DEVELOPMENT IN THE LAW OF TORTS IN INDIANA 1940-1945

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During war, as in peace, the problems of people living together result in about the usual number of Torts cases which get into the courts. The Indiana Supreme and Appellate Courts, during the past four years, have ground out a substantial number of such cases. Many of them are unimportant so far as the growth of the law is concerned. Most of the grade crossing, auto collision, pedestrian-auto accidents fall into the usual patterns. In many instances, the appellate court is merely called upon to review the record to determine whether there were facts sufficient to support the jury's findings, no new or troublesome questions of law being involved. No two cases, of course, are exactly alike. And yet one sometimes wonders how cases involving perfectly understood and accepted principles of law get into the appellate courts at all.

On the other hand, the Indiana Courts, have decided a number of important cases during the period in question. In some instances the rule of law was laid down for the first time in the State. The following pages discuss only cases which made new law, applied old principles to somewhat different situations or involved important problems of legal analysis or policy.

Problems Under the Indiana Automobile Guest Statute

The question of what constitutes "wanton" and "willful" misconduct under the Indiana Automobile Guest statute[1] has received several clarifying decisions during the past few years. A mere failure to exercise ordinary care, of course, is not enough to subject the driver of the automobile to liability to his gratuitous guest. The difference is one of kind. An inadvertent driver is not a wanton or reckless difference in degree is so great that it is treated as one of kind. An inadvertent driver is not a wanton or reckless driver. Wantonness can never be predicated on absentmindedness, preoccupation, or a failure to utilize one's senses or

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1. Burns' 1940 Replacement §11-265.

faculties in such a way as to appreciate the physical surroundings which constitute the danger. To constitute "wantonness," there must be an awareness of the situation and a deliberate decision to encounter the risk, a very considerable risk, it may be added. It is a case of very bad judgment rather than a failure to advert to the facts of the situation. "To constitute 'wanton or willful misconduct' it must appear that the driver of an automobile is conscious of his conduct, and with an appreciation of existing conditions knows that his conduct, if persisted in, will probably result in injury to his guest; and yet with the reckless indifference to consequence, he consciously or intentionally persists in such conduct."[2]

There are here, of course, several variables, such as "probably" result in injury. To what degree of probability? Propositions are always more or less probable. No rule of thumb can be given. The answer requires judgment, a judgment on the facts of the particular case, as guided by general experience. The judgment will ordinarily be that of the jury, under proper instructions from the court and subject to the usual control of the judge. In other words, if the jury's judgment on the issue of "how probable" the injury must be to constitute "wantonness" is not, in the judge's view, an unreasonable one, it will stand.

Another troublesome question under the Guest statute is what constitutes a "guest" within the terms of the act. What is the distinction between a "guest'" and a "passenger?" The statute employs the words "without payment for transportation." This is the basis for the distinction. "The word 'guest,' " says the Supreme Court in Liberty Mut. Ins. Co. v. Stitzle,[3] "has more of social than business significance. The words 'without payment for such transportation' imply some valuable consideration for the ride. The presence of the person injured must have directly compensated the own or operator in a substantial and material way. If the trip is primarily social, incidental benefits, though monetary do not exclude the guest relationship. If the trip is primarily for business purposes and the one to be charged receives substantial benefit, though not payment in a strict sense, the guest relation-

2. Lee Bros. v. Jones, 114 Ind. App. 688, 699, 50 N.E. (2d) 286 (1944). See also Bedwell v. DeDolt, 221 Ind. 600, 50 N. E. (2d) 875 (1943).
3. 220 Ind. 180, 41 N. E. (2d) 133 (1942).

ship does not exist. Expectation of a material gain rather than social compensation must have motivated the owner or operator in inviting or permitting the other person to ride."

Although here, too, there are a number of normative words which require the exercise of judgment in their application to specific facts, the standard is reasonably clear and affords a guide to the solution of particular cases. The standard is not dissimilar to that employed to distinguish a "licensee" on the premises of another from an "invitee" or "business guest." This distinction is necessary to determine the respective duties owed by the possessor of land toward persons coming on to his premises with respect to the condition of artificial structures on the land. A licensee is one on another's land solely for his own benefit whereas the business guest or invitee is present for a purpose in which the possessor has a business interest. The mutuality of business interest distinguishes the "invitee" from the "licensee." The social guest is a mere licensee.

In the Stitzle case, the Court would not hold as a matter of law that the injured person was a guest of the owner of the car where it appeared that she was an interior decorator, riding with the owner to Chicago to assist the latter in the selection of furniture and, through her professional and business knowledge and acquaintance, gain access to wholesale markets. The interior decorator was an employee of a department store through whom the defendant expected to buy the furniture and pay regular retail prices. The Court thought there might be sufficient "business interest" present to take the decorator out of the "guest" class. In Lee Bros. v. Jones,[4] the Appellate Court held that ,as a matter of law, a person who habitually rode to and from work with the defendant, a close friend, was a "guest" notwithstanding the fact that the former paid for the gasoline from time to time, as a friendly gesture, although he had not paid for the gasoline on the trip in which he was injured.[5]

In Fuller v. Thrun[6] the interesting question was presented whether a child of six could be a "guest" within the meaning of the statute. The child's parents had left her in the

4. 114 Ind. App. 688, 50 N. E. (2d) 286 (1943)
5. See also on sharing expenses, Albert McGann Securities Co., v. Coen, 114 Ind. App. 60, 48 N. E. (2d) 1000 (1943).
6. 109 Ind. App. 407, 31 N. E. (2d) 670 (1941).

defendant's custody, with instructions to put her to bed at 7:30. Instead, the defendant took her for a ride in his automobile. The Court held that a "guest" was one who had accepted an invitation to ride and that a child below seven years of age could not "accept" such an invitation because mentally incapable. The child, the Court held, was in the defendant's custody and while riding with the defendant was entitled to the exercise by the latter of reasonable care to avoid injury.

In Long v. Archer,[7] the Supreme Court held that, although described in the complaint as a "passenger," a plaintiff, riding in her employer's automobile within the scope of her employment, was not a "guest." The relationship was one which carried with it the duty on the part of the driver to exercise reasonable care for her safety.

In two interesting cases, the Supreme Court dealth with still another difficult question under the Guest statute. What are the rights of the parties when, as a result of collision between two automobiles caused by the "willful and wanton" driving of one and the negligent driver of the other, the guest of the willful driver and the negligent driver are both injured? One aspect of the problem was dealt with by the Supreme Court in Kizer v. Hazelett,[8] the other aspect in Hoesel v. Cain; Kahler v. Cain.[9]

In the Kizer case the plaintiff guest brought her action against the driver of the car in which she was riding (her son), charging "willful and wanton" driving and the driver of the other car, alleging negligence. The defendants moved for seperate trials which were denied. Plaintiff obtained a judgment against both defendants. The Supreme Court reversed for error in refusng the separate trials, reasoning as follows: "If we should be required to hold in a particular case that the driver of a car in which a guest was riding was guilty or willful or wanton misconduct so as to establish a liability to a guest who was injured in a collesion occasioned by such misconduct, it is hard to see why the driver of the other car would be barred by his negligence from recovery against the host driver so guilty of willful and wanton misconduct. When questions such as these are presented for

7. 221 Ind. 186, 46 N. E. (2d) 818 (1942).
8. 221 Ind. 575, 49 N. E. (2d) 543 (1943).
9. 222 Ind. 330, 53 N. E. (2d) 769 (1943).

the consideration of the jury in one trial in one pagaraph of complaint, it seems to us that the opportunity for confusion is so great that as a preventative there well may be a separation of the issues and separate trials." It is undoubtedly correct that contributory negligence is not a defense in an action against a willful, wanton or reckless defendant.[10] It is to be observed that there is no apparent way, under Indiana practice, that the negligent defendant could sue the reckless driver in the same action in which they are defendants. It is to be further observed that, if such were procedurally possible, there are strong reasons for permitting it in order to avoid inconsistent findings by separate juries. If would obviously be an unsatisfactory state of affairs were the guest to recover against the host driver in one case whereas the negligent driver, in a subsequent case lost because his jury found the host driver not guilty of willful misconduct. Theoretically, of course, both injuried parties should have recovered or neither should have prevailed.

In Hoesel v. Cain and Kahler v. Cain, as in the Kizer case, plaintiff sued the drivers of both cars and obtained judgment against both. No motion for separate trials was made although both defendants took separate appeals which were consolidated. The second driver contended that the allegation that the host driver was guilty of willfulness is conclusive as a matter of law that the negligence of the second driver could not have been the proximate cause of the plaintiff's injury. The question had been discussed but left open in the Kizer case. Reasoning largely on the analogy of the liability of two negligent drivers whose acts concur to cause injury, the Court rejected the contention, holding that "the two different kinds of torts, one more culpable than the other, could concur to cause an 'indivisible injury.' "

Although the contributory negligence of a guest in an automobile will not bar a recovery against a willful and wanton host, the contributory wantonness of the guest will prevent recovery.[11] This is in accord with sound principles[12] although it appears to be the first decision on the point in Indiana.

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10. See Restatement of Torts, § 842; Steinmetz v. Kelly, 72 Ind. 442 (1880), Harper on Torts, § 150, § 151 and cases cited.
11. Pierce v. Clemens, 113 Ind. App. 65, 46 N. E. (2d) 836 (1942).
12. Restatement of Torts, § 482 (2).

Duty to Aid Person in Peril

The troublesome problem of duty to aid others, in peril through their own fault, the fault of a third person or through accident, was before the Court in Ayres & Co. v. Hicks.[13] Plaintiff, a boy of six, visited the store with his mother. While using the escalator, the lad fell and caught his hands in the moving parts of the machinery at a place where the escalator disappeared into the floor. The findings of the jury exonerated the defendant of negligence in the choice, construction, maintenance and operation of the escalator. Having no reason to anticipate such an accident, defendant, accordingly, was not bound to provide an attendant.

The evidence, however, disclosed that after the plaintiff's fingers had been caught in the mechanism, the esclalator continued to run for seventy steps (of 15 inches) for a period of from three to five minutes before it was stopped. The boy's injuries were increased by the continued grinding effect on his fingers which were not extricated until the escalator was stopped. The Court held that, although defendant was not liable for plaintiff's original injury, it was under a duty to use reasonable care to rescue an invitee or business guest on its premises in peril through use of an instrument provided by defendant and under its control. Judgment on a verdict recovered by plaintiff was properly reversed, however, because of an incorrect instruction that the jury could consider "all phases" of plaintiff's injuries in assessing damages. Such an instruction, of course, would enable the jury to award damages for the initial injury as well as the aggravation thereof which alone resulted from the defendant's negligence.

I am not my brother's keeper at common law. There is no general duty to aid others in peril.[14] There must be some relationship between the parties sufficient to justify the imposition of such a duty. It is submitted that the Court's position in the Hicks case is sound and that the relationship of invitor-invitee is such as to justify the affirmative duty to aid the invitee in peril through the use of facilities provided by the invitor. There probably would be no such duty

13. 220 Ind. 86, 41 N. E. (2d) 356 (1941)

14. See Buch v. Amory Mfg. Co., 69 N. H. 257, 44 Atl. 809 (1897); Bohlen, Moral Duty to Aid Others, 56 U. of Pa. L. Rev. 217 (1908); Restatement of Torts, §314.

to aid an invitee in danger from some source other than the condition of the premises or the facilities thereon, as, for example, where the invitee is injured by the accidental discharge of a gun which he is carrying. [An exception to this rule is the case of injury to an invitee by another invitee which the invitor could prevent by the exercise of reasonable efforts to control the second invitee's conduct[15] Similarly there probably would be no duty to aid one not a bona fide invitee (e.g., a shoplifter) who is in peril even by use of defendant's facilities properly and carefully operated. The combination of the two factors, however, would appear to establish a relationship between the parties which carries with it the duty to rescue, according to well-established principles of the common law.

Proximate Cause

In recent years, the Indiana Courts have stressed the "substantial factor" test as throwing light on the problem of proximate cause. This, together with the test of "foreseeability," constitutes the current rubric. Whether "the defendant's act is a substantial factor in producing the injury of the plaintiff and whether such injury was reasonably foreseeable at the time of the defendant's misconduct"[16] is the favorite test of proximate or legal cause. "Substantial" presumably means much the same thing as "material," also an approved word in Indiana. It apparently has a double significance: 1. that the defendant's negligence contributed *in fact* to the injury, that is, was at least an important *actual* cause, and 2. that there was no unforeseeable intervening force which makes the defendant's negligence *unsubstantial* or relatively unimportant. If the defendant's negligence is a "substantial factor" in this sense, it is immaterial that the extent of the injury or the manner of its occurrence is wholly unforeseeable.[17]

As pointed out in several recent cases,[18] the "exact na-

15. See Restatement of Torts, § 318; Harper and Kime, Duty to Control Conduct of Third Persons, 43 Yale L. J. 886; 9 Ind. L. J. 498 (1934); and see Indianapolis St. R. Co. v. Dawson, 31 Ind. App. 605, 68 N. E. 909 (1903)
16. Swanson v. Slagel, 212 Ind. 394, 8 N. E. (2d) 993 (1937).
17. Restatement of Torts, § 435, quoted with approval in Tabor v. Continental Baking Co., 110 Ind. App. 633, 644, 38 N. E. (2d) 257 (1941)
18. e. g., Daugherty v. Hunt, 110 Ind. 264, 272, 38 N. E. (2d) 250 (1941).

ture of the injury" need not be foreseeable. It is enough that the general class of injury was one that could have been anticipated. Actually, this is the criterion for determining negligence rather than proximate cause; a confusion between the risk which constitutes negligence, if it is unreasonable, and the way or manner or sequence of events through which the risk materializes into injury. The Indiana courts, it may be said, are by no means the only one guilty of this confusion.

The tendency to discuss the negligence problem in terms of proximate causation is further illustrated in Riesbeck Drug Co. v. Wray.[19] In this case plaintiff's decedent had committed suicide by drinking a bottle of carbolic acid which, at his instruction, the decedent's son, a lad of eight, had bought at defendant's drug store. The Court held that the defendant's negligence in selling the poison to the boy was not the proximate cause of the decedent's death because, although it was alleged he was of unsound mind, there was no evidence that he did not realize the physical effects of his acts. This technique works out very well in the principal case. It is a sound and established rule that an intentional suicide breaks the causal relation between the death so caused and the original negligence and the Court cited ample authority to support it.

But what if the decedent had been in a delirium and had not realized what he was doing? By the reasoning involved in the case, defendant would have been liable although it is highly dubious that it should have been so held. The case is different from those in which the rule originated. Those cases were ones in which the defendant, by its negligence, had caused injury to the plaintiff which in turn resulted in unsound mind. In the present case, the defendant's conduct had nothing whatever to do with the decedent's mental condition. It is submitted that the real problem here is one of negligence which, when properly determined, leaves no question of causation. Was the defendant, in selling poison to the child negligent to any person other than the child? Perhaps. Such conduct might constitute negligence toward the child's playmates who knew no more of its harmful qualities than did the boy who bought it. But is the act of selling to the child negligence toward the child's father?

19. 111 Ind. App. 467, 39 N. E. (2d) 776 (1942).

Does it expose him to an unreasonable risk of injury. It is obvious that it did not, unless the defendant knew or should have known that the father was in such a mental condition that he might use it for self destruction. The test of foreseeability goes to the nature, extent and character of the risk and is thus primarily one of the essential criteria for determining negligence.

In relation to proximate cause, the test of foreseeability is primarily helpful in determining the legal effect of intervening forces. Two recent Appellate Court cases are typical. In Indiana Service Corporation[20] the plaintiff was hurt when defendant's electric light pole fell on him. The pole was old and rotten. But it had fallen because a motorist had run into and broke another pole, in good condition, which was connected by wires to the defective pole. The act of the motorist was an independent force the intervention of which was not reasonably foreseeable. In Shubert v. Thompson[21] a child had died of burns received from a fire started by other children who carried burning embers from an old crosstie which had been set on fire by the defendant's track crew who negligently left the crosstie afire. Here again, the harmful intervention of the children was not foreseeable. Thus, the railroad's negligence was not the proximate cause of the decedent's death.

A third Appellate Court case is illustrative of an intervening force which was foresee able and which, therefore, did not break the chain of causation between the defendant's negligence and the plaintiff's injury.[22] Workmen employed by a railroad company had started a fire to clear up its right-of-way which was a short distance from the highway. Unable to see because of huge clouds of smoke, a motorist drove into the plaintiff's automobile from the rear. The motorist's acts, whether negligent or not, did not constitute a superceding cause. The risk of such a collision was the very hazard that made the defendant's conduct negligent. Being thus foreseeable, the motorist's act of running into plaintiff's car did not break the causal relation between the defendant's negligence and the damage.

Careful analysis of the proper use and function of the

20. 109 Ind. App. 204, 34 N. E. (2d) 776 (1942).
21. 109 Ind. App. 34, 32 N. E. (2d) 120 (1941).
22. Pitcairn v. Whiteside, 109 Ind. App. 693, 34 N. E. (2d) 943 (1941).

factor of "foreseeability" would avoid much confusion in negligence cases.

Contributing Negligence and Proximate Cause

In Cousins v. Glassburn[23] the Supreme Court had before it the question of contributory negligence of the plaintiff in an action for injury sustained in an automobile accident. The trial court had instructed the jury that if the plaintiff's violation of the speed limit "materially" contributed to the injury the verdict should be for the defendant. The plaintiff appealed, contending that the instruction was erroneous because the court had failed to use the word "proximate" in defining contributory negligence. It was held there was no error. "The failure to use the word 'proximate' in defining contributory negligence," said the Court, "does not constitute error if other words are used which exclude the idea of a remote, indirect or insignificant causal connection between the negligence and the accident."[24] This appears to be completely sound. Entirely too much emphasis is placed in many cases on the exact rubric used by the trial judge in his instructions. It is doubtful whether the word "proximate" conveys any more definite or precise idea to the jury than it does to most judges. It is almost certain that the words "materially contribute" would be mare intelligible to the average juror than the words "proximately contribute." Indeed many legal scholars have advocated abolition of the words "proximate cause" and the substitution therefor of the word "legal cause." This would be of no material assistance to the jurors, however, without some further indication of what constituted "legal cause." The adverb "materially" is at least more helpful than the word "proximately."

The Court in the Cousins Case further said that "to establish the defense of contributory negligence it is not necessary to show that the plaintiff's negligence was the *sole* proximate cause of the injury, but only that it was a concurring or cooperating proximate cause." This, too, is a point worth making. One may find numerous instances in the cases of statements that the basis for the defense of contributory negligence is that the plaintiff's misconduct

23. 216 Ind. 431, 24 N. E. (2d) 1013 (1939).
24. See Earle v. Porter, 112 Ind. App. 71, 40 N. E. (2d) 381 (1942) to the same effect.

and not the defendant's is the proximate cause of the injury. This, of course, is sheer nonsense. In a genuine case of contributory negligence which bars a recovery, the negligence of both parties are causes of the injury. The reason the plaintiff does not recover is not because the defendant's negligence is not proximately connected with the injury, but because of reasons of public policy which will not permit one of two wrong-doers to recover from the other. The principle is cognate to the principle of no contribution among tort feasors. The law will neither permit one of two negligent parties who has been injured to recover from the other, nor will it permit one of two negligent parties who has responded in damages to a third persons to recover a proportionate share from the other negligent party. Courts were not established to adjust the respective rights and equities of wrongdoers. Much confusion can be avoided by the distinction between the policies incorporated in the principle of contributory negligence and the policy embodied in the principle of proximate cause.

Liability of Contractor to Persons on Premises

In Rush v. Hunziker[25] the Supreme Court dealt with the problem of the liability of an independent contractor who had constructed a temporary railing around the porch of an in completed clubhouse at a boat club. The plaintiff, a guest of an officer of the club, was injured when the railing gave way because of its defective construction. The Court, following several cases in other jurisdictions, held that the contractor owed a duty to use reasonable care in the construction of the railing to all persons rightfully on the premises with the consent or at the invitation of the owner or possessor. The principle has been formulated in the Restatement of Torts: "one who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to the same liability, and enjoys the same immunity from liability, as though he were the possessor of the land, for bodily harm caused to others within and without the land, while the work is in his charge, by the dangerous character of the structure or other conditions."[26]

This section of the Restatement was quoted and followed

25. 216 Ind. 529, 24 N. E. (2d) 931 (1939).
26. Section 384.

by the Appellate Court in Pentecost Const. Co. v. O'Donnell,[27] holding that a subcontractor on a construction job owed the duty to maintain a steel structure which he was installing in a reasonably safe condition in favor of the employees of the general contractor lawfully using the structure.

Imputed Negligence

In Lindley v. Sink,[28] an action was brought by the decedent's administrator for wrongful death. The decedent had met her death in an automobile collision between the car in which she was riding, driven by her husband, and the automobile driven by the defendant. The defendant contended that if the decedent's husband, who would be a beneficiary of any verdict recovered for his wife's death, had also been driving negligently there could be no recovery. In other words, the case raised the question of the effect of the contributory negligence of a beneficiary in an action for wrongful death. A few decisions hold that the contributory negligence of a beneficiary bars any recovery for wrongful death even though there are other beneficiaries who were in no way negligent. (See cases cited in Opinion.) Other decisions hold that the recovery is in no way affected by the negligence of the beneficiary because the action for wrongful death is conditioned upon the ground that it arises only under circumstances which would have enabled the decedent to maintain an action had he survived. Since the negligence of a third person would not have prevented a recovery by the decedent, it should not prevent recovery by the estate. The Court held that recovery was not barred. Because the question was not before it, the Court did not decide whether the husband's negligence should have any effect less than barring complete recovery. This question, however, was answered by the Appellate Court in 1909 in Cleveland, etc., R. R. Company v. Bossert[29] in which it was held that where one of several beneficiaries had negligently contributed to the decedent's death, the total amount of recovery should be reduced by the amount of such negligent beneficiary's share. The Restatement of Torts has taken the same position.[30]

27. 112 Ind. App. 47, 39 N. E. (2d) 812 (1942).
28. 218 Ind. 1, 30 N. E. (2d) 456 (1940).
29. 44 Ind. App. 245, 87 N. E. 158 (1909).
30. See Section 493, Comment a.

This is a proper rule. The action for wrongul death is a statutory action unknown to the common law. Its purpose is to protect the interest of the spouse and next of kin in the life of the decedent. Its purpose is to compensate the beneficiaries for their loss. It would clearly be inequitable to impute the negligence of one to other innocent beneficiaries. At the same time, the negligent beneficiary should not be permitted to profit by his own wrong. These desirable results are obtained by the rule in the Bossert Case.

In Gagle v. Heath,[31] the Appellate Court observed the distinction between a bailee and an agent driver of an automobile on the question of imputing the driver's negligence to the owner. Following Lee v. Layton,[32] the Court held that the negligence of even a gratuitous bailee is not imputed to the bailor so as to preclude the latter's recovery for damage to the automobile from a negligent third person. On the other hand, of course, if the driver is an agent of the owner of the automobile, the driver's negligence will be so imputed. The case follows majority holdings on both points.

A unique question was presented to the Appellate Court in Jones v. Kasper.[33] A house guest without authority appropriated the automobile of his host and persuaded two other house guests to join him in a joy ride. A collision resulted as a result of the first guest's negligent driving which caused injuries to the driver of the other car. The Court held that the driver's negligence might be imputed to his two companions so as to make them liable to the injured party, on the theory that they were in joint wrongful possession of the automobile and thus had joint control thereof. "It is our opinion after full consideration of the law and facts in this case, that all of the appellants in the case at bar stood in the same relationship one to the others, as would joint owners, joint hirers, and joint borrowers who are in joint possession, and that the jury, without more, was fully warranted in inferring a joint control from this relationship."

Last Clear Chance

In Chesapeake and Ohio Railroad Company v. Williams,[34]

31. 114 Ind. App. 566, 53 N. E. (2d) 547 (1943).
32. 95 Ind. App. 663, 167 N.E. 540 (1933).
33. 109 Ind. App. 465, 33 N. E. (2d) 816 (1941).
34. 114 Ind. App. 160, 51 N. E. (2d) 384 (1943).

the Appellate Court dealt with one of the difficult problems arising under the doctrine of Last Clear Chance in a remarkably clear and discriminating manner. The appellee had recovered judgment for personal injuries received when his automobile was struck by appellant's locomotive at an intersection of the railroad track and road. Appellee relied upon the doctrine of Last Clear Chance to overcome the effect of the contributory negligence with which he was charged by appellant. The facts disclosed that the driver, the appellee, could have seen the train for a distance of one hundred and forty-five or one hundred and fifty feet before reaching the crossing. He was driving at a speed which would have enabled him to stop within a few feet. The evidence indicated further that the head brakeman observed the approaching automobile when it was some distance from the track. There was nothing in appellee's conduct to indicate that he did not observe what any reasonably prudent driver would see, namely, the approach of the train. The brakeman took no measures to cause the train to slacken speed or to warn the approaching motorist by whistle or otherwise. The Court held that under these circumstances the Last Clear Chance doctrine was inapplicable and reversed the judgment for appellee.

In Indiana, the Last Clear Chance doctrine applies only when the negligent plaintiff is actually discovered by the defendant. Moreover, it is necessary that the defendant discover the plaintiff's peril. The peril may be either of two types: first ,the plaintiff may, by his own negligence, have gotten himself into a situation of danger from which he is physically helpless to extricate himself, for example, where he is injured, drunk, or asleep on the track; second, his danger may consist of his unawareness of his surroundings as, for example, where an inadvertent or absent-minded driver approaches the tracks oblivious of an oncoming train. In the latter case, the real danger consists in the fact that the plaintiff is not paying attention to his surroundings. If he were suddenly to become aware of them, he could save himself at almost any moment prior to the accident, particularly if his speed is not great. When a trainman sees a motorist approaching a level crossing with the train in plain sight, he may normally assume that the motorist knows what he is doing and is aware of his physical surroundings. In such a

case, the motorist is not in danger. It is only when the trainman realizes or should realize that the motorist is not paying attention to his surroundings that he has discovered the danger. Put in the terms employed by the Court in the instant case, "The liability of the appellant for the appellee's ensuing injuries hinges upon whether or not an ordinarily prudent person, under the conditions and circumstances surrounding the appellant's head brakeman at the time and place, would have realized that the appellee was not going to yield the right of way over the crossing to appellant's train, and that such realization would have come to such person in time to have averted the accident in the exercise of reasonable care." This case should help to clarify the Indiana law of Last Clear Chance.

Assumption of Risk

In the Indiana cases, as well as cases in other states, there is a good bit of confusion between the doctrine of assumed risk and the doctrine of contributory negligence. The difference is a basic one. In a case of contributory negligence, both the plaintiff and the defendant have been guilty of negligence which contributed proximately to the plaintiff's injury. In a case of assumed risk, neither the plaintiff nor the defendant has been negligent. Of course, in neither case is there a recovery. Two typical cases decided by the Appellate Court will make clear the proper application of assumed risk.

In Emhardt v. Perry Stadium[35] the plaintiff was injured while attending a ballgame. A foul ball was knocked into the open stands where he was sitting. The ball was recovered by another fan who attempted to return it to the playing field but hit the plaintiff instead. It was held that the risk of foul balls being knocked into the unprotected stands was well-known to the public and that the plaintiff, having exposed himself voluntarily and with full knowledge of the danger, could not recover.

Another recent case involving a typical assumption of risk is Carmen v. Eli Lily & Company.[36] Here the plaintiff's decedent died as a result of an anti-rabies vaccine manufactured by the defendant. A printed pamphlet furnished by

35. 113 Ind. App. 197, 46 N. E. (2d) 704 (1942).
36. 109 Ind. App. 76, 32 N. E. (2d) 729 (1940).

the manufacturer had fully informed the deceased as to the fatal results which occassionally followed its use. With full knowledge, he submitted to the treatments and thus assumed the risk. The defendant had discharged its legal duty toward the decedent by the warning.

The reason a plaintiff who has assumed the risk may not recover is because the defendant has violated no duty toward him and is, therefore, not negligent. When a man voluntarily enters into a relation with another with full knowledge of the hazards involved, he is not entitled to expect the other to protect him against such hazards. The doctrine originated as an incident to the relation of master and servant. The servant assumed the known risks inherent in the job he undertook. The master owed no duty to protect him against such risks. This was the typical common law principle. It required legislation to change the rules with respect to assumed risk in connection with the master-servant relation. The same principle, however, is applicable to all voluntary relations, contractual and otherwise.

Statutory Duties

The Supreme Court in the case of Heiny, Admx. v. Penn. R. R. Co.,[37] construed the statute which requires the driver of a vehicle loaded with explosives or highly inflammable materials to stop the vehicle and "ascertain definitely that no train, car or engine is approaching."[38] In an action by decedent's administrator, the defendant pleaded contributory negligence, arguing in substance that had the plaintiff complied with the statute the accident could not have happened. The trial judge concurred in this argument and directed a verdict against the plaintiff. The theory appears to have been that of *res ipsa loquitor*. The Supreme Court took the defendant's view, declining to interpret the statute in a way that would make the operator of such a vehicle practically an insurer of his own safety. The Court declined "to ascribe to the General Assembly an intent to establish a different standard of conduct for determining contributory negligence than that which obtains when the question of negligence is in issue." "It is to be remembered", continued the Court, "that we are not here dealing with a statute that undertakes

37. 221 Ind. 367, 47 N. E. (2d) 145 (1942).
38. Burns' 1933, § 14-557.

to create a new right of action or to take away one that previously existed. This is basically a common law action and the legal duty resting on the decedent is for the determination of the court. We hold therefore that the decedent's conduct, like that of the appellee's, is to be measured by the standard of ordinary care. It will not be presumed that the decedent was guilty of contributory negligence merely because there was a collision between his truck and the locomotive."

The opinion in the Heiny case was filed March 19, 1943. Ten days later the Court held that "the obvious purpose of the statute is to prevent collisions between trains and vehicles transporting dangerous material." The violation of a statutory duty the purpose of which is to avoid a particular and specific risk constitutes negligence per se,[39] except perhaps, in that type of situation where the statutory rule has no intrinsic merit with respect to safety but operates only as a convention. The law of the road is a good example of the exception. The rule which requires vehicles to drive on the right hand side of the road is no more calculated to avoid accidents than, as in England, a rule which requires vehicles to drive on the left. A violation therefore of such a rule may under certain circumstances not constitute negligence.[40] Indeed a driver may be negligent by not violating the rule where the exigencies of the occasion obviously require it. The statute in question is not such a rule. It is more than a convention. It is patently calculated to avoid the risk of collisions in situations where, by reason of the contents of the vehicle, a collision would be unusually dangerous. It is difficult, therefore, to accept the Court's reason in the Heiny case that the conduct of the driver of a truck loaded with explosives is to be judged by the common law standard of care. Notwithstanding this, the result of the decision would appear to be sound. It is submitted that this result may be reached by an interpretation of the act which requires only that the driver stop and reasonably satisfy himself that it is safe to proceed. The word "ascertain definitely" should not be given a strict and literal interpretation. To "ascertain definitely" may well mean merely to make sure in ones own mind that no train is coming. Such an interpre-

39. See Restatement of Torts, § 286.
40. Tedla v. Ellman, 280 N. Y. 124, 19 N. E. (2d) 987 (1939).

tation would probably achieve the legislative intention and would not require the driver to cross the track at his peril.

In Remington v Hesler,[41] plaintiff sustained damage to her person and her automobile when she drove into an unguarded hole in the street. Defendant defended on the ground of contributory negligence since plaintiff ran into the hole while crossing to the left hand side of the street to park, thus violating the statutory law of the road.[42] The Court declined to hold plaintiff guilty of contributory negligence *per se*. The Court reasoned that the statute "was designed to protect travelers in other vehicles and was not designed to protect municipalities". This argument is slightly garbled. The real reason for the decision is that the *statute was not designed to protect persons from defects in the streets,* hence plaintiff was not failing to take proper precautions to protect herself from such risks by violating the statute. The result was right for the wrong reason.

Res Ipsa Loquitur

Res Ipsa Loquitur was invoked by the plaintiff to support her claim for damages in Phillips v Klepfer.[43] The plaintiff had been a patron at the Indiana State Fair where she tripped on some wood which had been nailed to the flat surface of a runway of an amusement device called a "Caterpillar". The contention was denied. The Court pointed out the difference between this case and one where a person is injured while riding, as a result of an accident caused by the vehicle's defective equipment or operation. When a person is riding on a railroad train and a wreck occurs, he, of course, has no way of proving either how the accident happened or who was responsible for it. The instrumentality is under the exclusive control of the railroad and only the railroad and its servants have the knowledge or the means of knowledge to explain the accident. It is in such cases only that the doctrine of *Res Ipsa Loquitur* is applied to require the defendant to show that the accident happened without any negligence on the part of himself or his employee's. Such obviously was not the situation in this case. Moreover, *Res Ipsa* is applicable only in situations where injuries do not

41. 111 Ind. App. 404, 41 N. E. (2d) 657 (1941).
42. § 47-2123, Burns' 1940 Replacement.
43. 217 Ind. 237, 27 N. E. (2d) 340 (1940).

ordinarily occur unless somebody has been negligent. It is for this reason that, although the doctrine has been applied for many years to railroads, it has not yet been applied against commercial aviation companies. The operation of railroads has been so perfected that it is a rare accident indeed that is not explained by the oversight or negligence of some employee. On the other hand, for obvious reasons, many airplane accidents are never explained and it would be a violent assumption that all or nearly all of them are the result of negligently defective equipment or operation.

In Coca Cola Bot. Wks. v. Williams,[44] the Appellate Court held the doctrine of *res ipsa loquitur* applicable to foreign substances of a deleterious nature found in a bottle of Coca Cola. This rule is defensible since the defendant, if anybody, can explain how such substances got into the bottle and the situation is one which ordinarily occurs only when someone connected with the bottling process has been negligent.

Invitee or Licensee

In Kirklin v. Everman,[45] the plaintiff entered the plant of a water works corporation operated by the town of Kirkland at the request of the manager to discuss the matter of plaintiff's employment. Plaintiff was asked by the manager to go into a pit containing a gasoline engine and to light a match in order to find a screw driver. The pit was full of gasoline fumes which immediately exploded causing injury to the plaintiff. The defendant urged that because the plaintiff was looking for employment, he was only a licensee on the premises to whom the defendant owed no duty other than to warn the licensee of concealed danger. The Court ruled otherwise, holding that the plaintiff was on the premises in the common interest of himself and the Water Works Company and, as such, entitled to the protection of an "invitee" or what the Restatement of Torts describes as a "business guest." The case follows the usual holding in such situations. It is to be noted that, even had the plaintiff been regarded as a bare licensee, he probably should have recovered, since he was not only exposed to a danger unknown to him, although known to the manager of the water works, but was actually invited to encounter the danger. It seems

44. 111 Ind. App. 502, 37 N. E. (2d) 702 (1941).
45. 217 Ind. 683, 29 N. E. (2d) 206 (1940)

clear that the defendant owed even a licensee the duty of warning the plaintiff of the existence or probable existence of gasoline fumes in the pit. Instead of advising the plaintiff to strike a match, the manager should have warned him of the danger of such an act.

An invitee or business guest does not lose his status as such merely because he goes to a part of the premises not necessary to the transaction of his business. The "invitation" extends to "'all parts of the premises that may reasonably be expected to be used in the transaction of the mutual business, those incidental as well as those necessary." In Silvestro v. Valz,[46] the plaintiff had driven his car to defendant's garage for repairs. After parking his car, he looked around for a washroom. In his search, he passed through a door, thinking it led to another part of the building and, because there was no light, fell down an unguarded stairway. The Court held that the jury might reasonably conclude that the plaintiff was entitled to the status of an invitee at the time of his injury.

In Wise v. Southern Indiana Gas etc. Co.,[47] a boy sought to recover for injuries sustained while he was climbing on the superstructure of a bridge by coming in contact with defendant's uninsulated wires. Defendant sought to show that plaintiff was a trespasser on the bridge and, therefore, that it owed him no duty. The Court held that plaintiff's status on the land was a matter of no concern to the defendant, itself a licensee; that although he might be a trespasser as against the possessor of the land, he was no trespasser as to the defendant. The immunity from liability to trespasser is a protection to the possessor and no one but such possessor can claim the benefit of the rule. The holding follows the leading case on the subject, Dillon v. Twin State Gas etc. Co.[48]

Range of Vision Rule—Negligence and Contributory Negligence

The Supreme Court in Cushman Motor Company v. McCabe[49] reaffirmed the rule of Opple v. Ray[50] that the hard

46. 222 Ind. 163, 51 N. E. (2d) 629 (1943)
47. 109 Ind. App. 681, 34 N. E. (2d) 975 (1941)
48. 85 N. H. 449, 163 Atl. 111 (1932)
49. 219 Ind. 156, 36 N.E. (2d) 769 (1942)
50. 208 Ind. 450, 195 N. E. 81 (1935)

and fast rule that a motorist must so drive that he can stop his car within the range of visibility is not the law in Indiana. Plaintiff's decedent had failed to stop his car when signalled by a truck driver with a flashlight. The truck had been parked without lights on the pavement and the plaintiff's decedent had run into the rear of the truck causing an accident from which he died. The Court also gave its sanction to an important distinction between acts which might construe negligence toward a third person and acts which might construe contributory negligence. "It is true," said the Court, "that a motorist, seeing a lighted flashlight being waved on the highway at night would know that someone was carrying it and would owe the duty to that person to use due care not to injure him. A violation of that duty would constitute negligence towards that person so waving the light, and if injury resulted to him as a result of such negligence, the motorist would be liable. It does not follow, however, that while the motorist is violating his duty to use due care for the safety of such pedestrian, he is also violating his duty to use due care for his own safety." It is an important distinction and one that courts sometimes fail to recognize. Although the same standard of care is, of course, employed to determine both negligence toward a third person and contributory negligence, the same acts will frequently constitute negligence toward the third person but not negligence with respect to the actor's safety. The reverse is also true. The distinction has been noted and approved by the Restatement of Torts as follows: "Contributory negligence differs from that of negligence which subjects the actor to liability for harm done to others in one important particular. Negligence is conduct which creates an undue risk or harm to others. Contributory negligence is conduct which involves an undue risk or harm to the person who sustains it. In the one case, the reasonable man, whose conduct furnishes the standard to which all normal adults must conform, is a person who pays reasonable regards to the safety of others; in the other, the reasonable man is a reasonably prudent man, who, as such, pays reasonable regards to his own safety."[51]

Duty of Railroad to Children on Premises

Indiana Harbor Belt R. Co. v. Jones[52] makes an important

51. Sec. 463, Comment b.
52. 220 Ind. 139, 41 N. E. (2d) 361 (1941)

contribution to the clarification of the duty of railroads to children on and about the tracks and yards of the company—a problem not always handled satisfactorily by the Indiana cases. Confusion is usually to be found in more or less pertinent (and sometimes non-pertinent) discussions of liability to trespassers, attractive nuisance, contributory negligence, last clear chance and proximate cause.

The first problem in such cases is to determine the duty owed the child. Too often the courts approach this problem by inquiring whether the child was a trespasser or whether he was "invited" on to the premises by an "attractive nuisance." Courts frequently begin with a statement of the erroneous proposition that the only duty owed a trespasser is not to willfully or intentionally injure him. It is submitted that the principal inquiry should be whether the presence of children at the place of inquiry was reasonably to be expected and if so whether, by the defendant's activities or the condition of the premises and equipment, the child had been exposed to unreasonable risks. If the child's presence was probable, for any reason, the railroad company owes him the duty of reasonable care. This is true whether a turntable or other device attractive to children lured him there or whether, even over the company's protests, youngsters persisted in trespassing at the place of injury. The important and vital question is, was the child's presence there reasonably to be foreseen. The duty of due care, so far as the company's operations are concerned, is owed even to adults under these circumstances.[53] There is a duty to keep a reasonable lookout to discover habitual trespassers at a particular place. The duty is extended, in the case of children, to the condition of the premises and facilities, where they are of such a nature as to create unreasonable dangers to children of immature judgment.[54]

The Court, in the Jones case, cut through most of the tangle and correctly analyzed this problem, holding that "the probable presence of children upon property where a dangerous activity is being carried on, imposes a duty of ordinary care upon the owner of such property to anticipate their

53. See Harper on Torts, § 91 and cases cited. Restatement of Torts, § 334.

54. Indeed, under some circumstances, this duty is also owed to trespassing adults. See Restatement of Torts, § 335.

presence by keeping a look-out for them."[55] The Court went farther, applying the same principle to the condition of the premises. "And if the probable presence of the children raises a duty to them of ordinary care," it continued, "this may be violated before the children arrive upon the premises, by leaving things undone which ought to have been done in anticipation of their coming." This clear analysis and forthright holding should eliminate much confusion which has heretofore existed in the Indiana law dealing with injuries to children on railroad properties.

Fraud

In Automobile Underwriters, Inc., v. Rich,[56] plaintiff filed an action for damages alleged to have been sustained by reason of the fraud of defendant's agent in inducing her to execute a release and covenant not to sue. Plaintiff had been injured in an automobile accident. Defendant's agent was alleged to have procured the release by telling her: one, that he was a lawyer and knew her rights; two, that she didn't need a lawyer; three, that she could not hope to recover more than a hundred and fifty dollars; four, that if she didn't accept that amount she wouldn't get anything; five, that her injuries were only temporary and that she could go to work within a few days; six, that a jury of farmers in the county would give her nothing; and seven, that even if she did recover, her lawyers would take all the money.

The evidence disclosed, with respect to the fifth statement, that the agent had talked with plaintiff's physician and that he had indicated that plaintiff's injuries were only temporary. The Court held that the other statements were matters of opinion only and that there was no evidence that they were not honestly expressed.

A statement of opinion may be the basis for recovery in deceit. Fraud there must be, but the statement of opinion that the speaker does not actually hold constitutes fraud. A fraudulent statement of opinion by an adverse party, with no special knowledge, dealing at arms length is not actionable. In a competitive society people must stand on their own judgments and opinions. But there are exceptions. The "special knowledge" exception[57] might be applicable in

55. Quoted by the Court from a note in 14 Ind. L. J. 376.
56. 222 Ind. 384, 53 N. E. (2d) 775 (1943)
57. See Picard v. McCormick, 11 Mich. 68 (1862); Andrews v. Jackson, 168 Mass. 266, 47 N. E. 412, 37 A. L. R. 402 (1897); Manley v. Felty, 146 Ind. 194, 45 N. E. 74 (1896)

the instant case. The defendant's agent was an expert; plaintiff was presumably untutored in legal affairs and from the exaggerated character of some of the alleged statements, the inference might reasonably be made that the agent did not hold the opinions stated. It is arguable, therefore, whether the Court should have taken the position that, as a matter of law, the plaintiff had failed to make out a case of actionable fraud.

In McClellan v. Tobin,[58] a party to a real estate transfer failed to obtain recovery for false and fradulent statements made to her when she testified that she had not believed the statements because she knew they were not true. The case raises the question of the state of mind required to support a recovery for fradulent misrepresentation. The law requires that he rely upon the statements. Indeed, it requires that he rely upon their truth. In Hagee v. Grossman, [59] it was held that the plaintiff could not recover for fradulent misrepresentation in connection with the purchase of a quantity of flour when it appeared that the plaintiff had himself inspected the flour to determine its quality. The jury found that the defendant had relied upon his own tests and not the defendant's misrepresentation. It should be noted that the mere fact that the defendant used some of the flour for test purposes is indicative that he did not believe the defendant's statement about the flour. A curious problem is raised where a party makes his own examination of property in connection with a proposed purchase and thereby discovers the falsity of the defendant's statement, but at considerable expense to himself in making the discovery. It was held in Enfield v. Colburn[60] that the expense of exposing the falsity of the misrepresentations could not be recovered because the plaintiff had not relied upon their truth. Actually, he might be said to have acted in reliance upon their falsity. In any event, he did not believe them to be true otherwise he would not have investigated. "It is the damages which result from acting upon false representations, as if they were true, and not the expense of detecting their falsity which a plaintiff is entitled to recover.[61]

58. 219 Ind. 563, 39 N. E. (2d) 772 (1941)
59. 31 Ind. 223 (1869).
60. 63 N. H. 218 (1884)
61. Enfield v. Colburn, Supra.

Interference with Contract Relations

The famous case of Lumley v. Guy[62] established the principle, as a part of the common law, that the intentional intreference by a third person, without justification, whereby one of the parties to a contract is induced to break it, constitutes a tort. In Wade v. Culp,[63] the plaintiff had entored into a contract with an inventor, whereby the latter was to invent and develop an electric steak broiler, the plaintiff to furnish the shop, tools and finances; and, on the satisfactory development of the same, the plaintiff was to arrange for the manufacture and distribution of the broiler. After the broiler had been developed, the inventor entered into a contract with the defendant company whereby it was to produce and market the broiler. Defendant was held liable for the actual out-of-pocket losses sustained by the plaintiff as a result of the breach of contract by the inventor. No force, threats or fraud of any kind was employed by the defendant company in inducing the breach. Indeed, it appears that the inventor first approached the defendant company and offered to enter into such an arrangement. The defendant company, however, acted with full knowledge of the outstanding contract between the inventor and the plaintiff. It was only in this sense that the defendant company "induced" the breach. The case, therefore, comes to this: it is a tort to enter into a contract with a person known to be under an inconsistent contract with a third person, if, as a result thereof, loss is caused to the third party by a breach of the contract with him.

62. 2 E. & B. 216 (1853)
63. 107 Ind. App. 503, 23 N. E. (2d) 615 (1939)