from failure to disclose material information when a fiduciary or confidential relationship exists between the physician and patient. The physician’s failure to disclose that which he knows, or in the exercise of reasonable care should have known, constitutes constructive fraud. . . . Fraudulent concealment thus tolls the running of the statute of limitations until either the physician-patient relationship is terminated or the patient discovers the malpractice or learns information which in the exercise of due diligence would lead to the discovery of the malpractice.

Hosp. Corp. of Am. v. Hiland, 547 N.E.2d 869, 873 (Ind. Ct. App. 1989) (citations omitted), *trans. granted and opinion adopted in relevant part by* Cacdac v. Hiland, 561 N.E.2d 758 (Ind. 1990). I was of the view that genuine issues of material fact existed as to whether the defendant was estopped from asserting the statute of limitations defense in accordance with these principles. *Martin*, 711 N.E.2d at 1285 (Sullivan, J., concurring in result).

227. 712 N.E.2d 491 (Ind. 1999); *accord* Harris v. Raymond, 715 N.E.2d 388 (Ind. 1999); Halbe v. Weinberg, 717 N.E.2d 876 (Ind. 1999).

228. *Van Dusen*, 712 N.E.2d at 493.

229. *Id.* at 497.

230. 730 N.E.2d 692, 700 (Ind. 2000) (Sullivan, J., dissenting).

231. *Id.* at 700.

discover malpractice at the time of occurrence.<sup>232</sup> Therefore, the equal privileges and immunities clause demands two years within which to file claims for all remaining medical malpractice plaintiffs, i.e., that class of plaintiffs who discover the malpractice within two years of occurrence.<sup>233</sup>

But the Court's majority saw no such impermissible distinction among these groups of medical malpractice plaintiffs.<sup>234</sup> In *Booth v. Wiley*,<sup>235</sup> the last of the principal medical malpractice statute of limitations cases, Justice Dickson synthesized the holdings of the prior cases:

- "If the discovery date is more than two years beyond the date the malpractice occurred, the claimant has two years after discovery within which to initiate a malpractice action."<sup>236</sup>
- "[I]f the discovery date is within two years following the occurrence of the alleged malpractice, the statutory limitation period applies and the action must be initiated before the period expires, unless it is not reasonably possible for the claimant to present the claim in the time remaining after discovery and before the end of the statutory period."<sup>237</sup>
- "In such cases where discovery occurs before the statutory deadline but there is insufficient time to file, . . . such claimants must thereafter initiate their actions within a reasonable time."<sup>238</sup>

*C. Justice Dickson and Justice Rucker Debate "Wrongful Birth"  
and "Wrongful Life"*

In *Cowe v. Forum Group, Inc.*,<sup>239</sup> a case decided several years before I joined the Court, Justice Dickson's unanimous opinion began by denominating three types of claims:

- "An action for 'wrongful conception or pregnancy' refers to a claim for damages sustained by the parents of an unexpected child alleging that the conception of the child resulted from negligent sterilization procedures or a defective contraceptive product."<sup>240</sup>
- The phrase "wrongful birth" applies to claims brought by the parents of a child born with birth defects alleging that due to negligent medical advice or testing were precluded from an informed decision about whether to conceive a potentially handicapped child or, in the event of

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232. *Id.*

233. *Id.*

234. *Id.* at 697-98 (majority opinion).

235. 839 N.E.2d 1168, 1172 (Ind. 2005).

236. *Id.*

237. *Id.*

238. *Id.*

239. 575 N.E.2d 630 (Ind. 1991).

240. *Id.* at 633 (citation omitted). "This action is recognized in Indiana. *Garrison v. Foy* (1985). Ind. App., 486 N.E.2d 5." *Id.*



a pregnancy, to terminate it.<sup>241</sup>

- “When such action seeks damages on behalf of the child rather than the parents, the phrase ‘wrongful life’ instead of ‘wrongful birth’ is employed.”<sup>242</sup>

*Cowe*, the Court said, was a “wrongful life” claim arising from a most distasteful set of acts: the plaintiff was a child conceived by an intellectually disabled woman unable to walk, talk, or care for herself after having been raped.<sup>243</sup> Both mother and father were residents of a long-term care facility owned by the defendant.<sup>244</sup> The specific claims at issue were that defendant’s failure to (1) protect the mother from rape proximately caused the child’s birth under circumstances where there was “no natural parent capable of caring for and supporting him”<sup>245</sup> and (2) “detect the pregnancy until its fifth month proximately caused a failure of proper prenatal care resulting in physical injury to [the child].”<sup>246</sup>

The Court then turned to conventional “wrongful life” claims where children allege they were born with disabilities due to negligent medical advice or testing.<sup>247</sup> Such claims, the Court said, were not cognizable in Indiana for two interrelated reasons set forth in the accompanying footnote.<sup>248</sup> “[L]ife,” the Court concluded, “even life with severe defects, cannot be an injury in the legal sense.”<sup>249</sup>

Although the birth in *Cowe* was the result of rape and not negligent medical advice or testing, the Court saw that claim for relief as the same—damages as a consequence of the circumstances of the child’s birth. For that reason, the defendant was entitled to summary judgment.<sup>250</sup>

I think that the Court wanted to declare wrongful life claims non-cognizable

241. *Id.* (citations omitted).

242. *Id.* (citations omitted).

243. *Id.* at 632.

244. *Id.*

245. *Id.* (internal quotation marks omitted).

246. *Id.*

247. *Id.* at 633.

248.

An overwhelming majority of other jurisdictions considering the issue have rejected claims for wrongful life by children born with congenital disorders. There are two interrelated grounds upon which the denial of recovery usually rests. The first is a general conceptual unwillingness to recognize any cognizable damages for a child born with a genetic impairment as opposed to not being born at all. . . .

. . . .

The second basis for rejecting wrongful life claims is the impossibility of calculating compensatory damages to restore a birth defective child to the position he would have occupied were it not for the defendant’s negligence.

*Id.* at 634 (citations omitted).

249. *Id.* at 635 (internal quotation marks and citation omitted).

250. *Id.* at 635-36.

in Indiana and this was the closest vehicle it had to do so. (The plaintiff did not call this a “wrongful life” case and in fact disputed that it was.)<sup>251</sup> But the case did not end there. Remember the child had a second claim, alleging the defendant was negligent for failing to detect the pregnancy until its fifth month, thereby proximately caused a failure of proper prenatal care resulting in physical injury to the child. The Court permitted that claim to proceed. In other words, the Court had vanquished “wrongful life” claims but the plaintiff was still allowed to seek damages.

Nine years later, the Court changed course. *Bader v. Johnson*<sup>252</sup> was a straight-up wrongful life claim where defendant healthcare providers allegedly failed to recognize and advise a couple that a fetus would be born with serious disabilities.<sup>253</sup> Yet the Court permitted the plaintiff parents to seek a variety of damages on grounds that the alleged failure to inform deprived the parents of the opportunity to terminate the pregnancy.<sup>254</sup>

Justice Rucker wrote the opinion and he makes several distinctions to get out from under the precedent of *Cowe*.<sup>255</sup> First, he jettisons use of the moniker “wrongful birth” altogether, saying this is a medical malpractice case, plain and simple, and “[l]abeling the [appellees’] cause of action as ‘wrongful birth’ adds nothing to the analysis, inspires confusion, and implies the court has adopted a new tort.”<sup>256</sup> Second, he distinguishes *Cowe* on the basis that “in *Cowe*, the injury was life itself. . . . Here, however, the injury is the lost opportunity and ability to terminate the pregnancy.”<sup>257</sup>

Justice Dickson would have none of it. His *Cowe* opinion had made clear that “wrongful birth” and “wrongful life” claims were distinguishable only by whether the parents or the child brought the claim and it did not matter whether the damages were sought for life itself or the inability to terminate a pregnancy.<sup>258</sup> Therefore, exactly the same policy reasons that precluded recognizing claims of “wrongful life” should also operate to preclude claims of “wrongful birth,” Justice Dickson argued.<sup>259</sup> From my perspective, the Court had recognized in Justice Rucker’s opinion in *Bader* precisely the cause of action that Justice Dickson’s opinion in *Cowe* had declared as not cognizable.

Justice Dickson would have the last word in *Chaffee v. Seslar*.<sup>260</sup> In this case, plaintiff mother sought damages including the expenses of raising and educating her child born following an unsuccessful sterilization procedure.<sup>261</sup> Justice

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251. *Id.* at 635.

252. 732 N.E.2d 1212 (Ind. 2000).

253. *Id.* at 1215.

254. *Id.* at 1220, 1222.

255. *Id.* at 1216, 1219.

256. *Id.* at 1216.

257. *Id.* at 1219.

258. *Id.* at 1222 (Dickson, J., dissenting).

259. *Id.* at 1223.

260. 786 N.E.2d 705 (Ind. 2003).

261. *Id.* at 706.

Dickson wrote for the Court, quoting from his opinion in *Cowe* that “life . . . cannot be an injury in the legal sense.”<sup>262</sup> Holding the damages sought by the plaintiff not available, the Court wrote “[a] child, regardless of the circumstances of birth, does not constitute a ‘harm’ to the parents so as to permit recovery for the costs associated with raising and educating the child.”<sup>263</sup> The Court did hold “[r]ecoverable damages may include pregnancy and childbearing expenses, but,” to repeat, “not the ordinary costs of raising and educating a normal, healthy child conceived following an allegedly negligent sterilization procedure.”<sup>264</sup>

Now it was Justice Rucker’s turn to dissent.<sup>265</sup> He reminded the Court his opinion in *Bader* treated the plaintiffs’ claim no differently than any other claim of medical negligence, thereby avoiding the thorny policy debate over “wrongful birth” and “wrongful life.”<sup>266</sup> He bemoaned the fact that *Chaffee* “changes course, enters the debate, and retreats from the principle we announced in *Bader*.”<sup>267</sup>

Justice Rucker said the Court had “endorsed the view that an action for wrongful pregnancy exists in Indiana, and has decided that for policy reasons child-rearing expenses are not recoverable under such an action.”<sup>268</sup> He argued that as in *Bader*, the same mode of analysis used for other medical malpractice cases should be used here.<sup>269</sup> If the plaintiff proved negligence, “then she is ‘entitled to damages proximately caused by the tortfeasor’s breach of duty.’ The expense of raising and educating a child falls in this category.”<sup>270, 271</sup>

#### IV. THE COLLATERAL SOURCE RULE AND *STANLEY V. WALKER*

*Shirley v. Russell*<sup>272</sup> and *Stanley v. Walker*<sup>273</sup>—two decisions I wrote for the Court—involved the less-than-intuitive topic of the “collateral source rule.” What makes the collateral source rule difficult to understand is that the *common law* collateral source rule is very different—indeed, almost the reverse—of the

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262. *Id.* at 708 (quoting *Cowe v. Forum Grp., Inc.*, 575 N.E.2d 630, 635 (Ind. 1991)).

263. *Id.*

264. *Id.*

265. *Id.* at 709 (Rucker, J., dissenting).

266. *Id.*

267. *Id.*

268. *Id.* at 710. It would be more precise to say the Court adopted an earlier decision of the Court of Appeals in this respect. See *Garrison v. Foy*, 486 N.E.2d 5 (Ind. Ct. App. 1985).

269. *Chaffee*, 786 N.E.2d at 710 (Rucker, J., dissenting).

270. *Id.* (quoting *Bader v. Johnson*, 732 N.E.2d 1212, 1220 (Ind. 2000)).

271. My view on *Chaffee* was different from both Justice Dickson and Justice Rucker. I would have applied Restatement (Second) of Torts § 920 (1977), which requires that in situations where the defendant’s conduct has harmed the plaintiff or the plaintiff’s property but “in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.” *Chaffee* 786 N.E.2d at 709 (Sullivan, J., dissenting).

272. 663 N.E.2d 532, 533 (Ind. 1996).

273. 906 N.E.2d 852 (Ind. 2009).

*statutory* collateral source rule in effect in Indiana today.

The common law collateral source rule provided “compensation for loss which is received by a plaintiff from a collateral source independent of the wrongdoer [as from insurance] cannot be utilized by the wrongdoer in mitigation of damages.”<sup>274</sup>

Professor Lawrence P. Wilkins<sup>275</sup> says courts used the common law collateral source rule to deny “defendant tortfeasors the ability to present evidence that the plaintiff has obtained compensation for the injuries from other sources and avoid liability by arguing that the plaintiff has no need for compensation through the torts system.”<sup>276</sup> As such, the rule was powerfully pro-plaintiff.

As Wilkins discusses, the common law collateral source rule was grounded in a “philosophy of corrective justice”: one part retribution; one part deterrence. The tort system should correct the wrongdoer, and in so correcting deter that wrongdoer from further injurious conduct.<sup>277</sup>

There’s a good illustration of the animating principle of corrective justice in *Sherlock v. Alling*,<sup>278</sup> an Indiana Supreme Court opinion from long ago—1873. The heirs of a steamship passenger who had been killed in a collision with another boat, sued the owners of the steamship for negligence.<sup>279</sup> The owners argued since the heirs received life insurance proceeds because the owners of the steamship caused the passenger’s death, the owners should get credit for the amount of life insurance paid!<sup>280</sup>

To allow such a defense would defeat actions under law, when the party killed had, by his prudence and foresight, made provision or left means for the support of his wife and children, and the wrong-doer would thus be enabled to protect himself against the consequences of his own wrongful act.<sup>281</sup>

Wilkins wrote that by the end of the 19th century, courts considered the rule to be “well settled” that the plaintiff could “recover his entire loss from [defendant] without regard to the amount of insurance he may have been paid thereon.”<sup>282</sup> Twentieth century courts took to simply quoting the encyclopedic statement of the rule.<sup>283</sup>

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274. *Allegheny Airlines, Inc. v. United States*, 504 F.2d 104, 112 (7th Cir. 1974); *Powers v. Ellis*, 231 Ind. 273, 279 (1952); *Pittsburgh, C., C. & St. L. Ry. Co. v. Home Ins. Co.*, 183 Ind. 355 (1915).

275. William R. Neale Professor of Law Emeritus at the Indiana University Robert H. McKinney School of Law.

276. Lawrence P. Wilkins, *A Multi-Perspective Critique of Indiana’s Legislative Abrogation of the Collateral Source Rule*, 20 IND. L. REV. 399, 399 (1987).

277. *Id.* at 402-03.

278. 44 Ind. 184 (1873), *aff’d*, 93 U.S. 99 (1876).

279. *Id.* at 185-86.

280. *Id.* at 188.

281. *Id.* at 200.

282. Wilkins, *supra* note 276, at 405 (internal quotation and citation omitted).

283. *See, e.g., Evans v. Breeden*, 164 Ind. App. 558, 561 (1975) (“Compensation for the loss received by plaintiff from a collateral source, independent of the wrongdoer, as from insurance,

Then, effective September 1, 1986, the Indiana General Assembly, abrogated the powerfully pro-plaintiff common law collateral source rule and replaced it with a Collateral Source Statute far friendlier to defendants.<sup>284</sup>

This was, as discussed in Part I.D of this Article, a manifestation of the pro-defendant tort reform movement.<sup>285</sup> And it was the culmination of several criticisms of the collateral source rule that had been percolating for a century.

Wilkins recounts that permitting a “plaintiff to benefit from a judgment that did not take into account the fact that the injury had already been compensated would permit a double recovery.”<sup>286</sup> Now we can say to this criticism that double recovery is better than a wrongdoer enjoying a windfall merely because the wrongdoer’s victim had a collateral source available to it.<sup>287</sup> And the law and economics literature smiles on the common law collateral source rule as preventing under-deterrence.<sup>288</sup>

But there is a second argument as well and that goes to the fact that under modern tort law, the defendant does not have to be a wrongdoer, or at least much of a wrongdoer, at all. In a strict liability case, the plaintiff need not prove fault and the defendant need not be guilty of any negligence at all.<sup>289</sup> In a comparative fault regime—like Indiana has—a plaintiff can be as much as fifty percent at fault and still recover.<sup>290</sup>

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cannot be set up by the wrongdoer in mitigation of damages.’ 9 I.L.E. Damages s 86, p. 253-Insurance or other Collateral Compensation.”).

284. Pub. L. No. 201-1986, 1986 Ind. Acts 1959, § 3 (codified at IND. CODE § 34-44-1 (2016)). For more information on the legislative history of this and other Indiana tort reform statutes, see *supra* note 60.

285. Joseph P. Poehlmann, *Enduring Doctrine: The Collateral Source Rule in Wisconsin Injury Law*, 99 MARQ. L. REV. 209, 224 (2015) (citing Wilkins, *supra* note 276, at 402-03).

286. Wilkins, *supra* note 276, at 407 (internal quotation and citation omitted).

287. *Molzof v. United States*, 6 F.3d 461, 465 (7th Cir. 1993) (“In choosing who should receive the windfall from the ‘surplus’ award, i.e., compensation over and above that necessary to compensate the plaintiff for the injuries sustained by the tortious conduct, the plaintiff is thought to be far more deserving than the defendant.”).

288.

To permit [a] defendant to set up [the plaintiff’s] insurance policy as a bar to [an auto accident damages] action would result in underdeterrence. . . . [T]he defendant’s incentive . . . to prevent a similar accident in the future will be impaired. Less obviously, the double recovery is not a windfall to [the plaintiff]. [The plaintiff] bought the insurance policy at a price presumably equal to the expected cost of [the plaintiff’s] injury plus the cost of writing the policy.

RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 200 (6th ed. 2003).

289. Wilkins, *supra* note 276, at 408. “In many instances of strict liability, however, the defendant may be at fault in fact, even if the plaintiff has not proved it.” Dobbs et al., *supra* note 3, at § 3, 3.

290. IND. CODE § 34-51-2-6 (2016); see, e.g., *Smith v. Beaty*, 639 N.E.2d 1029, 1035 (Ind. Ct. App. 1994) (“[E]ven if the evidence established that [plaintiff’s] own negligence was a cause of his injuries, [plaintiff] was not necessarily precluded from recovery under Indiana’s Comparative

The Collateral Source Statute enunciates a two-fold purpose: enabling the trier of fact in a personal injury or wrongful death action to determine the actual amount of the prevailing party's pecuniary loss; and providing that a prevailing party not recover more than once from all applicable sources for each item of loss sustained.<sup>291</sup> Note the contrast with the philosophy of corrective justice and its prongs of retribution and deterrence.

Under the Collateral Source Statute, the general rule is that in personal injury and wrongful death actions,<sup>292</sup> evidence of "proof of collateral source payments" is admissible.<sup>293</sup> However, there are significant exceptions to the general rule. *Not* admissible is evidence of the following collateral source payments, which are made before trial to a plaintiff as compensation for the loss or injury for which the action is brought:

- (A) payments of life insurance or other death benefits;
- (B) insurance benefits that the plaintiff or members of the plaintiff's family have paid for directly; or
- (C) payments made by:
  - (i) the state or the United States; or
  - (ii) any agency, instrumentality, or subdivision of the state or the United States[.]<sup>294</sup>

Did the Collateral Source Statute actually abrogate the common law collateral source rule? The presumption of the common law rule does seem to have been reversed. The common law rule said "no reference to collateral sources, with some exceptions"; the new statutory rule says "collateral sources shall be considered, with some exceptions." Wilkins flat out says "the Indiana General Assembly . . . reversed the judicial rule of *exclusion*."<sup>295</sup>

On the other hand, the exceptions to the new rule of *inclusion* are pretty broad: apparently any payments of life insurance or other death benefits, regardless of who paid the premiums; any other insurance benefits the plaintiff or members of the plaintiff's family have paid for directly; and any government benefits.

One way to compare the common law rule with the statutory rule is to go back and think about the fact pattern of that 1873 Indiana common law case, *Sherlock v. Alling*,<sup>296</sup> where the Court refused to permit the tortfeasor to offer up the plaintiff's life insurance as a defense.<sup>297</sup> We can say the common law rule used in *Sherlock v. Alling* was a general rule of *exclusion*: Payments from

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Fault Act. A plaintiff is barred from recovery only if his fault is greater than the fault of all persons whose fault proximately contributed to his damages." (citation to statute omitted)).

291. IND. CODE § 34-44-1-1 (2016).

292. *Id.* § 34-44-2-1.

293. *Id.* § 34-44-1-2(1).

294. *Id.* § 34-44-1-2(1)(A)-(C).

295. Wilkins, *supra* note 276, at 400 (emphasis added).

296. 44 Ind. 184, 200 (1873), *aff'd*, 93 U.S. 99 (1876).

297. *Id.*

collateral sources did not reduce the amount of damages a tortfeasor must pay, e.g., where the victim purchased life insurance.<sup>298</sup> The Court said if the defendant were given credit for the life insurance, “the wrong-doer would thus be enabled to protect himself against the consequences of his own wrongful act.”<sup>299</sup>

Under the Collateral Source Statute, the facts of *Sherlock v. Alling* would constitute an *exception* from a general rule of *inclusion*: Payments from collateral sources would reduce the amount of damages a tortfeasor must pay, except where the victim purchased life insurance.<sup>300</sup> But the result is the same: The defendant does not benefit where “the party killed had, by his prudence and foresight, made provision or left means for the support of his wife and children.”<sup>301</sup>

Ten years after the enactment of the Collateral Source Statute, the Court was presented with *Shirley v. Russell*.<sup>302</sup> Loren Shirley, a retired teacher, had died in an automobile accident caused by the defendants and had recovered approximately \$575,000 in damages in a bench trial.<sup>303</sup> The defendants maintained the Court should have considered in making its award the present value of a “joint and survivor annuity” payable to the victim’s family under the Ohio teacher’s retirement plan.<sup>304</sup>

Under the common law collateral source rule of exclusion, I think it is clear, the annuity payments Shirley’s family received would have been excluded collateral source evidence. *Shirley*, however, is governed by the Collateral Source Statute’s rule of inclusion that allows into evidence proof of collateral source payments.<sup>305</sup> But not all collateral source payments. As we have seen, payments of life insurance or other death benefits and insurance benefits that the plaintiff has paid for are not to be considered.

The Court held the evidence was to be excluded:

Shirley’s widow’s survivor annuity, though perhaps not insurance for tax or regulatory purposes, has sufficient hallmarks of insurance to be deemed such for purposes of the new collateral source rule statute. Shirley caused his monthly pension benefit to be reduced by the economic and functional equivalent of an insurance premium[.] . . . And had Shirley’s widow predeceased him, his obligation to pay the premium

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298. *Id.*

299. *Id.*

300. IND. CODE § 34-44-1-2(1)(A) (2016).

301. *Sherlock*, 44 Ind. at 200.

302. 663 N.E.2d 532 (Ind. 1996). The trial in the case took place in federal district court. The opinion was in response to a “certified question” from the United States Court of Appeals for the Seventh Circuit. *See* IND. APP. R. 64 (authorizing federal courts to certify issues of Indiana law to the Indiana Supreme Court “when it appears to the federal court that a proceeding presents an issue of state law that is determinative of the case and on which there is no clear controlling Indiana precedent”).

303. *Shirley*, 663 N.E.2d at 533-34.

304. *Id.* at 534.

305. *Id.* at 534-35.

would have ceased as the need for coverage would have ended.<sup>306</sup>

All five members of the Court agreed.<sup>307</sup>

Harkening back to Part I.B of this Article,<sup>308</sup> one might identify *Shirley* as an exemplar of the derogation canon at work. After all, the Collateral Source Statute had changed the common law collateral source rule, and so the derogation canon mandated it be strictly construed. Evidence of the survivor annuity would have been inadmissible at common law and the derogation canon, if it applied, would direct the Court construe evidence of the survivor annuity as inadmissible under the Collateral Source Statute unless its admissibility was required by the Statute either in express terms or by unmistakable implication.<sup>309</sup> But if you were of the view that the legislature had completely reversed (remember “reversed” was the word Wilkins used<sup>310</sup>) the common law, perhaps the apparent intent of the legislature should be implemented without reference to the derogation canon. And, indeed, *Shirley* says the Collateral Source Statute “abrogated the common law collateral source rule.”<sup>311</sup>

In any event, there is no reference in *Shirley v. Russell* to the Collateral Source Statute being in derogation of common law, one way or the other. As already noted, the decision was unanimous.<sup>312</sup>

I wrote *Shirley v. Russell* after I had been on the Court for about three years. About three years before I left, I wrote *Stanley v. Walker*.<sup>313</sup> Whereas the Court had been unanimous in *Shirley*, it was divided 3-2 in *Stanley*, with a vigorous dissent from Justice Dickson<sup>314</sup> and an equally vigorous concurring rejoinder from Justice Boehm.<sup>315</sup>

Plaintiff Danny Walker was injured in an automobile accident caused by defendant Brandon Stanley.<sup>316</sup> The hospital bill was approximately \$11,600 but this amount was discounted by about \$4800, meaning that plaintiff only paid \$6800.<sup>317</sup> The question was whether the defendant could introduce evidence the plaintiff’s bill had been discounted by \$4800.<sup>318</sup>

An injured plaintiff is entitled to recover damages for medical expenses that

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306. *Id.* at 536.

307. *Id.*

308. *See supra* note 17 and accompanying text.

309. *Quakenbush v. Lackey*, 622 N.E.2d 1284, 1290 (Ind. 1993) (citing *State Farm Fire & Cas. Co. v. Strutco Div., King Seeley Thomas Co.*, 540 N.E.2d 597, 598 (Ind. 1989)).

310. Wilkins, *supra* note 276, at 400.

311. *Shirley*, 663 N.E.2d at 534.

312. *Id.*

313. 906 N.E.2d 852 (Ind. 2009).

314. *Id.* at 860 (Dickson, J., dissenting).

315. *Id.* at 859 (Boehm, J., concurring).

316. *Id.* at 853-54.

317. *Id.* at 854.

318. *Id.*



were both necessary and reasonable.<sup>319</sup> To determine *actual* medical expenses, we oftentimes need to know how much insurance pays. But does admitting evidence of how much insurance pays violate the Collateral Source Statute? Did, in other words, evidence of the \$4800 discount constitute proof of a collateral source payment? And if so, was it a collateral source payment that was admissible or did it fall into one of the excluded categories?

The Court's majority opinion focused on the evidentiary need to establish the reasonable value of the medical services and concluded evidence of both the amount billed and the amount paid could be presented to the factfinder without violating the Collateral Source Statute.<sup>320</sup> Different states had reached different results in answering this question but the Court chose to follow the approach taken by the Ohio Supreme Court.<sup>321</sup> "The collateral source statute does not bar evidence of discounted amounts in order to determine the reasonable value of medical services," our opinion held.<sup>322</sup> "To the extent the adjustments or accepted charges for medical services may be introduced into evidence without referencing insurance, they are allowed."<sup>323</sup>

Justice Dickson strongly disagreed. His dissent took the position that the trial court had been correct to exclude the evidence of the discount because it constituted "insurance benefits for which the plaintiff or members of the plaintiff's family ha[d] paid for directly."<sup>324</sup> He buttressed his position by writing at some length about the derogation canon—a bedrock principle, he called it—and how its application here would favor exclusion of the evidence of the discount for the reasons given in my discussion above about the derogation canon in the context of *Shirley*.<sup>325</sup> In this regard, Justice Dickson says that *Shirley* had been wrong to say that the Collateral Source Statute "abrogated the common law collateral source rule," while saluting *Shirley*'s result in excluding the evidence of the survivor annuity.<sup>326</sup> "*Shirley* is . . . entirely consistent," Justice Dickson maintained, "with the trial court's decision to exclude the discounted insurance benefit payments in the present case."<sup>327</sup>

*Stanley v. Walker* was controversial when it was decided.<sup>328</sup> With the role of

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319. *Id.* at 855.

320. *Id.* at 856 (discussing IND. R. EVID. 413).

321. *Id.* (discussing *Robinson v. Bates*, 112 Ohio St. 3d 17, 23 (2006) (holding the jury may determine the reasonable value of medical services is the amount originally billed, the amount accepted as payment, or some amount in between)).

322. *Id.* at 858.

323. *Id.*

324. *Id.* at 861 (Dickson, J., dissenting) (quoting IND. CODE § 34-44-1-2(1)(B) (2016)).

325. *See supra* note 17 and accompanying text.

326. *Stanley*, 906 N.E.2d at 862 n.2 (Dickson, J., dissenting).

327. *Id.* (citing IND. CODE § 34-44-1-2(1)(B) (2016)).

328. In the immediately succeeding session of the legislature, opponents of the decision put forward a bill to overturn the decision by adding to the list of exclusions in the Collateral Source Statute "a writeoff, discount, or other deduction associated with a collateral source payment." H. 1255, 116th Gen. Assemb. (amending Indiana Code section 34-44-2(1) by adding a new

government payments under Obamacare, robust debate about the relationship of the collateral source rule to health payments has spread throughout the nation.<sup>329</sup> It is a rich and nuanced subject, well worth continued study.

#### V. GOVERNMENTAL IMMUNITY AND POLICE CHASES

A particularly noteworthy example of the rise of progressive common law of the sort discussed in Part I.C of this Article was the abolition of the doctrine of sovereign immunity by state courts. While conservative common law had immunized governmental units from tort liability, that immunity was abrogated in Indiana in a series of decisions<sup>330</sup> culminating in the Supreme Court's 1972 opinion in *Campbell v. State*.<sup>331</sup>

In *Campbell*, the Court held establishing categories of governmental immunity was best left to the legislature.<sup>332</sup> The decision abrogated the common law doctrine of sovereign immunity except (1) where a unit of government fails "to provide adequate police protection to prevent crime";<sup>333</sup> (2) where a government official makes "an appointment of an individual whose incompetent performance gives rise to a suit alleging negligence on the part of the state official for making such an appointment";<sup>334</sup> and (3) where judicial decision making is

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subdivision (D)) (printing of Jan. 25, 2010). The Bill passed the House by a vote of 57-40, Roll Call 124, Ind. H.R. (Feb. 2, 2010), but the Bill died in the Senate.

329. See, e.g., Ryan Hart, *A Grim Prognosis? The Collateral Source Rule in Pennsylvania Medical Malpractice Actions After the Affordable Care Act*, 121 PENN ST. L. REV. 529 (2016); LaMar F. Jost & Marissa S. Ronk, *The Affordable Care Act and Colorado's Collateral Source Rule*, 93 DENV. L. REV. ONLINE 1 (2016); Poehlmann, *supra* note 285; Christopher W. Blaylock, *The Vital Role of the Collateral Source Rule in United States Healthcare Financing*, 36 U. LA VERNE L. REV. 1 (2014); Todd R. Lyle, *Phantom Damages and the Collateral Source Rule: How Recent Hyperinflation in Medical Costs Disturbs South Carolina's Application of the Collateral Source Rule*, 65 S.C. L. REV. 853 (2014); Ann S. Levin, *The Fate of the Collateral Source Rule After Healthcare Reform*, 60 UCLA L. REV. 736 (2013).

330. First, the courts held that while local governmental units were immune under common law from tort liability in the performance of "governmental functions," they were not immune under common law in respect of "proprietary functions." See *Flowers v. Bd. of Comm'rs*, 240 Ind. 668, 671 (1960). Then common law immunity in respect of governmental functions was abolished for municipalities, *Brinkman v. City of Indianapolis*, 141 Ind. App. 662, 668-69 (1967), and for county units of government, *Klepinger v. Bd. of Comm'rs*, 143 Ind. App. 178, 201 (1968). Next, common law immunity in respect of proprietary functions was abolished for state government in *Perkins v. State*, 252 Ind. 549, 558 (1969). Finally, common law immunity in respect of governmental functions was abolished for state government in *Campbell v. State*, 259 Ind. 55 (1972).

331. 259 Ind. 55.

332. *Id.* at 62.

333. *Id.* (citing *Simpson's Food Fair, Inc. v. City of Evansville*, 272 N.E.2d 871 (Ind. Ct. App. 1971)).

334. *Id.* at 62-63.

challenged.<sup>335</sup>

Before *Campbell*, the (conservative) common law general rule was that governmental units were immune from liability for their torts unless the courts had recognized an exception.<sup>336</sup> *Campbell* reversed that. Henceforth, the (progressive) common law general rule would be that governmental units would be liable for any “breach of a duty owed to a private individual”—except for such claims as failure to prevent crime, appointment of an incompetent official, or an incorrect judicial decision.<sup>337</sup>

In response to *Campbell*’s conclusion that the interests—financial and otherwise—of governmental units in being protected from tort liability were “questions which properly belong to the legislature,”<sup>338</sup> the Indiana General Assembly in 1974 enacted the Indiana Tort Claims Act (“ITCA”).<sup>339</sup> The Tort Claims Act established limitations on the common law rights to sue and recover from governmental units and their employees through procedural mechanisms such as notice requirements and limitations on recovery. The Act also contained a list of immunity provisions that shield governmental units from liability in specific situations where a common law duty of care exists.<sup>340</sup>

Following the enactment of ITCA, plaintiffs pursuing tort claims against the government must navigate their way through these immunity provisions and

335. *Id.* at 62 (citing *Pierson v. Ray*, 386 U.S. 547 (1967)).

336. *Benton v. City of Oakland City*, 721 N.E.2d 224, 227 (Ind. 1999).

337. *Campbell*, 259 Ind. at 63.

338. *Id.* at 61.

339. Pub. L. No. 142-1974, 1974 Ind. Acts 599 (codified at IND. CODE § 34-13-3 (2016)). For more information on the legislative history of this and other Indiana tort reform statutes, see *supra* note 60.

340. The list contains twenty-four such specific situations, a number of which have required judicial interpretation. See, e.g.,

- *King v. Northeast Security, Inc.*, 790 N.E.2d 474, 480-81 (Ind. 2003) (contract security service alleged to have failed to protect students at public school; interpreted Indiana Code section 34-13-3-3(10), which provides immunity for “[t]he act or omission of anyone other than the governmental entity or the governmental entity’s employee”);
- *Davis v. Animal Control*, 948 N.E.2d 1161, 1162 (Ind. 2011) (city animal control unit alleged to have failed to protect resident from dangerous dog; interpreted Indiana Code section 34-13-3-3(8), which provides immunity for “[t]he adoption and enforcement of or failure to adopt or enforce: a law (including rules and regulations) . . . unless the act of enforcement constitutes false arrest or false imprisonment”);
- *Giles v. Brown Cty.*, 868 N.E.2d 478, 479 (Ind. 2007) (county emergency response unit alleged to have failed to provide ambulance; interpreted Indiana Code section 34-13-3-3(19), which provides immunity for “operation . . . of an enhanced emergency communication system”);
- *Noble Cty. v. Rogers*, 745 N.E.2d 194, 196 (Ind. 2001) (county alleged to owe damages caused by enforcing housing code; interpreted Indiana Code sections 34-13-3-3(6)-(7), which provide immunity for “[t]he initiation of a judicial or an administrative proceeding” and “[t]he performance of a discretionary function,” respectively).

through subsequent decisions that interpret the extent and scope of the various immunity provisions. In general, it is only after a determination is made that a governmental defendant is not immune under the ITCA that a court undertakes the analysis of whether a common law duty exists under the circumstances. Justice Roger O. DeBruler neatly summed up the tort claim against a governmental unit: “A finding of immunity assumes negligence but denies liability. . . . However, if the court finds the government is not immune, the case may yet be decided on the basis of failure of any element of negligence. This should not be confused with the threshold determination of immunity.”<sup>341</sup>

Perhaps most noteworthy of the governmental immunity cases have been those involving accidents caused during police chases. The first was a wrongful death claim, *Seymour National Bank v. State*,<sup>342</sup> that grew out of a 100+ MPH chase by a state trooper of a fleeing suspect on I-65 near Austin; the trooper’s cruiser collided with an innocent motorist’s vehicle.<sup>343</sup> The State offered the following immunity provision in the ITCA in defense:

A governmental entity or employee acting within the scope of the employee’s employment is not liable if a loss results from . . . [t]he adoption and enforcement of or failure to adopt or enforce: (A) a law (including rules and regulations) . . . unless the act of enforcement constitutes false arrest or false imprisonment.<sup>344</sup>

The Supreme Court read the provision to hold “all acts of enforcement save false arrest and imprisonment now render the State immune,”<sup>345</sup> and concluded the State was immune from liability for the negligence of the trooper.<sup>346</sup> But the case was a 3-2 decision over the dissents of Justices DeBruler and Donald H. Hunter<sup>347</sup> and contrary to the decision of a unanimous panel of the Court of Appeals.<sup>348</sup> Those five judges took the position that the legislature had not intended to grant immunity for the breach of what they called “a private duty” owed by governmental entities or employees to individual citizens.<sup>349</sup> I will return to the meaning of “private duty”; for now, the reader can get a sense of it from the well-turned opening paragraph of Justice DeBruler’s dissent:

Operators of motor vehicles upon the public streets and highways,

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341. *Greathouse v. Armstrong*, 616 N.E.2d 364, 366 (Ind. 1993) (internal quotation marks omitted).

342. 422 N.E.2d 1223 (Ind.), *modified on reh’g*, 428 N.E.2d 203 (Ind. 1981).

343. *Id.* at 1225.

344. IND. CODE § 34-13-3-3(8) (2016).

345. *Seymour*, 422 N.E.2d at 1226.

346. *Id.*

347. *Id.* at 1226-29 (DeBruler, J., dissenting; Hunter, J., dissenting).

348. *Seymour Nat’l. Bank v. State*, 179 Ind. App. 295 (1979). The decision of the Court of Appeals was written by Judge Jonathon J. Robertson and joined by Judges Joe W. Lowdermilk and Robert B. Lybrook. *See id.*

349. *Seymour*, 422 N.E.2d at 1226 (DeBruler, J., dissenting); *Seymour*, 179 Ind. App. at 384.

whether in the employ of another or not, owe a private legal duty to others using the streets, to use due care while driving. This duty is imposed upon governors, judges, legislators, public employees and private employees and citizens, alike, when taking the wheel. That the General Assembly should grant to any person a legal immunity from liability when operating a motor vehicle upon a public street, is an astounding proposition, as it is totally at odds with the pervasive regulation of that activity by the State.<sup>350</sup>

A dozen years after *Seymour National Bank*, the Supreme Court again took up the question of governmental immunity for high-speed police chases in *Quakenbush v. Lackey*.<sup>351</sup> This case involved an Indianapolis Police Department officer who, while driving to the scene of a domestic disturbance, collided in an intersection with an innocent motorist's vehicle, injuring the four occupants.<sup>352</sup> Sailing with *Seymour National Bank* at its back, the City offered up in defense the law enforcement immunity provision of ITCA.<sup>353</sup>

The issue was the same as in *Seymour National Bank* but this time the plaintiff prevailed. In a dramatic 3-2 decision, the Court overruled *Seymour National Bank* and held the law enforcement immunity provision of ITCA

was intended to codify the common law as it existed at the time the Act was passed. The state of the common law was such that governments and their employees were subject to liability for the breach of private owed duties to individuals, but were immune from liability for the breach of public duties owed to the public at large.<sup>354</sup>

The Court had now adopted the "private duty" notion that had animated the views of Judge Robertson and Justice DeBruler in *Seymour National Bank*.<sup>355</sup> But just what was a private duty?

Relying heavily on the analyses of Justice DeBruler and Judge Robertson in *Seymour National Bank*, *Quakenbush* said "governmental units were not liable for all acts or omissions which might cause damage to persons, but only those

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350. *Seymour*, 422 N.E.2d at 1226 (DeBruler, J., dissenting).

351. 622 N.E.2d 1284 (Ind. 1993).

352. *Id.* at 1286.

353. *Id.*

354. *Id.* at 1290-91.

355. While *Quakenbush* rested in substantial part upon its public/private duty analysis, its holding was also separately based on a basic principle of statutory construction. *Quakenbush* pointed out that interpreting the immunity provision "to confer immunity in situations involving the operation of police vehicles on public streets conflicts with other statutes which regulate the operation of such vehicles." *Quakenbush*, 622 N.E.2d at 1290. Identifying the statutory duty to operate emergency vehicles "with due regard for the safety of all persons," (citing IND. CODE § 9-21-1-8 (2016)), the opinion employs the canon of construction that "[w]here two statutes are in apparent conflict they should be construed, if it can be reasonably done, in a manner so as to bring them into harmony." *Id.*

involving the breach of a private duty owed to an individual.”<sup>356</sup> The Court used a venerable Court of Appeals case, *Simpson Food Fair v. City of Evansville*,<sup>357</sup> to illustrate. In *Simpson*, the City was held immune from a claim by a grocery corporation that city police negligently failed to halt a crime wave that had closed the store.<sup>358</sup> Why immunity? Because “the duty to provide police protection under those circumstances was a duty owed to the public at large, not to individual members of the public. On the other hand, governmental entities and employees were not immune for the breach of a duty owed to an individual.”<sup>359</sup>

The *Quakenbush* court then gave a list of cases in which the public duty/private duty had been applied; its list is set forth in the footnotes below<sup>360</sup> and illustrates the fact that questions of governmental immunity arose with frequency outside the context of police chases. These cases continued to arise and distinguishing private duty from public duty became increasing difficult.

In 1999, *Benton v. City of Oakland City* took up what had become “admittedly confusing precedents governing this area of the law.”<sup>361</sup> The Court candidly acknowledged these cases had produced “highly abstract, almost metaphysical debates over whether the duty alleged to have been breached was a ‘private’ one or a ‘public’ one.”<sup>362</sup>

*Benton* was itself a case that did not involve a police chase. Rather, the plaintiff alleged a city had breached a duty to warn him of danger after he was injured diving into shallow water at a city-owned beach.<sup>363</sup> The case presented a nice opportunity for the Court to address common law principles of immunity

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356. *Quakenbush*, 622 N.E.2d at 1288; *Campbell v. State*, 259 Ind. 55, 62 (1972).

357. 149 Ind. App. 387, 391 (1971).

358. *Id.* at 394-95.

359. *Quakenbush*, 622 N.E.2d at 1288 (citing *Simpson*, 149 Ind. App. at 393-95) (citation omitted).

360. In *Quakenbush*, the Court set forth the following cases showing the application of the public duty/private duty test to various fact situations:

- *Lewis v. City of Indianapolis*, 554 N.E.2d 13, 16 (Ind. Ct. App. 1990) (holding city owed no private duty to individual user of “911” emergency telephone system; city immune from liability for system malfunction).
- *State v. Flanigan*, 489 N.E.2d 1216, 1218 (Ind. Ct. App. 1986) (holding duty to control traffic was owed to public; police immune from private suit for damages).
- *City of Hammond v. Cataldi*, 449 N.E.2d 1184, 1187 (Ind. Ct. App. 1983) (describing duty to fight fires is a public duty; city immune for not responding).
- *Crouch v. Hall*, 406 N.E.2d 303, 305 (Ind. Ct. App. 1980) (holding duty to apprehend suspect owed to public; police immune from failure to arrest suspect before he committed another crime).

*Quakenbush*, 622 N.E.2d at 1288.

361. 721 N.E.2d 224, 225 (Ind. 1999). I was the author of this opinion. Among the “confusing precedents” discussed in *Benton* was another opinion of mine, *Mullin v. Municipal City of South Bend*, 639 N.E.2d 278 (Ind. 1994).

362. *Id.* at 230.

363. *Id.* at 225.

because there was no contention the city was entitled to immunity under ITCA.<sup>364</sup>

In any event, the Court said in *Benton* that it was done with trying to come up with tests to explain when government was entitled to immunity and when not.<sup>365</sup> Rather,

we return to and reaffirm *Campbell*. We hold that *Campbell* is properly applied by presuming that a governmental unit is bound by the same duty of care as a non-governmental unit except where the duty alleged to have been breached is so closely akin to one of the limited exceptions (prevent crime, appoint competent officials, or make correct judicial decisions) that it should be treated as one as well. We refuse to articulate a one-size-fits-all test for determining when a duty is so closely akin to one of the limited exceptions that it should be treated as one as well.<sup>366</sup>

“The best we can say as a general proposition,” *Benton* concluded, “is that because the duty of care is so pervasive, any additional exceptions will be rare and identified on a case-by-case basis.”<sup>367</sup> For the most part, the Court said, exceptions would be left to the legislature.<sup>368</sup>

Several years later, *King v. Northeast Security, Inc.*,<sup>369</sup> reinforced the holding of *Benton*. In another immunity case not involving a police chase, the Court confronted a claim for damages from a public school student beaten up in the school parking lot by other students.<sup>370</sup> The public school corporation argued it had no common law duty to protect against criminal activity of others.<sup>371</sup> But to the Court, the school district’s duty that was implicated was that of taking reasonable steps for the protection of its students.<sup>372</sup> “*Benton*,” the *King* Court said, “stands for the general proposition that common law immunity with respect

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364. *Id.* at 226 n.2.

365. *Id.* at 230.

366. *Id.*

367. *Id.* The Court’s judicial self-criticism in *Benton* did not stop at public duty/private duty. The Court also took up “still another test for duty” that had been propounded by the Court of Appeals in *Henshilwood v. Hendricks County*, 653 N.E.2d 1062 (Ind. Ct. App. 1995). *Henshilwood* made a distinction between cases in which liability is asserted against a governmental unit for failing to take some action and where liability is asserted for taking some action. *Id.* at 1065. *Henshilwood* referred to the failure-to-act as “nonfeasance” and subsequent cases have referred to affirmative-acts-of-negligence as “malfeasance”; liability turned on the distinction. *Id.* *Benton* said, “It seems to us that the subsequent cases have had every bit as difficult a time distinguishing nonfeasance and malfeasance as the earlier cases had distinguishing private duty and public duty.” *Benton*, 721 N.E.2d at 231. The Court held that henceforth, a “governmental unit’s duty with respect to an alleged act of negligence does not depend on whether the negligence is claimed to be the result of nonfeasance or malfeasance.” *Id.*

368. *Id.* at 232.

369. 790 N.E.2d 474 (Ind. 2003).

370. *Id.* at 477.

371. *Id.* at 478.

372. *Id.* at 479.

to all governmental activities is limited to activities ‘closely akin’ to the three *Campbell* areas.”<sup>373</sup> The school district’s activities here did not fall into any of the three *Campbell* categories and so the school district was relegated to any statutory immunity that might be available.<sup>374</sup>

This brings us back to police chases. With the “private duty” theory espoused in *Quakenbush* now disapproved, what of *Quakenbush*’s holding of no immunity? The answer came three years after *King* in *Patrick v. Miresso*.<sup>375</sup> Patrick reaffirmed *Quakenbush*’s result—no immunity—and did so in a unanimous opinion,<sup>376</sup> demonstrating how firmly entrenched *Quakenbush* had become as precedent given that both of the two previous key police chase cases (*Seymour National Bank* and *Quakenbush* itself) had both been decided by 3-2 votes.<sup>377</sup>

Justice Dickson authored *Patrick*, where a Gary Police Department officer pursuing a fleeing burglary suspect collided with an innocent motorist’s vehicle.<sup>378</sup> The defendant City did not give much stock to *Quakenbush* as precedent, dismissing its rationale as having been “abandoned in *Benton v. City of Oakland City*.”<sup>379</sup> Justice Dickson’s opinion explains why *Quakenbush* remained undiminished. First, *Benton* was entirely about common law; it did not speak to the availability of the statutory law enforcement immunity that the City was claiming.<sup>380</sup> Second, as to statutory law enforcement immunity, *Quakenbush* identifies the statutory duty to operate emergency vehicles “with due regard for the safety of all persons.”<sup>381</sup> *Quakenbush* employed the harmonization canon of statutory construction to construe this statute consistent with holding that law enforcement immunity does not extend the operation of police vehicles on public streets.<sup>382</sup>

Most importantly, *Patrick* says that while *Benton* concluded “the public/private duty test did not work,”<sup>383</sup> *Benton* did not “thereby resurrect or increase immunity for government conduct. To the contrary, it offers the ‘general

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373. *Id.* at 480.

374. As to statutory immunity, the school district sought relief on two grounds: it was entitled to immunity for the “enforcement of or failure to adopt or enforce . . . a law (including rules and regulations)” under Indiana Code section 34-13-3-3(8), and for “[t]he act or omission of anyone other than the governmental entity or the governmental entity’s employee” under Indiana Code section 34-13-3-3(10). After analysis, the Court held neither of these two immunities was available to the school district and remanded the case for trial. *King*, 790 N.E.2d at 480-84.

375. 848 N.E.2d 1083 (Ind. 2006).

376. *See generally id.*

377. *See Seymour Nat’l Bank v. State*, 422 N.E.2d 1223, 1226 (Ind. 1981); *Quakenbush v. Lackey*, 622 N.E.2d 1284, 1291 (Ind. 1993).

378. *Patrick*, 848 N.E.2d at 1084.

379. *Id.* at 1085.

380. *Id.* (citing *Benton v. City of Oakland City*, 721 N.E.2d 224, 232 (Ind. 1999) (stating “whether the legislature has insulated [the defendant city] is not part of this appeal”).

381. *Id.* (citing IND. CODE § 9-21-1-8 (2016)).

382. *Id.*

383. *Id.* at 1086 (citing *Benton*, 721 N.E.2d at 230).



proposition . . . that because the duty of care is so pervasive, any additional exceptions will be rare and identified on a case-by-case basis.’”<sup>384</sup>

*Patrick* went on to hold ITCA’s law enforcement immunity did not extend to police chase cases.<sup>385</sup> And in doing so, reaffirmed the broader framework of governmental immunity articulated in *Campbell* and *Benton*: the common law presumption that governmental units are bound by the same duty of care as non-governmental actors unit except for limited exceptions.

#### VI. EMOTIONAL DISTRESS: THE MODIFIED IMPACT AND RELATIVE BYSTANDER RULES

The availability in tort of damages for emotional distress<sup>386</sup> evolved considerably in Indiana beginning in 1991. For a century prior, such damages were only available when the distress *both* was *accompanied by* and *resulted from* a physical injury caused by an *impact* to the *person seeking recovery*.<sup>387</sup> This principle was known as the “impact rule” because of the requirement that there be some physical impact on the plaintiff before recovery for emotional distress was allowed.<sup>388</sup>

The rationale for limitations on damages for emotional distress—limitations like the impact rule—are generally familiar. The following summary is a fair one:

Behind these limitations lie a variety of policy considerations, many of them based on the fundamental differences between emotional and physical injuries. . . . “[C]ourts have been concerned . . . that recognition of a cause of action for [emotional] injury when not related to any physical trauma may inundate judicial resources with a flood of relatively trivial claims, many of which may be imagined or falsified, and that liability may be imposed for highly remote consequences of a negligent act.” The last concern has been particularly significant. Emotional injuries may occur far removed in time and space from the negligent conduct that triggered them. Moreover, in contrast to the situation with physical injury, there are no necessary finite limits on the number of persons who might suffer emotional injury as a result of a given negligent act. The incidence and severity of emotional injuries are also more difficult to predict than those of typical physical injuries because they depend on psychological factors that ordinarily are not apparent to

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384. *Id.* (quoting *Benton*, 721 N.E.2d at 230).

385. *Id.* at 1087.

386. “Emotional distress” in this context means “is mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms.” *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994).

387. *Shuamber v. Henderson*, 579 N.E.2d 452, 454 (Ind. 1991) (citing cases back to *Kalen v. Terre Haute & I.R.R. Co.*, 18 Ind. App. 202, 47 N.E. 694 (1897)).

388. *Id.*

potential tortfeasors.<sup>389</sup>

In *Cullison v. Medley*,<sup>390</sup> the Indiana Supreme Court was presented with a claim for damages for a variety of intentional torts (trespass, assault, and invasion of privacy) that the plaintiff alleged the defendants—five members of a single family—committed by entering his home and, with at least one family member bearing a holstered handgun, castigating and threatening him for fraternizing with a teenaged female member of the family.<sup>391</sup> Specifically, the plaintiff claimed to have required psychological and psychiatric counseling and prescription medication as a result of the emotional distress he endured.<sup>392</sup>

To this point in time, the impact rule had applied to intentional torts as well as negligence. The plaintiff in *Cullison* had suffered no physical impact and so the traditional rule precluded his recovery.<sup>393</sup> The Court examined the rationale for the impact rule set forth above and concluded the presence of physical impact did not logically make a claim of emotional injury any less speculative, subject to exaggeration, or likely to lead to fictitious claims.<sup>394</sup> Nor did the Court fear that a relaxation of the rule would inundate the courts with claims.<sup>395</sup> The Court, therefore, expressed a willingness to abrogate the impact rule in the “proper circumstances” and recognize liability for an intentional infliction of emotional distress.<sup>396</sup> But these pronouncements turned out to be dicta; the Court said the facts in *Cullison* did not support a finding that the plaintiffs intended to cause emotional injury to the defendant.<sup>397</sup>

The big bang came six months later in *Shuamber v. Henderson*.<sup>398</sup> This was an allegation of negligent infliction of emotional distress where the distress did not result from physical impact—and the Court not only recognized the availability of relief, it granted it!<sup>399</sup>

The facts were these: A mother was the victim of an automobile accident in which her young son was killed and young daughter injured.<sup>400</sup> Plaintiffs (the

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389. *Consolidated Rail Corp.*, 512 U.S. at 545-46 (quoting *Maloney v. Conroy*, 208 Conn. 392, 397-98 (1988); footnoting Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 507 (1982) (“The geographic risk of physical impact caused by the defendant’s negligence in most cases is quite limited, which accordingly limits the number of people subjected to that risk. There is no similar finite range of risk for emotional harm.”) (footnote citation omitted)).

390. 570 N.E.2d 27 (Ind. 1991).

391. *Id.* at 28-29.

392. *Id.*

393. *Id.* at 30.

394. *Id.*

395. *Id.*

396. *Id.* at 31.

397. *Id.* at 30.

398. 579 N.E.2d 452 (Ind. 1991).

399. *Id.* at 456.

400. *Id.* at 453.

mother and daughter in the automobile accident) alleged suffering severe emotional distress from witnessing the death of the son and brother.<sup>401</sup> But because the impact rule required the emotional distress both be accompanied by and result from a physical injury caused by *an impact to the person seeking recovery*, plaintiffs' claims were barred: their emotional distress was not the result of a physical injury they suffered.<sup>402</sup>

Invoking the dicta for abrogating the impact rule it had set forth in *Cullison*, the Court permitted the plaintiffs' claims for emotional distress to proceed.<sup>403</sup> But perhaps the bang was not quite so big; the Court limited the relaxation of the impact rule to the facts of *Shuamber* itself:

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.<sup>404</sup>

When *Shaumber* was finished, the reach of the impact rule had been constricted only a little—but the Court showed no particular reluctance to further constriction in the future.

The next case was *Conder v. Wood*.<sup>405</sup> As two women walked across an intersection in downtown Indianapolis, one was knocked to the ground by a turning truck.<sup>406</sup> Fearing the truck would run over the fallen woman, the other began pounding on the truck, trying to get the driver's attention.<sup>407</sup> The truck came to a stop just before the rear wheels ran over the fallen woman's head. She died at the scene.<sup>408</sup>

The surviving woman sought damages for emotional distress.<sup>409</sup> The defendant argued such damages were not available because plaintiff had not suffered any direct physical impact from the driver's negligence.<sup>410</sup> The difference from *Shaumber*'s facts was that the *Conder* plaintiff had not herself suffered "direct impact."<sup>411</sup> Did that matter? Not to the Court. "Direct impact," it said, is nothing more than the "requisite measure of 'direct involvement.'"<sup>412</sup> As such, it

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401. *Id.*

402. *Id.* at 454.

403. *Id.* at 455.

404. *Id.* at 456.

405. 716 N.E.2d 432 (Ind. 1999). I was the author of this opinion.

406. *Id.* at 433.

407. *Id.*

408. *Id.*

409. *Id.* at 433-34.

410. *Id.* at 434.

411. *Id.* at 435.

412. *Id.*

was of little consequence how the physical impact occurred, “so long as that impact arises from the plaintiff’s direct involvement in the tortfeasor’s negligent conduct.”<sup>413</sup> Because the plaintiff sustained an impact as she pounded on the truck and alleged suffering mental and emotional trauma as a result of her direct involvement in the negligent conduct, the Court held the requirements of the (modified) impact rule had been met.<sup>414</sup>

In *Groves v. Taylor*,<sup>415</sup> a six-year-old boy was struck and killed by a vehicle as he was collecting the mail at the end of his driveway.<sup>416</sup> His eight-year-old sister was walking in the driveway at the time and heard but did not see the impact.<sup>417</sup> She sought damages for negligent infliction of emotional distress, which the defendant opposed on grounds that there had been no direct physical impact.<sup>418</sup>

With *Conder v. Wood* holding that it was “direct involvement” rather than “direct impact” that was at issue in these cases, *Groves* now posed the question of whether there could be the requisite degree of direct involvement without the plaintiff having incurred any physical direct impact at all.<sup>419</sup> The Court was prepared to answer in the affirmative but was worried about having some limiting principle to ward off “spurious” claims.<sup>420</sup> The Court found a solution in *Bowen v. Lumbermens Mutual Casualty Co.*,<sup>421</sup> a decision of the Wisconsin Supreme Court on facts similar to *Groves*. *Bowen* set forth a three factor test designed to meet the goals of “(1) establishing the authenticity of the claim and (2) ensuring fairness of the financial burden placed upon a defendant whose conduct was negligent.”<sup>422</sup> The Indiana Supreme Court adopted the Wisconsin “relative

413. *Id.*

414. *Id.*

415. 729 N.E.2d 569 (Ind. 2000). I was the author of this opinion.

416. *Id.* at 571.

417. *Id.*

418. *Id.*

419. *Id.* at 572.

420. Upon reflection, “spurious” claims was probably not the best way to describe the Court’s concern. “Spurious” means illegitimate, false, or not genuine. *Spurious*, WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY (2d ed.). The concern here was more that beyond some point, it would simply be bad policy to permit such claims. *Atlantic Coast Airlines v. Cook*, 857 N.E.2d 989 (2006), to be discussed *infra* accompanying note 426, is a good illustration.

421. 517 N.W.2d 432 (Wis. 1994).

422. *Groves*, 729 N.E.2d at 572 (quoting *Bowen*, 517 N.W.2d at 443). The *Bowen* elements are:

- “First, ‘[a] fatal injury or a physical injury that a reasonable person would view as serious can be expected to cause severe distress to a bystander. Less serious physical harm to a victim would not ordinarily result in severe emotional distress to a reasonable bystander of average sensitivity.’” *Id.* at 572-73 (quoting *Bowen*, 517 N.W.2d at 444).
- “Second, emotional distress may accompany the death or severe injury of persons such as friends, acquaintances, or passersby. But the emotional trauma that occurs when one witnesses the death or severe injury of a loved one with a relationship to the plaintiff

bystander rule” as an *alternative* theory of recovery to the “modified impact rule” of *Conder v. Wood*.<sup>423</sup> “[W]here the direct impact test is not met,” Groves held:

a bystander may nevertheless establish “direct involvement” by proving that the plaintiff actually witnessed or came on the scene soon after the death or severe injury of a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling caused by the defendant’s negligent or otherwise tortuous conduct.<sup>424</sup>

*Groves* was decided June 7, 2000;<sup>425</sup> *Cullison* had been decided April 23, 1991.<sup>426</sup> In ten years, the availability of damages for emotional distress had been dramatically expanded as the impact rule was systematically constricted and an alternative to it was approved. Then the expansion stopped. In 2007, the Court decided two cases showing its unwillingness to go further in respect of either the modified impact rule or the relative bystander rule.

The first of these two cases, *Atlantic Coast Airlines v. Cook*,<sup>427</sup> involved the modified impact rule. A passenger on a flight from Indianapolis engaged in disruptive conduct (refusing to fasten seat belt; smoking; foot stomping; etc.) and made alarming pronouncements (“World Trade Center”; “Americans”; “New York City”; etc.).<sup>428</sup> No physical violence occurred and the passenger was arrested when the plane landed.<sup>429</sup>

Two other passengers on the flight sued the airline, contending they suffered a direct physical impact from the alleged negligence of Atlantic Coast, resulting

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analogous to ‘a spouse, parent, child, grandparent, grandchild, or sibling is unique in human experience and such harm to a plaintiff’s emotional tranquility is so serious and compelling as to warrant compensation.’ Limiting recovery to those plaintiffs who have the specified relationships with the victim acknowledges the special quality of such relationships yet places a reasonable limit on the liability of the tortfeasor.” *Id.* at 573 (quoting *Bowen*, 517 N.W.2d at 444) (internal citations omitted).

- “Third, ‘witnessing either an incident causing death or serious injury or the gruesome aftermath of such an event minutes after it occurs is an extraordinary experience, distinct from the experience of learning of a loved one’s death or severe injury by indirect means.” *Id.* (quoting *Bowen*, 517 N.W.2d at 444-45).

423. *Conder*, 716 N.E.2d 432.

424. *Groves*, 729 N.E.2d at 573. As set forth in the text, for a plaintiff to recover damages for emotional distress under the relative bystander rule, that another person must be the victim of negligently-inflicted “death or severe injury.” *Id.* Note that the same is not required for emotional distress claims brought under the modified impact rule where recovery is permitted so long as the plaintiff personally sustains a physical impact and the requisite emotional distress damages. *Spangler v. Bechtel*, 958 N.E.2d 458, 467 (2011) (citing *Bader v. Johnson*, 732 N.E.2d 1212, 1215, 1222 (Ind. 2000)).

425. *Groves*, 729 N.E.2d 569.

426. *Cullison v. Medley*, 570 N.E.2d 27 (Ind. 1991).

427. 857 N.E.2d 989 (Ind. 2006).

428. *Id.* at 992.

429. *Id.*

in severe emotional distress.<sup>430</sup> The Court rejected the claim but only after giving it extended treatment, reviewing each of the cases discussed above.<sup>431</sup> In the end, the Court concluded:

We do not suggest that the [plaintiffs'] fear and anxiety during the flight were trivial. But there was simply nothing before the trial court, and by extension before this Court, suggesting that the [plaintiffs'] fear and anxiety were anything other than temporary. And it is pure speculation to assume that the [plaintiffs'] later feelings of being bothered, concerned, and nervous are causally related to the events aboard the flight. Because the physical impact in this case was slight to nonexistent, allowing an emotional distress claim to proceed based on the [plaintiffs'] lingering mental anguish would essentially abrogate the requirements of Indiana's modified impact rule.<sup>432</sup>

Focus on the last sentence: The Court was unwilling to modify further the modified impact rule; the Court had done as much as it was going to do.

In *Smith v. Toney*,<sup>433</sup> the Court addressed the relative bystander rule. A man on his way home from visiting his fiancée was killed in a collision between his automobile and a semi-trailer.<sup>434</sup> Approximately two hours after the accident was declared a fatality and after the body had been placed in a body bag, the man's fiancée, by now searching for her missing fiancé, drove by the scene of the accident at about the time his body was being moved to the coroner's vehicle.<sup>435</sup> She later sued, alleging severe emotional trauma and distress from the death of her fiancé.<sup>436</sup>

The facts implicated two aspects of the relative bystander test enunciated in *Groves v. Taylor*: whether the plaintiff fiancée "came on the scene soon after the death" of her fiancé; and whether the victim's relationship with the plaintiff was "analogous to a spouse."<sup>437</sup>

The Court first addressed whether these determinations were questions of fact or law and, following the *Bowen* decision from Wisconsin, held the latter.<sup>438</sup> "These criteria are derived from the public policy considerations that underlie and define a claim for negligent infliction of emotional distress. They are therefore issues of law for a court to resolve."<sup>439</sup>

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430. *Id.* ("Recalling the events of September 11th, and recalling also a passenger's attempt to detonate a shoe bomb aboard an airplane with the use of a match, the [plaintiffs] described their ordeal as one in which they 'have never been so scared in their entire lives.'").

431. *Id.* at 995-96.

432. *Id.* at 1000.

433. 862 N.E.2d 656 (Ind. 2007).

434. *Id.* at 658.

435. *Id.*

436. *Id.*

437. *Id.* at 657.

438. *Id.* at 658.

439. *Id.* at 660 (citing *Bowen*, 517 N.W.2d at 445-46).

Next, the Court took up the question of whether engaged couples are in relationships “analogous” to marriage and held not.<sup>440</sup>

Lastly, the Court considered the “soon after the death of a loved one” element. “The scene viewed by the claimant,” the Court held, “must be essentially as it was at the time of the incident, the victim must be in essentially the same condition as immediately following the incident, and the claimant must not have been informed of the incident before coming upon the scene.”<sup>441</sup>

Consider these three holdings: The Court decided each in a way that circumscribed the relative bystander rule. The Court had done as much as it was going to do.

#### VII. CONCLUSION: AN UNAPPRECIATED RELATIONSHIP BETWEEN WORKERS’ COMPENSATION AND TORT LAW

Part I.B of this Article discussed the way in which progressives secured enactment of workers’ compensation statutes during the Historical Age, thereby ameliorating some of the harshest doctrines of the Conservative Common Law Era. Even though workers’ compensation statutes are now a century old, their interpretation provides a steady diet of interesting cases for courts. Many of those cases are extremely interesting but are beyond the scope of this Article.<sup>442</sup>

That workers’ compensation laws provide injured employees a statutory rather than common law remedy for workplace injuries is well recognized and appreciated. Less so is that a great deal of common, statutory, and constitutional

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440. *Id.* at 660-62. The Court spent a great deal of time on this point, giving three reasons for limiting recovery to married couples, including that “marriage affords a bright line and is often adopted by the legislature in defining permissible tort recovery.” *Id.* at 661. I was concerned the Court was excising the “analogous to” language from the relative bystander test and wrote to protest that anything the Court said beyond engaged couples would be dicta. *Id.* at 663 (Sullivan, J., concurring). My concern, in the decade before the law recognized same-sex marriage, see *Obergefell v. Hodges*, 135 S. Ct. 2584, (2015), was that same-sex couples have the benefit of the relative bystander rule.

441. *Smith*, 862 N.E.2d at 663.

442. I will mention one particularly interesting workers’ compensation case, *Everett Cash Mut. Ins. Co. v. Taylor*, 926 N.E.2d 1008 (Ind. 2010), of which I was the author. A farmer engaged an independent contractor to perform some work on farm property. *Id.* at 1010. An employee of the independent contractor was injured on the job. *Id.* As it turned out, the contractor did not have workers’ compensation insurance and so the employee sued the farmer under a provision in the workers’ compensation statute that imposes liability upon a person who hires a contractor without verifying the contractor carries worker’s compensation insurance to the same extent as the contractor for the injury or death of any of the contractor’s employees. *Id.* (quoting IND. CODE § 22-3-2-14(b) (2016)). What made the case particularly interesting to me was that although this requirement had been part of the workers’ compensation statute since its enactment in 1929, none of the lawyers—or, for that matter, judges—involved in the case was aware of the provision or of it having been utilized in the past. The discovery and deployment of the statute on behalf of a client in need strikes me as an example of lawyering at its best.

law results from workplace injury cases where workers' compensation laws do not apply.

Indiana's workers' compensation law provides the exclusive remedy for recovery of personal injuries "arising out of and in the course of employment."<sup>443</sup> Although the law bars a court from hearing any common law claim brought against an employer for a workplace injury, it does permit an action for injury against a third-party tortfeasor provided the third-party is neither the plaintiff's employer nor a fellow employee.<sup>444</sup> Without going into too much detail, the statute does prohibit double recovery, i.e., both collecting workers' compensation and recovering against a third party.<sup>445</sup> For our purposes, the operation of these provisions creates an incentive for an injured worker to seek recovery from a potential third party tortfeasor for a workplace injury where there is some prospect the amount of the recovery will exceed by some measurable amount the value of the workers' compensation benefits.<sup>446</sup>

There are many such cases. Here are five examples—some using cases discussed earlier in this Article and some for the first time here—of significant contributions to Indiana common law, statutory law, and constitutional law that arose from workplace injuries but were litigated outside the confines of workers' compensation. And the important point is that the holdings in these decisions apply well beyond workplace injury cases.

#### *A. Constitutional Law*

It is not at all surprising that many workplace injury claims brought against third party tortfeasors are product liability claims, for workers are often injured on the job while using machines or other products manufactured by third parties. One such case, discussed at some length in this Article (*McIntosh v. Melroe Co., A Division of Clark Equipment Co., Inc.*<sup>447</sup>), was a workplace injury claim that challenge the very constitutionality of the IPLA.

In *McIntosh*, a worker had been injured in an accident involving a machine akin to a forklift, manufactured by the defendant and placed in service approximately thirteen years before the accident.<sup>448</sup> The injured worker contended that to bar his claim on grounds of the IPLA's ten-year statute of repose violated his rights under the Indiana Constitution's open courts and right to remedy and the equal privileges and immunities clauses.<sup>449</sup> The Court divided 3-2 in

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443. IND. CODE § 22-3-2-6 (2016).

444. *Id.* § 22-3-2-13.

445. *See* *DePuy, Inc. v. Farmer*, 847 N.E.2d 160, 171 (Ind. 2006).

446. For a good discussion of the interplay between workers' compensation and third-party actions, see *Spangler, Jennings & Dougherty P.C. v. Indiana Insurance Co.*, 729 N.E.2d 117, 119-22 (Ind. 2000) (Shepard, C.J.).

447. 729 N.E.2d 972 (Ind. 2000). *See* discussion *supra* accompanying note 75.

448. *McIntosh*, 729 N.E.2d at 973-74.

449. *Id.* at 974.



upholding the statute's constitutionality.<sup>450</sup>

### *B. Strict Liability*

Another case discussed earlier in this Article involving a products liability claim arising from a workplace injury is *Greeno v. Clark Equipment Co.*<sup>451</sup> In that case, an employee had been injured on the job at Dana Corp. using a forklift manufactured by Clark Equipment Co.<sup>452</sup> The forklift was defective.<sup>453</sup> The plaintiff was not in privity of contract with Clark Equipment.<sup>454</sup> The court adopted Restatement (Second) of Torts section 424A and recognized a seller of an unreasonably dangerous product in a defective condition is liable for harm caused by the product without regard for either privity or negligence.<sup>455</sup>

### *C. Summary Judgment*

Still a third case discussed earlier in this Article involving a products liability claim arising from a workplace injury is *Lenhardt Tool & Die Co. v. Lumpe*.<sup>456</sup> In that case, the plaintiff had been injured at work when a mold exploded.<sup>457</sup> Because the mold had been destroyed and there were no records as to where the mold had originated, there was no way of establishing the defendant had manufactured the mold.<sup>458</sup> The defendant sought transfer on grounds that summary judgment had been wrongfully denied; it would be impossible for the plaintiff to prove its liability.<sup>459</sup> The Court denied transfer but Justice Boehm wrote a lengthy dissent to the denial of transfer, which remains to this day the strongest argument in print against Indiana's non-movant friendly summary judgment standard.<sup>460</sup>

### *D. Comparative Fault*

An important change in Indiana tort law not heretofore discussed was the

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450. *Id.* at 978, 984. Justice Boehm's opinion also contains an extraordinarily interesting comparative analysis of the "remedy by due course of law" guarantee of the Indiana Constitution and the "due process" guarantees of the federal Constitution, including discussions of their procedural and substantive prongs.

451. 237 F. Supp. 427 (N.D. Ind. 1965). *See* discussion *supra* accompanying note 42.

452. *Id.* at 428.

453. *Id.*

454. *Id.*

455. *Id.* at 433.

456. 735 N.E.2d 221 (Ind. 2000) (order denying transfer) (Rucker, J., not participating); *see also* *Lenhardt Tool & Die Co. v. Lumpe*, 722 N.E.2d 824 (Ind. 2000) (Boehm, J., dissenting from denial of transfer). *See* discussion *supra* accompanying note 117.

457. *Lenhardt*, 722 N.E.2d at 825 (Boehm, J., dissenting from denial of transfer).

458. *Id.*

459. *Id.*

460. *See generally id.*

adoption in 1983 of the Indiana Comparative Fault Act ("ICFA").<sup>461</sup> In *Control Techniques, Inc. v. Johnson*,<sup>462</sup> an employee at the LTV Steel Plant in East Chicago sustained serious burns while measuring the voltage of a circuit breaker.<sup>463</sup> He sued the electric company that installed the breaker and the manufacturer that designed and built the circuit breaker.<sup>464</sup>

At issue was whether the ICFA had abrogated or otherwise modified the common law tort doctrine of "superseding" or "intervening" cause.<sup>465</sup> The requirement of causation as an element of liability for a negligent act includes the requirement that the consequences be foreseeable.<sup>466</sup> A superseding cause that forecloses liability of the original actor is, by definition, not reasonably foreseeable by that actor.<sup>467</sup> Accordingly, the Court said, the doctrine of superseding cause is simply an application of the larger concept of causation in effect both before and after the adoption of the ICFA.<sup>468, 469</sup>

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461. Pub. L. No. 317-1983, § 1, 1983 Ind. Acts 1930 (codified at IND. CODE § 34-51-2 (2016)). For more information on the legislative history of this and other Indiana tort reform statutes, see *supra* note 60. Some version of comparative fault has been adopted by statute in well over half of the fifty states, and several other jurisdictions have adopted comparative fault principles by judicial decisions. *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 107 (Ind. 2002).

462. 762 N.E.2d 104.

463. *Id.* at 106.

464. *Id.*

465. *Id.* at 107-08.

466. *Id.* at 108.

467. *Id.*

468. *Id.*

469. Justice Boehm's opinion points out comparative fault statutes addressed two major concerns. First, they abolished the "harsh common law rule that a plaintiff contributorily negligent to any degree was barred from all recovery." *Control Techniques, Inc.*, 762 N.E.2d at 109. Second, they also abolished the rule of "joint and several liability" where "a defendant whose negligence contributed only slightly to the plaintiff's loss could be required to pay for all of the plaintiff's damages and the plaintiff could proceed against and collect from the defendant of choice." *Id.*

Justice Dickson took strong exception to the second of these two observations. In his view, the ICFA did not "alter[ ] the common law rule of joint and several liability among joint tortfeasors." *Id.* at 110 (Dickson, J., dissenting). Invoking the derogation canon, see discussion accompanying footnote 17, Justice Dickson argued the ICFA "did not by express terms or unmistakable implication abrogate the common law principle of joint and several liability for joint tortfeasors." *Id.* at 112. *But see* Edgar W. Bayliff, *Drafting and Legislative History of the Comparative Fault Act*, 17 IND. L. REV. 863, 867 (1984) ("[L]imiting recovery against each defendant to the percentage of his own fault . . . implicitly abrogates the traditional rule of joint and several liability for concurrent wrongs, but only in certain instances [not relevant in *Control Techniques*].").

*E. Duty of Persons with Mental Disabilities*

In this last case, *Creasy v. Rusk*,<sup>470</sup> a certified nursing assistant in a nursing home sued her patient, a person with Alzheimer's disease, for injuries she suffered when he kicked her while she was trying to put him to bed.<sup>471</sup>

At issue was whether the general duty of care imposed upon adults with mental disabilities is the same as that for adults without mental disabilities.<sup>472</sup> The defendant argued Indiana precedent dictated that an adult with a mental disability is held to a standard of care "proportionate to his or her capacity."<sup>473</sup> The controlling rule, the Court of Appeals agreed, was that "a person's mental capacity, whether that person is a child or an adult, must be factored [into] the determination of whether a legal duty exists."<sup>474</sup>

Arrayed against this precedent was a rule generally accepted in other jurisdictions that mental disability does not excuse a person from liability for "conduct which does not conform to the standard of a reasonable man under like circumstances."<sup>475</sup> This was the position taken by the American Law Institute.<sup>476</sup>

In addition, there had been a host of statutory enactments since the 1970s that reflected policies to deinstitutionalize people with disabilities and integrate them into the least restrictive environment. National policy changes had led the way for some of Indiana's enactments in that several federal acts either guarantee the civil rights of people with disabilities or condition state aid upon state compliance with desegregation and integrationist practices.<sup>477</sup>

*Creasy* overruled precedent and adopted the A.L.I. position "that a person with mental disabilities is generally held to the same standard of care as that of a reasonable person under the same circumstances without regard to the alleged tort-feasor's capacity to control or understand the consequences of his or her actions."<sup>478</sup>

These five examples illustrate how tort law extending well beyond the workplace often emanates from workplace injuries notwithstanding the existence of the workers' compensation remedy. And, in point of fact, the tort law holdings

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470. 730 N.E.2d 659 (Ind. 2000). I was the author of this opinion. I must acknowledge the extraordinary assistance of my law clerk, Kathy L. Osborn, in writing *Creasy*.

471. *Id.* at 660-61.

472. *Id.* at 661.

473. *Id.* at 663.

474. *Id.* (internal quotation marks omitted).

475. *Id.* (quoting RESTATEMENT (SECOND) TORTS § 283B).

476. *Id.* (citing RESTATEMENT (SECOND) TORTS § 283B).

477. *Id.* at 664-65 (citing, inter alia, Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (1994) (requiring that children with disabilities receive a free appropriate public education in the least restrictive environment in states that accept allocated funds) and Americans with Disabilities Act, 42 U.S.C. § 12132 (1994) (providing a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities)).

478. *Id.* at 666-67.

in each of these workplace injury cases have been used to resolve issues arising in other factual settings.<sup>479</sup> As I have said, lawsuits against third-party defendants in workplace injury cases and the development of tort law generally is an unappreciated relationship but a profoundly important one.

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479. See, e.g., *Land v. Yamaha Motor Corp.*, 272 F.3d 514, 518 (7th Cir. 2001) (in a boating accident case, applying *McIntosh*'s holding on the constitutionality of the IPLA's statute of repose); *Gonzalez v. Volvo of Am. Corp.*, 752 F.2d 295, 300 (7th Cir. 1985) (in a motor vehicle accident case, applying *Greeno*'s holding adopting Restatement (Second) § 402A); *Comm'r of Ind. Dep't of Ins. v. Black*, 962 N.E.2d 675, 681 (Ind. Ct. App.) (in a medical malpractice case, adopting Justice Boehm's dissent in *Lenhardt Tool & Die* on the correct standard for summary judgment), *trans. granted, opinion vacated*, 969 N.E.2d 86 (Ind. 2012) (see discussion *supra* accompanying note 126); *Hill-Jackson v. FAF, Inc.*, No. 1:10-CV-01296-TWP, 2011 WL 3902772, at \*1 (S.D. Ind. Sept. 6, 2011) (in a multi-vehicle accident case, applying *Control Techniques*' holding on the relationship between the ICFA and the common law tort doctrine of superseding or intervening cause); *Penn Harris Madison Sch. Corp. v. Howard*, 861 N.E.2d 1190, 1194 (Ind. 2007) (in a lawsuit by a student against a school corporation for injuries received during rehearsal of school play, applying *Creasy*'s holding that an individual over the age of fourteen must exercise the reasonable and ordinary care of an adult).