

INDIANA TORT LAW REVIEW 1993

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INTRODUCTION

A survey of the significant cases of the Indiana appellate courts during 1993 in the field of torts law (other than products liability), reveals significant changes in the areas of punitive damages,¹ incurred risk, and Samaritan immunity. In each of these areas the Courts have steered toward the mainstream of the American common law, and handed down strong, consistent decisions.

I. THE DEFENSE OF INCURRED RISK IN INDIANA

“The Reports of my death are greatly exaggerated.”²

Roughly a decade ago, Indiana's legislature crossed the Rubicon, leaving the land of common law negligence to enter the territory of Comparative Fault.³ To the distress of those who attempt to predict outcomes in Indiana tort law, it is far from clear how much crossed over, and how much was left to dwell in the classic territory of former Indiana common law.⁴ In no area is this situation more perplexing and exacerbated than in the area of incurred risk.⁵ Perhaps some scholar might improve upon the analysis of Professor Wilkins, published on the eve of the new era, but I certainly cannot, and an annual survey seems an inappropriate place to attempt to outline a precise and detailed analysis.

In January of 1993 one commentator called attention to the fact that the status of the defense of incurred risk under the nearly ten-year-old Comparative Fault Act is still unsettled.⁶ This commentator argued from the rather plain

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1. Indiana law regarding punitive damages was significantly affected this survey year by the Indiana Supreme Court decision in *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975 (Ind. 1993). For an analysis of the changes in this area of law, see Judy L. Woods & Brad A. Galbraith, *Recent Developments in Contract and Commercial Law*, 27 IND. L. REV. 769 (1994).

2. Samuel Langhorne Clemens (a.k.a. Mark Twain), *Cable from London to the Associated Press* (1897).

3. Act of April 21, 1983, Pub. L. No. 317—1983, IND. CODE § 34-4-33-1(a)(2).

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

5. *Id.* at 757-94; see also Baker, *Has Adoption of Indiana Comparative Fault Act Abolished Incurred Risk?*, 36 RES GESTAE 356 (Feb. 1993) (indicating that the questions and difficulties identified by Professor Wilkins in 1984 remain, alas, very much alive a decade later).

An out of state attorney, or someone using national instead of Indiana terminology, would probably refer to this defense as assumption of risk, or secondary assumption of risk.

6. See Baker, *supra* note 5.

language of the Act itself⁷ that incurred risk, as a defense separate from general comparative fault, should be considered as abolished by the Act, and no separate jury instruction upon this defense should be given.⁸ He marshalled out-of-state decisions to support his conclusion, and although selected Indiana cases were discussed, they seemed to say little on the point of abolition or the unsettled questions of Professor Wilkins' article.⁹ Since the publication of the *Res Gestae* article, there have been three published opinions on incurred risk from the Indiana Supreme Court and Court of Appeals. What seems to emerge from these opinions is that, while we do not seem any closer to answering Professor Wilkins' insightful questions, any report of the death of the defense of incurred risk in Indiana is definitely premature. The doctrine, far from being dead, does not even appear to be sick.

Of the three new cases, the easiest to dispose of is *Clark v. Wiegand*.¹⁰ In *Clark*, the plaintiff was a student at Indiana State University, who had been injured when thrown in an elective Judo class. She sued the teacher supervising the class (an employee of ISU) and the ISU Board of Trustees. She did not proceed against the fellow student who actually threw her. Thus, *Clark* was an action against a state college or university,¹¹ entities which are specifically excluded from the reach of the Comparative Fault Act.¹² Such an action, therefore, is still subject to the common law, including the defense of incurred risk. However, the Indiana Supreme Court made no mention of this fact,¹³ and as a result, the case can easily be incorrectly read as applicable to the defense of incurred risk under the Comparative Fault Act. Actually, it has nothing to say either way on that point, and would seem to be properly read as indicating that, *to whatever extent the defense of incurred risk may survive* in Indiana law, it has the qualities identified in the *Clark* opinion.

In *Clark*, the Supreme Court held that the student's knowledge of the risk of being thrown to the mat did not conclusively, as a matter of law, establish her knowledge, and acceptance, of the risk of being thrown to the mat and incurring a disabling ligament injury to her knee.¹⁴ In order to find incurred risk as a matter of law, the Court required that the risk subjectively known to the plaintiff be the very risk, or at least very near the risk, which actually overtook her. Therefore, it appears that the *Clark* opinion restricts the "no prescience of specific accident required" language of the earlier *Muller*¹⁵ and *Forrest*¹⁶

7. 36 RES GESTAE 356 at n.1 (arguing from IND. CODE § 34-4-33-2).

8. *Id.* at 361.

9. *Id.* at 356-58, nn.5-8.

10. 617 N.E.2d 916 (Ind. 1993).

11. IND. CODE § 34-4-16.5-2(2)(f)(7) (Supp. 1993).

12. IND. CODE § 34-4-33-8.

13. No mention is made in either the majority, dissent, or footnotes of what is otherwise a quite detailed six page treatment. 617 N.E.2d 916-21.

14. *Id.* at 919.

15. *Muller v. City of Columbus*, 552 N.E.2d 500, 503, at n.3 (Ind. Ct. App. 1990),

cases, upon which the defendant University had heavily relied.¹⁷ It would be a bit strong to say this defense was “pruned back,” but it is perhaps accurate to note that the defense of incurred risk sustained a slight narrowing of the arteries entirely consistent with its respectably mature years. The following two Court of Appeals cases, which are not governmental cases, are consistent with this change.

In *Smith v. AMLI Realty Co.*,¹⁸ the court below had granted the defendant a summary judgment, finding that the plaintiff, a child of nine years of age, was barred from all recovery by the defense of incurred risk. The Court of Appeals noted that the trial court had simply “failed to refer to comparative fault in its ruling” and resolved the case by reversing on the error as to the *substance* of the defense of incurred risk, rather than dealing with the *effect* that should be given the defense under current comparative fault law. The Court of Appeals reversed the trial court, finding that there were issues of material fact regarding the defense of incurred risk,¹⁹ because although there was no dispute as to the evidence, conflicting inferences could be drawn from it by a jury.²⁰

In *Smith*, the child plaintiff was injured while lawfully playing on an exercise machine in the exercise room of the defendant’s apartment complex, in which the plaintiff’s father lived. His playmate was a little girl, who hung by her knees from a “lat bar” on the machine, connected by cable and pulley to seventy pounds of weights. She asked the plaintiff to help her get down. The plaintiff placed both hands under the weights and lifted, permitting his playmate

trans. denied (quoting *Tavernier v. Mays*, 51 Cal. Rptr. 575, 582 (1966)).

It is this “no prescience of exact risk” language which *Clark*, may be looked at as cutting back a bit. On the other hand, the facts of *Clark*, where a female college student was thrown and seriously injured by a 260 lb. member of the varsity football team, of whom she had expressed fear (based upon past rough encounters) to the defendant instructor, and been told she would have to deal with her fear, made the plaintiff’s position in *Clark* particularly appealing to traditional male protective and chivalrous attitudes, factors much less marked in *Mauler* and *Forrest*, though those cases also involved female claimants.

16. *Forrest v. Gilley*, 570 N.E.2d 934, 936 (Ind. Ct. App. 1991) quoting the “no prescience of specific accident” language from *Hamilton v. Roger Sherman Architects Group, Inc.*, 565 N.E.2d 1136, 1138, at n.3 (Ind. App. 1 Dist. 1991), which in turn, quoted the language from *Mauler*.

Actually, it seems impossible to make any sense of the *Hamilton* and *Forrest* opinions, if in fact the Comparative Fault Act abolished the defense of incurred risk in Indiana, but those are cases of earlier years, and the attempt here is to focus on the new developments of 1993.

Mauler, being a case against a city, was specifically left under common law by the Comparative Fault Act, and while *Forrest* and *Hamilton* can be read as leaving small but tantalizing possibilities of being given an abolition reading, the author believes such a reading would be very labored (but of course, not impossible).

17. *Clark v. Wiegand*, 617 N.E.2d 916, 919 (Ind. 1993).

18. 614 N.E.2d 618 (Ind. Ct. App. 1993).

19. If the defense was abolished by the Act, how could any fact concerning the defense be material?

20. 614 N.E.2d at 620-21.

to be lowered. However, when she jumped off the bar, leaving the plaintiff with the whole weight, it was more than he could handle alone. The weights crashed to their resting place upon a stack of weights, injuring the plaintiff's fingers.

The plaintiff child testified at deposition that he knew the weights would go down when the bar went up, and that if he left his hand or foot under the weights when they were coming down he could possibly be hurt.²¹

The Court of Appeals reviewed and applied the standard common law for children of the plaintiff's age as the standard for contributory negligence;²² that is, a child is to be held to the standard of care ordinarily exercised by children of the same age, knowledge, judgment, and experience under similar circumstances. Without discussion or citation to authority, the court applied this standard to a child confronted with the defense of incurred risk, and *seemed*²³ to indicate that a jury should be instructed to judge the child by that standard. The Court of Appeals observed that a jury might find that the weights were not yet descending when the plaintiff put his hands beneath them, that he may not have understood that his playmate would release the bar, or that he may have thought that he could hold the weights alone.²⁴ Reviewing standard Indiana law for this defense, the Court pointed out that in order to sustain a summary judgment that plaintiff had incurred the risk *as a matter of law*, the evidence must reveal without conflict that the plaintiff had actual knowledge of the specific risk and understood and appreciated that risk.²⁵ Because this was not the situation, the case was remanded for a trial on the merits.

In its holding that the more forgiving "child" standard should be applied to a plaintiff of age nine confronted with the defense of incurred risk, and that a plaintiff must actually, subjectively *know* the risk, and that a child plaintiff, at least, must *understand* and *appreciate* the risk he incurs to be found guilty of incurred risk as a matter of law, the Court of Appeals indicates that it does not intend to expand or extend the defense of incurred risk beyond prior bounds in Indiana, and perhaps can be seen as carefully limiting the reach of the prior *Mauler* holding.²⁶

Finally, in *K-Mart Corp. v. Beall*,²⁷ the Second District echoed the same view, holding that the defense of incurred risk requires actual knowledge and voluntary assumption of the risk.²⁸ The plaintiff in *K-Mart*, shopping in the aisle of a warehouse-type Builder's Square store, passed near a ladder while he was looking for goods near the floor level. He did not look up to see a store

21. *Id.* at 620.

22. *See Brockmeyer v. Fort Wayne Pub. Transp.* 614 N.E.2d 605, 607, 609 (Ind. Ct. App. 1993) (a governmental case still subject to full common law defenses).

23. *Smith*, 614 N.E.2d at 621.

24. *Id.*

25. 614 N.E.2d at 620.

26. 552 N.E.2d 500, 503 (Ind. Ct. App. 1990), *trans. denied*.

27. 620 N.E.2d 700 (Ind. Ct. App. 1993).

28. *Id.* at 704.

employee shifting goods some fifteen feet up. A box of electrical receptacles fell on the plaintiff's neck, injuring him. On that evidence, the court held that it was not reversible error for the trial court to deny defendant a requested instruction on the defense of incurred risk.²⁹

The Court of Appeals held that the tendered traditional incurred risk instruction "correctly stated the law relating to the defense of Incurred Risk"³⁰ and discussed it as a living part of current Indiana law.³¹ The court ultimately held that the evidence did not require the instruction, and further, that the defendant had not been prejudiced by its denial, as there was no actual knowledge or voluntary incurrence of the risk on the part of the plaintiff, since he was not aware of the work atop the ladder.³² The trial court instructed the jury correctly on contributory fault, in the more usual sense of inadvertent contributory negligence, and indeed, the jury assigned some fault to plaintiff and apparently diminished his recovery. The Court of Appeals affirmed.

Once again, the emphasis on the classic requirements that the risk which overtakes the plaintiff, or something very close to it, must be subjectively known to the plaintiff and voluntarily encountered, is in harmony with the notes struck by the Indiana Supreme Court in *Clark* and the Third District in *Smith*. The present course of the Indiana higher courts therefore seems to be to confine the defense of incurred risk carefully within the boundaries of classic common law. However, any conclusion that the defense of incurred risk has been abolished and no separate instruction should be given on it seems decidedly premature. Further, the questions Professor Wilkins posed a decade ago were in no way impacted or resolved by this year's cases on the subject of incurred risk.³³

II. SAMARITAN'S ACQUIRED STATUTORY IMMUNITY FOUND DEFICIENT

Physician, watch thy step!

The basic common law held that when one undertook to act, even though he had no duty to act, he was bound to act with ordinary care.³⁴ This principle applied in Indiana.³⁵ Those who have reached middle age may remember the

29. *Id.*

30. *Id.* (Certainly an odd and awkward remark if the Comparative Fault Act abolished the defense of incurred risk. How can a tendered instruction correctly state the law of an abolished defense? Of course, one could read this as merely awkward dicta).

31. 620 N.E.2d 700. There is nearly a full page of closely reasoned discussion and analysis of authorities about this defense.

32. 620 N.E.2d at 704.

33. *See supra* notes 4-5.

34. W. PAGE KEETON, ET. AL., PROSSER & KEETON ON TORTS § 56, at 378 (5th ed. 1984); O.W. HOLMES, JR., THE COMMON LAW 278, 279 (48th printing, Little Brown & Co.) (1991); CLARENCE MORRIS, MORRIS ON TORTS 126-32 (2d ed. 1980).

35. *See, e.g.,* Simpson's Food Fair, Inc. v. City of Evansville, 272 N.E.2d 871 (Ind. Ct. App. 1971).

considerable agitation of the early 1960s resulting from the general belief that the American common law of torts was an unconscionable mess, that juries were awarding huge judgments to undeserving claimants, and that a prime example of this evil state of affairs, urgently demanding immediate remedy, was the rule which exposed the good Samaritan to the risk of negligence liability, whilst the priest and the Levite who callously passed by on the other side got off scot free.³⁶ It was argued that physicians were being substantially victimized by this rule.³⁷

Thereafter, many legislatures attempted to remedy what was believed to be a real evil, and Indiana's was among them. In 1963 the original version of the present statute was enacted,³⁸ immunizing from negligence liability Indiana-licensed practitioners of the healing arts who acted gratuitously as good Samaritans at the scene of an accident. In 1971 the statute was rewritten to protect any person who so acted at the scene of an accident or gave emergency care to the victim thereof.³⁹ This is the present law in Indiana.⁴⁰

The reality of the crisis which prompted this statute should be examined in light of the fact that careful research shows no reported appellate case in the United States of a physician/Samaritan being held liable before the enactment of this statute,⁴¹ and there have been only four appellate cases in Indiana relying on the act in the thirty years it has been on the books.⁴² Two of those were not healer's cases, and the statute did not in fact apply to *any* of the four cases where defendants sought shelter behind it. This particular "crisis" bears a striking resemblance to *The Emperor's New Clothes*,⁴³ but perhaps, as in the case of the original artifact, if one possessed more virtue, one too could see the garment. Whether the "Soak the Samaritan" crisis was real or not, it was believed to be real by many good people, and it is beyond question that real

36. *Union Pac. Ry. v. Cappier*, 72 P. 281 (Kan. 1903); *Wilmington Gen. Hosp. v. Manlove*, 174 A.2d 135 (Del. 1961) (no past good deed goes unpunished). For the original, happier account, see Luke 10:30.

37. One useful lead into this story is recorded by Professor C. Morris, MORRIS, *supra* note 34, at 131.

38. Indiana Samaritan Immunity Act, 1963 Ind. Acts ch. 319, § 1.

39. 1971 Ind. Acts, Pub. L. No. 447, § 1.

40. IND. CODE § 34-4-12-1 (West 1988).

41. The editors of NEWSWEEK and EMERGENCY MEDICINE magazines, despite offering a bounty, could find none. See Morris, *supra* note 34.

42. *Dreibelbis v. Bennett*, 319 N.E.2d 634 (Ind. Ct. App. 1974) (passer-by directing traffic at accident); *McKinney v. Public Serv. Co. of Ind., Inc.*, 597 N.E.2d 1001 (Ind. Ct. App. 1992) (passing driver stopped to assist changing of flat tire); *Beckerman v. Gordon*, 614 N.E.2d 610 (Ind. Ct. App. 1993) (doctor); *Steffey v. King*, 614 N.E.2d 615 (Ind. Ct. App. 1993) (doctor); both doctor cases *aff'd*, 618 N.E.2d 56 (Ind. Ct. App. 1993). There have been NO reported cases to which the statute has ever applied.

43. Hans Christian Andersen, *The Emperor's New Clothes* (1835); BARTLETT'S FAMILIAR QUOTATIONS 505 (15th ed. 1980).

crises *did* exist in physicians' fears and malpractice insurance rates.⁴⁴ It should be noted that the physician/Samaritan problem was only one small part of the medical malpractice liability/health care controversy, which continues to gain strength and divisive intensity today, and which is part of a controversy over the role and future of tort law and government in our society. All of the larger controversies, "crises" if one likes, are quite real, and the fact that the imagined woes of the Samaritan/physician are not real should not obscure the reality or seriousness of these problems. The limited lesson of this nobly intentioned (but so far universally inapplicable) statute is that it would behoove a serious person to be extremely careful in assaying facts in these general areas. Great interests and strong emotions are involved, and smoke, mirrors, and spin doctors are easier to find than facts, on every side of these debates.⁴⁵

The opinions of the Second District Court of Appeals, construing the present Indiana Samaritan Immunity Act in the cases of two physicians who gave emergency care, seem to be models of the skill and spirit with which one would hope appellate courts everywhere would approach cases in such controversial areas. I would include the single dissenting/concurring opinion in this observation.

In *Beckerman v. Gordon*,⁴⁶ Dr. Beckerman responded to a telephone call from Mr. Gordon in the early hours of the morning. Mr. Gordon's wife was in distress from pain in her left chest radiating to her arm, nausea, and was feeling very hot. Dr. Beckerman was not Mrs. Gordon's physician, but was in practice with her regular doctor, and lived a few blocks from the Gordons. Responding to Mr. Gordon's request, Dr. Beckerman promptly made a house call to the Gordon's home.⁴⁷ He diagnosed Mrs. Gordon with pleurisy (a painful but not dangerous illness) and gave her medicine appropriate for that condition from samples in his bag. An hour later, Mrs. Gordon began gasping and choking, and Dr. Beckerman was again telephoned, and returned in less than five minutes. Although he administered cardio-pulmonary resuscitation, Mrs. Gordon remained in full cardiac arrest and died. Her symptoms had been caused by a massive heart attack rather than pleurisy. A malpractice claim was commenced, but Dr.

44. For a fairly conventional repetition of the ordinary perception of these matters see PATRICIA DANSON, *TORT LAW AND THE PUBLIC INTEREST* 176-81 (Peter Schuck ed., 1991).

45. For an example of the surprises encountered when a skilled and careful lawyer runs down the actual facts behind the claimed "truths" special interests are trying hard, on both sides, to sell us in these areas, see C. Hoodenpyl, Jr., *Medical Malpractice Litigation in Indiana*, 20 RES GESTAE 126 (1976) (a ten year survey). I recommend this, and another praiseworthy digging for the *facts*, covering a broader spectrum, Indiana Continuing Legal Education Forum, Indiana State Bar Association, *Medical Negligence Litigation, 1993* (June 15-16, 1993).

46. 614 N.E.2d 610 (Ind. Ct. App. 1993), *reh. denied*, 618 N.E.2d 56 (Ind. Ct. App. 1993).

47. This is not a typographical error. Dr. Beckerman made not one, but *two* house calls, within minutes of being called, for someone who was not his patient, in the early hours of the morning. *See id.* at 611.

Beckerman's attorney claimed that the doctor did not have to answer the case before the medical panel because he was immune from negligence liability under the Samaritan statute.⁴⁸ The trial court held that the statute did not give Dr. Beckerman immunity on these facts, and the Court of Appeals affirmed in a two-to-one decision, on the basis that the immunity statute was in derogation of the common law, and thus should be strictly construed, and concluded that the statutory language is limited to cases of *accident*, rather than covering the whole spectrum of emergency care from every cause.⁴⁹

As a result, it was held that Dr. Beckerman was not immune, and his case would have to follow the normal medical malpractice claim procedure, beginning with the customary medical panel.⁵⁰ The case, and the *Steffey* case which came up with it, should not be read as turning upon some oversight or neglect of substantive law or procedure by counsel. The attorneys for all parties appear to have presented these cases with great determination and skill.⁵¹

In *Steffey v. King*,⁵² Mrs. Steffey was in the hospital awaiting delivery of her child. It was expected that hers would be a breach delivery and the medical plan was to proceed to normal delivery, falling back on caesarian section if it became necessary. The attending doctor left the delivery room, and could not be found when Mrs. Steffey spontaneously commenced breach delivery. The baby was partly delivered, Mr. Steffey holding its legs, when the nurse went for assistance and returned with Doctor Templeton, the Samaritan in this case. Dr. Templeton employed forceps and delivered the child, the plaintiff Aaron, alive, but blue-green in color and with indentations in the sides of his head. Aaron allegedly sustained injuries of some consequence in this procedure. In this case, which came from another county, the trial judge ruled that Dr. Templeton, the Samaritan, was immune under the statute. The Second District Court of Appeals held unanimously that these events, while an emergency, were not an *accident* as required by the language of the statute to confer immunity.⁵³ Further, the judge who had dissented in *Beckerman* did not find the quality of unexpectedness

48. IND. CODE § 34-4-12-1 (Burns 1988). The relevant part of the statute reads: "Any person, who in good faith gratuitously renders emergency care at the scene of an *accident* or emergency care to the victim *thereof*, shall not be liable for any civil damages . . ." (emphasis added).

49. *Beckerman*, 614 N.E.2d at 612-13. The dissent would have interpreted the critical statutory word "accident" to include sudden grave emergency illnesses which come on as an unexpected surprise to the patient and would have left the issue of whether Mrs. Gordon's illness was such to a jury. *See id.* at 614-15 (Sullivan, J., dissenting) (further explained in Judge Sullivan's concurrence in the companion case of *Steffey*, 614 N.E.2d 615, 617, 618 (Sullivan J., concurring)).

50. *Id.* at 611, 613.

51. I have simplified the procedure of these cases in this report without misstating the holdings to aid in clarity. The change of venue, summary judgment motions, and possible *res judicata* procedural questions illustrate how diligently these cases were presented.

52. 614 N.E.2d at 615.

53. *Id.* at 617.

which his broader interpretation of the word "accident" would require. He pointed out that a breach birth was expected, and Mrs. Steffey had entered the hospital in due course and time for her breach delivery. He therefore concurred in *Steffey*, making the holding unanimous, that the Samaritan/physician Templeton was not within the immunity statute.⁵⁴

Both of these cases were joined again and reheard, and the opinion was published three months later. This reinforces the perception that these cases were hard and skillfully fought, but the only new idea in the opinion was *dicta* favorable to the physicians. The opinion says that physician/Samaritans in these situations are entitled to the more relaxed standard of care of the sudden emergency doctrine. That is, that one who acts in a sudden emergency not of his own making is held to a lesser standard of care, by factoring in the fact that he acted during a sudden emergency.⁵⁵

The new development for the past year in the medical malpractice area in this State indicates that illnesses, even sudden grave ones, are not *accidents* to which the Samaritan immunity statute will apply. Under the Indiana Samaritan statute, an accident is a single, discrete event, not a condition, even though the condition gives rise to an emergency. Physicians giving emergency care are said to be entitled to the benefit of the emergency doctrine.

IV. CONCLUSION

One can do little better than to quote the words of the authors of last year's survey, indicating that "[d]uring this survey period, Indiana courts again took advantage of opportunities to bring Indiana tort law into the mainstream."⁵⁶ It is perhaps natural that the character and direction of the Indiana appellate courts, which are the same in structure and personnel as they were in 1992, should

54. *Id.* at 617-18.

55. *Beckerman*, 618 N.E.2d at 57. There are no authorities cited for the proposition that physicians in medical emergency cases, where they often act in exigent circumstances, but generally hold themselves out as capable of dealing skillfully with emergencies, would ordinarily be given a "sudden emergency" jury instruction, or that the Indiana medical panel should use this standard. Is an emergency room physician entitled to a sudden emergency instruction? A physician whose patient takes a sudden critical turn? *Sed quaere*. In any event, unlike the other parts of these well crafted opinions, this idea seems to have been thrown in without the same careful consideration the rest of the ideas expressed received. It is strictly speaking only *dicta*, and was thrown in as makeweight to an argument that these cases (and the interpretation of the immunity statute they made) will not seriously inhibit a doctor's decision to provide emergency medical assistance.

Modern physicians are careful about their exposure to malpractice liability, even in Indiana. These decisions (*Beckerman* and *Steffey*) are correct, but will increase the already serious caution with which healers approach potential Good Samaritan situations. The Court of Appeal thought otherwise. Whichever opinion is correct on this question, the two cases seem correct in their interpretation of the immunity statute.

56. Karen A. Jordan & Neal Lewis, *Survey of 1992 Developments in Tort Law*, 26 IND. L. REV. 1159 (1993).

continue on a course of "steady as she goes." This course seems a strong one, emphasizing the natural strengths of the common law system, and a proper deference to the legislative branch. To those who might prefer a more exciting scenario of judicial activism with judicial legislators or super legislators, and who would derogate Indiana's present course as "back to the future," I would suggest that most of today's difficult problems seem to be only the unanticipated faces of yesterday's incompletely thought out activist solutions. Indiana's appellate courts seem to me to serve well and wisely by maintaining their mainstream course.