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Tort Law: The Languages of Duty

JAY TIDMARSH*

Summarizing the developments in Indiana tort law is a daunting, perhaps impossible task. In more than 115 reported opinions, state and federal courts wrestled with issues, many of them issues of first impression, which ranged across the spectrum of tort law. From physical to psychic to economic injuries, from compensatory to punitive damages, from legal doctrine to legal process, scarcely a page of Indiana's tort hornbook was left unchanged. Describing the changes in complete detail would exhaust everyone long before the work was done, while organizing the year's developments around any single theme risks the omission of cases and concepts as important as the theme chosen.

In spite of its risks, I have taken the latter approach. The reason is that a constant thread runs through many of these cases. The thread is duty. Time and again during the past year, Indiana courts were required to decide whether a particular set of facts gave rise to a duty of care by the defendant or an obligation of avoidance by the plaintiff.

Some of the cases involved novel legal duties, while others gave modern answers to time-worn problems. Whatever the ultimate result, one aspect of the decisions stands out: the courts did not resolve the issue of duty along any consistent view of the notion of obligation and responsibility. Although the Indiana Supreme Court purported to announce a comprehensive new test for the determination of duty during 1991, Indiana does not in fact have a single, coherent theory of duty. Rather, it has four competing models: a model of duty based on relationship, a model based on foreseeability of harm, a model based on public policy, and a model based on community values. Different areas of tort doctrine have been captured by different models, with the result that Indiana tort law is presently a confused patchwork of obligation and immunity.

Part I of this Article begins the exploration of this theme by describing Indiana's new test for duty. Part II examines three sets of cases decided by the Indiana Supreme Court and demonstrates that the four models of duty remain entrenched despite this new test. Part III applies these models to duty decisions in the areas of physical, psychic, and economic torts, as well as to the plaintiff's own obligation of due care, and proves that the reliance on the

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disparate models has frustrated any coherent pattern of doctrinal development in the area of duty. Part IV provides some tentative conclusions about the general direction of duty analysis in Indiana.

By focusing on this theme of duty, I am necessarily bypassing important, interesting, and occasionally inconsistent decisions regarding negligence,[1] proximate cause,[2]

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1. *See* Amcast Indus. Corp. v. Detrex Corp., 779 F. Supp. 1519 (N.D. Ind. 1991) (holding that the violation of an Indiana administrative regulation was evidence of negligence but not negligence per se); Witco Corp. v. City of Indpls., 762 F. Supp. 834 (S.D. Ind. 1991) (holding that doctrine of *res ipsa loquitur* could apply in case in which city failed to maintain building in order to prevent vagrants from setting fire); Adams Township of Hamilton County v. Sturdevant, 570 N.E.2d 87 (Ind. Ct. App. 1991) (refusing to allow negligence per se claim for violation of statute when statute's purpose was not public safety); Cochran v. Phillips, 573 N.E.2d 472 (Ind. Ct. App. 1991) (rejecting use of *res ipsa loquitur* for escape of dog); French v. Bristol Myers Co., 574 N.E.2d 940 (Ind. Ct. App. 1991) (finding negligence per se theory available when defendant failed to abide ordinance's command to keep bushes near roadway trimmed); Hale v. Community Hosp. of Indpls., Inc., 567 N.E.2d 842 (Ind. Ct. App. 1991); Hobble v. Basham, 575 N.E.2d 693 (Ind. Ct. App. 1991) (holding unconstitutional an ordinance which defendant violated and on which plaintiff had relied to establish negligence per se); Kerr v. Carlos, 582 N.E.2d 860 (Ind. Ct. App. 1991) (finding that mere fact of unsuccessful first surgery did not establish a breach of the standard of care and that expert testimony was therefore required); Nalls v. Blank, 571 N.E.2d 1321 (Ind. Ct. App. 1991) (holding that compliance with postal regulations is not conclusive on the issue of due care, especially when the regulations are not concerned with safety); Stackhouse v. Scanlon, 576 N.E.2d 635 (Ind. Ct. App. 1991) (holding that chiropractor cannot give expert testimony on standard of care for internal and pulmonary medicine); Summit Bank v. Panos, 570 N.E.2d 960 (Ind. Ct. App. 1991) (holding that affidavit of expert who was not familiar with locality and was not a licensed physician at time of malpractice was sufficient to resist motion for summary judgment).

2. *See* Cowe v. Forum Group, Inc., 575 N.E.2d 630 (Ind. 1991) (holding that jury could find that failure to diagnose and care for pregnant mother in defendant's care was a proximate cause of child's afflictions); Peak v. Campbell, 578 N.E.2d 360 (Ind. 1991) (reversible error not to give instruction on the burden of proof on proximate cause when the defendant admits negligence); Adams Township of Hamilton County v. Sturdevant, 570 N.E.2d 87 (Ind. Ct. App. 1991) (holding that failure of township to enforce fence repair law not a proximate cause of death of decedent who collapsed after repairing hole in neighbor's portion of fence); Cornett v. Johnson, 571 N.E.2d 572 (Ind. Ct. App. 1991) (holding that trial judge's testimony that evidence would have had an effect on his decision was speculative and therefore should have been excluded); Lilge v. Russell's Trailer Repair, Inc., 565 N.E.2d 1146 (Ind. Ct. App. 1991) (finding that whether plaintiff's failure to put his foot on bumper was sole proximate cause of his fall from back of trailer was question of fact for the jury); Stackhouse v. Scanlon, 576 N.E.2d 635 (Ind. Ct. App. 1991); Summit Bank v. Panos, 570 N.E.2d 960 (Ind. Ct. App. 1991) (finding that patient's alleged suicide from overdose of prescription medication was not an intervening cause when the prescribing doctor knew of patient's suicidal behavior and neglected to give proper warnings regarding the use of medication); Tucher v. Brothers Auto Salvage Yard, 564 N.E.2d 560 (Ind. App. 1991) (finding summary judgment proper when plaintiff failed

defamation,[3] nuisance,[4] false arrest,[5] malicious prosecution and abuse of process,[6] statutes of limitation,[7] sovereign

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to prove that gravel on which he slipped came from defendant's salvage yard); Walker v. Rinck, 566 N.E.2d 1088 (Ind. Ct. App. 1991) (holding that parents' subsequent knowledge of the mother's Rh negative blood type and their decision at that time to have children was an intervening cause which precluded claim against doctor and laboratory).

3. *See* Tacket v. Delco Remy Div. of Gen. Motors Corp., 937 F.2d 1201 (7th Cir. 1991) (holding that plaintiff must prove pecuniary damages in order to recover in libel per quod action); Bandido's, Inc. v. Journal Gazette Co., 575 N.E.2d 324 (Ind. Ct. App. 1991) (stating that inaccurate headline which constituted extreme departure from the standards of journalism could be used as evidence of actual malice); Burks v. Rushmore, 569 N.E.2d 714 (Ind. Ct. App. 1991) (holding that medical director's allegedly defamatory comment regarding employee on disability entitled to qualified privilege); Chambers v. American Trans Air, Inc., 577 N.E.2d 612 (Ind. Ct. App. 1991) (holding that reference given by former employer to prospective employer entitled to qualified privilege); Powers v. Gastineau, 568 N.E.2d 1020 (Ind. Ct. App. 1991) (finding that comment to county commissioners that plaintiff is a "lunatic" is defamatory and not entitled to qualified privilege because of actual malice); Olsson v. Indiana Univ. Bd. of Trustees, 571 N.E.2d 585 (Ind. Ct. App. 1991) (holding that reference given by teacher to prospective employer of student entitled to qualified privilege).

4. *See* Witco Corp. v. City of Indpls., 762 F. Supp. 834 (S.D. Ind. 1991); Blair v. Anderson, 570 N.E.2d 1337 (Ind. Ct. App. 1991) (holding that an open pit dump which failed to comply with applicable ordinances was a public nuisance); Pickett v. Brown, 569 N.E.2d 706 (Ind. Ct. App. 1991) (holding that a nuisance suit is not an exception to the Indiana's "common enemy" doctrine).

5. *See* Edwards v. Vermillion County Hosp., 579 N.E.2d 1347 (Ind. Ct. App. 1991).

6. *See* Indiana Nat'l Bank v. Churchman, 564 N.E.2d 340 (Ind. Ct. App. 1991).

7. The significant statute of limitations decisions occurred in the areas of products liability, medical malpractice, and legal malpractice. In perhaps the most important statute of limitations decision of the year, B & B Paint Corp. v. Shrock Mfg. Inc., 568 N.E.2d 1017 (Ind. Ct. App. 1991), the court of appeals held that a product liability claim asserting a breach of implied warranties was governed by the four-year Uniform Commercial Code statute of limitations rather than the two-year Products Liability Act statute of limitations. The issue has resulted in a significant divergence of opinion in other jurisdictions, *see* Taylor v. Ford Motor Co., 408 S.E.2d 270 (W. Va. 1991), but had apparently never been addressed in Indiana.

The most fascinating series of opinions, however, concerned the application of the discovery rule in products liability and malpractice cases. As a general matter, the discovery rule holds that a statute of limitations begins to run on the date on which the plaintiff discovers or reasonably should discover the relationship between the defendant's actions and the injury. In Alexander v. Beech Aircraft Corp., 952 F.2d 1215, 1226 (10th Cir. 1991), the Tenth Circuit held that the discovery rule does not apply in all products liability cases; rather, it is limited only to those cases in which injury results from "the ill effects of long term chemical exposure." The *Alexander* court upheld this reading of the discovery rule, which effectively limits the discovery rule just to toxic tort claims, against an equal protection challenge. In another products liability case, the Indiana Supreme Court applied the discovery rule exception to the two-year statute of limitations and found that, although the plaintiff did not actually discover the relationship between the product and his injury until a date within the two-year period, there was a jury question about whether the plaintiff should have known about the relationship at a date outside the two-year period. Allied Resin Corp. v.

immunity,[8] preemption,[9] compensatory[10] and punitive

Waltz, 574 N.E.2d 913 (Ind. 1991).

When the discovery rule was applied in medical malpractice cases, however, the result was different. In Yarnell v. Hurley, 572 N.E.2d 1312 (Ind. Ct. App. 1991), the court held that the two-year statute of limitations begins to run at the date of malpractice, but is tolled for an equitable period of time when there is evidence of fraudulent concealment or continuous wrong. The court held that a 21-month delay in bringing a malpractice claim after discovery of the fraud was unreasonable and that the defendant's continuous wrong ended when the physician-patient relationship ended, which had occurred more than two years before the filing of the proposed malpractice complaint. Similarly, Keesling v. Baker & Daniels, 571 N.E.2d 562 (Ind. Ct. App. 1991), held in a legal malpractice case that the two-year statute of limitations on a claim of malpractice due to conflict of interest begins to run, at the latest, on the last date of the attorney's representation. The most stringent statute of limitations decision, however, was Madlem v. Arko, 581 N.E.2d 1290 (Ind. Ct. App. 1991), in which the court held that a claim for malpractice begins to run on the date of the malpractice and that there is no discovery rule which tolls the statute until the time when the client discovers the malpractice. The direct conflict between *Madlem* and *Keesling*, as well as *Madlem*'s general inconsistency with the trend toward adoption of discovery rules, is a development which should continue to be monitored.

8. *See* Witco Corp. v. City of Indpls., 762 F. Supp. 834 (S.D. Ind. 1991); Buckley v. Standard Inv. Co., 581 N.E.2d 920 (Ind. 1991) (holding that utility is not entitled to immunity under the Indiana Tort Claims Act for negligent inspection); Board of Trustees v. Henry, 576 N.E.2d 614 (Ind. Ct. App. 1991) (holding that the statements regarding the extent of loss provided sufficient notice to satisfy Tort Claims Act's claim presentation requirement); City of Valparaiso v. Edgecomb, 569 N.E.2d 746 (Ind. Ct. App. 1991) (finding that police officer involved in car accident while leading funeral procession was entitled to immunity); Edwards v. Vermillion County Hosp., 579 N.E.2d 1347 (Ind. Ct. App. 1991) (holding that hospital is entitled to immunity of Indiana Tort Claims Act after its instigation of a debt collection action); Hupp v. Hill, 576 N.E.2d 1320 (Ind. Ct. App. 1991) (finding that judge *pro tem* was entitled to immunity under Indiana Tort Claims Act for signing warrant minutes after his commission had expired); State v. Hughes, 575 N.E.2d 676 (Ind. Ct. App. 1991) (holding that plaintiff's physical injuries, did not excuse her failure to file a notice of claim within 180 days of the injury); Tucher v. Brothers Auto Salvage Yard, 564 N.E.2d 560 (Ind. Ct. App. 1991).

9. *See* Heath v. General Motors Corp., 756 F. Supp. 1144 (S.D. Ind. 1991) (holding that design defect claim of failure to equip car with air bag preempted by federal motor vehicle safety standards); Smith v. Norfolk & Western Ry. Co., 776 F. Supp. 1335 (N.D. Ind. 1991) (finding that alleged negligence in failing to provide additional warning devices at railroad crossing preempted by Federal Railway Safety Act).

10. Undoubtedly the most important opinion on compensatory damages was Southlake Limousine & Coach, Inc. v. Brock, 578 N.E.2d 677 (Ind. Ct. App. 1991), in which the plaintiff used an economist to testify about his calculations of the economic value of a person's life ("hedonic damages"). The court of appeals held that this type of testimony is inadmissible in a wrongful death suit because it is irrelevant to the issues of loss of love, guidance, and mental anguish; because it is speculative as to the losses of the survivors; and because it invades the jury's province in assessing damages. Other opinions worthy of note are: Chamness v. Carter, 575 N.E.2d 317 (Ind. Ct. App. 1991) (holding that a noncustodial parent can file a wrongful death action on behalf of the deceased child when the custodial parent refuses to do so); Eden United, Inc. v. Short, 573 N.E.2d 920 (Ind. Ct. App. 1991)

damages,[11] indemnity,[12] assignability of claims,[13] vicarious liability,[14] strict liability,[15] and the jury process.[16] I do so with great reluctance.

(describing the level of certainty needed in order to obtain damages for tortious interference with prospective advantage); Smith v. Syd's, Inc., 570 N.E.2d 1216 (Ind. Ct. App. 1991) (holding that court incorrectly excluded testimony of $26,000 in medical expenses suffered by the plaintiff).

11. *See* Mundell v. Beverly Enter.-Ind., Inc., 778 F. Supp. 459 (S.D. Ind. 1991) (holding that personal representative of decedent could not recover punitive damages for improper care received by decedent); Erie Ins. Co. v. Hickman, 580 N.E.2d 320 (Ind. Ct. App. 1991); Powers v. Gastineau, 568 N.E.2d 1020 (Ind. Ct. App. 1991) (holding that punitive damage award must be reversed because of a failure to demonstrate malice, fraud, gross negligence, or oppression); Hotel Operating Co. v. Shaffer, 580 N.E.2d 306 (Ind. Ct. App. 1991) (discussing the foundation needed to permit introduction of evidence on net worth of defendant and to pierce the corporate veil); Ramada Robbins v. McCarthy, 581 N.E.2d 929 (Ind. Ct. App. 1991) (holding that punitive damages could be awarded even when defendant had already been subject to criminal sanctions); Swain v. Swain, 576 N.E.2d 1281 (Ind. Ct. App. 1991) (holding that constructive fraud supported award of punitive damages where there was evidence of oppression).

With one exception, however, the courts missed the most pressing issue under punitive damages. After the United States Supreme Court's decision in Pacific Mutual Insurance Co. v. Haslip, 111 S. Ct. 1032 (1991), it appears that the punitive damages rules of each state will need to be examined to determine whether they comport with the due process guarantees which *Haslip* found in the Alabama case before the Court and which the majority strongly implied were required to render an award of punitive damages constitutional. The only case to raise the issue of the constitutionality of Indiana's punitive damages rules held that they were constitutional because *Haslip* determined that awards of punitive damages are constitutional as long as the court considers the character and degree of the wrong and the necessity of preventing similar wrongs. United Farm Bureau Mut. Ins. Co. v. Ira, 577 N.E.2d 588 (Ind. Ct. App. 1991). The court's reading of *Haslip* is extremely generous and probably incorrect. *See* Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991). *But see* Hospital Auth. of Gwinnett County v. Jones, 409 S.E.2d 501 (Ga. 1991).

12. *See* Allied Signal, Inc. v. Acme Serv. Corp., 946 F.2d 1295 (7th Cir. 1991); Sprigler v. Osnabrucker Mettallwerke, 761 F. Supp. 86 (S.D. Ind. 1991); Indianapolis Power & Light Co. v. Snodgrass, 578 N.E.2d 668 (Ind. 1991) (holding that Indiana Comparative Fault Act creates no right of indemnity against employer of plaintiff).

13. *See* Picadilly, Inc. v. Raikos, 582 N.E.2d 338 (Ind. 1991) (holding that legal malpractice claim cannot be validly assigned to victorious plaintiff as part of a discharge of defendant's debts in bankruptcy).

14. *See* Bitzer v. Pradziad, 571 N.E.2d 593 (Ind. Ct. App. 1991); Eden United, Inc. v. Short, 573 N.E.2d 920 (Ind. Ct. App. 1991) (piercing corporate veil to hold subsidiary organizations liable for parent organization's interference with plaintiff's economic advantage).

15. *See* Amcast Indus. Corp. v. Detrex Corp., 779 F. Supp. 1519 (N.D. Ind. 1991).

16. The most significant opinion was probably Frito-Lay, Inc. v. Cloud, 569 N.E.2d 983 (Ind. Ct. App. 1991), in which the court found that the failure to give a sudden emergency instruction required reversal of a judgment entered in favor of a teenager who failed to yield at a stop sign and was struck by the defendant's driver. Calling the plaintiff's reasons for a nonbifurcated trial "mere subterfuge," the court held that the compelling damages testimony evoked such sympathy for the plaintiff that the defendant was unduly prejudiced by a nonbifurcated trial and that a bifurcated trial would maximize judicial

1991 was a year of rich diversity in Indiana tort law. Ultimately, however, it was the year of duty.

I. A New Test For Duty?

Michael Neal was a patient of Dr. Orville Webb. At some point before 1985, Dr. Webb began to prescribe anabolic steroids for Neal. On March 27, 1985, Neal brandished a knife at his wife, pointed a gun at her head, and pulled the trigger. Fortunately the gun was unloaded, and Ms. Neal escaped to the home of her sister and brother-in-law. Her brother-in-law, a state trooper, called the sheriff's office, which in turn called Dr. Webb. Dr. Webb went to the Neals' home and found Neal distraught and afraid he might hurt someone. Dr. Webb convinced Neal to see a psychiatrist the next day and then called the sheriff's office to report that it would be better if everyone stayed away from Neal for the night. The sheriff's office subsequently called Ms. Neal and told her that everything was fine. Ms. Neal called her husband, who said that she could come over to pick up some clothes for the night. When Ms. Neal and her brother-in-law arrived at the home, Neal threatened his wife with a gun, shot the brother-in-law, and drove to a local hospital, where he killed a nurse.

The brother-in-law and his wife sued Dr. Webb. The plaintiffs' theory of the case was that Neal had become a toxic psychotic because of Dr. Webb's negligent over-prescription of anabolic steroids. As the Indiana Supreme Court framed it, the legal issue presented by the case was "[w]hat duty a physician owes to a third person injured by the physician's patient as a result of treatment."[17] The issue was new; no prior precedent dictated the result.

To answer the novel issue, the supreme court began by asking a logical question: What is the test for determining whether a duty in tort exists? Although obvious, the question was also revolutionary. Indiana

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economy. *Id.* at 990-91. *But see* Fultz v. Cox, 574 N.E.2d 956 (Ind. Ct. App. 1991) (declining to follow *Frito Lay* and refusing to bifurcate issue of prior release in car accident case).

Courts were also active in reviewing damage awards and liability findings which were arguably the product of "jury justice." *See, e.g.*, Adams v. McClevy, 582 N.E.2d 915 (Ind. Ct. App. 1991); Conklin v. Demastus, 574 N.E.2d 935 (Ind. Ct. App. 1991) (upholding jury verdict for defendant when defendant's lawyer conceded that defendant was more than 50% at fault, but there was a serious question that the plaintiffs' injuries were caused by other events); Schuh v. Silcox, 581 N.E.2d 926 (Ind. Ct. App. 1991) (ordering new trial in case where jury returned verdict for defendant after defendant's lawyer conceded liability in opening statement); State v. Snyder, 570 N.E.2d 947 (Ind. Ct. App. 1991).

17. Webb v. Jarvis, 575 N.E.2d 992, 993 (Ind. 1991).

cases had long recognized the need of a tort plaintiff to establish a duty,[18] but no single test to determine the existence of a duty had ever been established.[19] Rather, various duties—such as the duty of a landowner to an invitee or licensee,[20] the duty of care for the actions of contractors,[21] the duty of a motorist,[22] the duty to prevent criminal conduct,[23] the duty of a seller or supplier of alcohol,[24] even the duties of physicians[25] and product manufacturers[26]—grew up independently and haphazardly, without any thought given to their relationship to other tort obligations arising in other factual contexts. By asking a simple question, the Indiana Supreme Court was poised to bring the unruly duty analysis, full of its technicalities and exceptions, within a single framework.

The court's answer was straight-forward. In determining whether a duty existed in the case, "three factors must be balanced . . . (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns."[27] Applying these three factors to the facts of the case, the court found that all three counseled against the imposition of a duty.[28] Consequently, it held that "generally physicians do not owe a duty to unknown nonpatients who may be injured by the treatment of a patient."[29]

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 multi-factor balancing tests: lack of certainty and undue pliability. When all

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18. *See, e.g.*, Miller v. Griesel, 308 N.E.2d 701, 706 (Ind. 1974).

19. *See, e.g.*, Gariup Constr. Co. v. Foster, 519 N.E.2d 1224 (Ind. 1988).

20. *See* Cleveland C.C. & St. L. Ry. Co. v. Means, 104 N.E. 785 (Ind. App. 1914).

21. *See* Prest-O-Lite Co. v. Skeel, 106 N.E. 365 (Ind. 1914); Hale v. Peabody Coal Co., 343 N.E.2d 316 (Ind. App. 1976).

22. *See* Martin v. Lilly, 121 N.E. 443 (Ind. 1919).

23. *See infra* notes 116-25 and accompanying text.

24. *See* Picadilly, Inc. v. Colvin, 519 N.E.2d 1217 (Ind. 1988); Gariup Constr. Co. v. Foster, 519 N.E.2d 1224 (Ind. 1988).

25. *See* Worster v. Caylor, 110 N.E.2d 337 (Ind. 1953).

26. *See* J.I. Case Co. v. Sandefur, 197 N.E.2d 519 (Ind. 1964).

27. Webb v. Jarvis, 575 N.E.2d 992, 995 (Ind. 1991).

28. The court cautioned, "This conclusion should not be interpreted as inoculating physicians so as to give them complete immunity against third party claims. In a different factual setting, the duty analysis undertaken here could lead to a different conclusion." *Id.* at 998.

29. *Id.*

three factors pull in the same direction, the answer to the duty question is always easy. When factors tug in different directions, however, the courts will necessarily be forced to do one of two things: either manipulate the meaning and evidence concerning the discordant factor in order to create an appearance that all three factors support the decision or establish a "lexical" or serial ordering in which some factors are given priority or greater weight.[30] In *Webb v. Jarvis*,[31] the court appears to have adopted the former approach. With respect to the first factor (relationship), the Indiana Supreme Court noted that, although privity "has vanished evolutionarily during the twentieth century" and that "[a]s we approach the next century, it is well-established that privity is not always required,"[32] the lack of professional relationship between the plaintiff and the physician compels a finding of no duty unless the professional knows that a third person is relying on his opinions and conclusions.[33] By focusing on the relationship between the plaintiff and the physician, the court failed to appreciate that the existence of a relationship between a physician and a patient can also give rise to obligations toward others.[34]

Similarly, with respect to the second factor (foreseeability), the court rejected the plaintiff's analogy to dram shop cases which find a duty on the tavern for a patron's drunken conduct;[35] it noted that the toxic dangers of steroids are less widely known, and therefore, less foreseeable than the dangers of selling someone too much alcohol.[36] Here too, the court's argument is thinly reasoned. The consequences of excessive steroid use might well have been known to the defendant as a medical professional. If the court intended to suggest that a defendant owes no duty for harm which it can foresee simply because the general public, with less expertise than the defendant, cannot foresee the harm, then

30. By "lexical" or serial ordering, I mean that the court will need to acknowledge that certain factors are dominant and others are subservient in the case of a conflict. For instance, if public policy considerations favored a duty while relationship and foreseeability did not, the court would need to determine which set of factors deserved the priority. On the more general question of lexical ordering, see JOHN RAWLS, A THEORY OF JUSTICE 42-44 (1971).

31. 575 N.E.2d 992 (Ind. 1991).

32. *Id.*

33. *Id.* at 996. In this case, there was no evidence that the plaintiff had relied on the defendant's conclusions and opinions or that the defendant knew of any arguable reliance.

34. *See* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976) (holding that relationship of doctor to patient creates obligation of due care toward specific target of patient's violent ideation); RESTATEMENT (SECOND) OF TORTS § 315 (1965).

35. *Webb*, 575 N.E.2d at 997. The court did not specifically cite any dram shop cases, but it was presumably thinking of Picadilly, Inc. v. Colvin, 519 N.E.2d 1217 (Ind. 1988).

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

the foreseeability factor will work against the creation of duties for significant classes of injuries caused by technological innovations.

Finally, the court turned to public policy, where it stood on the firmest ground. The court found that the negative effects of a duty on a physician's loyalty to a patient and on the generally beneficial use of prescription medication were policy reasons which weighed heavily against the duty.[37] Although these arguments are persuasive, the court ignored countervailing public policy factors such as the compensation of plaintiffs and the deterrence of negligent prescription. The court gave no reason that the public policies it selected were the critical ones.

That problem leads to the third weakness of *Webb*: whether in fact the new test of duty will be taken seriously. Less than a month after *Webb* was decided, the supreme court decided *Cowe v. Forum Group, Inc.*,[38] a case involving a child born to a woman raped in the defendant's institutional care facility. The case, in which the child sued on a theory of wrongful life, bore significant parallels to *Webb*: both involved a professional relationship, both involved third party criminal conduct, and both claimed an asserted duty to protect. Both held that no duty existed. In many ways, however, the most remarkable thing about *Cowe* is that it utterly fails to cite *Webb* or to undertake the three-factor balancing test which *Webb* seemingly requires. The duty analysis adopted in *Cowe* is considered shortly. At this point it is enough to note that the court ignored the *Webb* test in its first opportunity to use it.

This last observation—that courts have not and may not accept the *Webb* balancing test—leads to a further question: If the courts are not deciding duty issues with *Webb's* test, then what are the factors on which courts are basing their duty decisions? Again using cases decided during the past year, the next section explores the models on which the Indiana courts have premised the existence of a legal duty.

II. Four Models of Duty

With few exceptions, Indiana's duty decisions during 1991 turned on one of four critical factors. Some cases relied on the nature of the relationship between the defendant and the plaintiff (or third person) in order to resolve the duty issue, some relied on the failure of due care, some relied on public policy, and at least one relied on a sense of community values. The first three factors are familiar; they are the ones identified in *Webb*. The difference from *Webb*, however, is that the presence or absence of a single factor was typically deemed dispositive of the duty question; the courts did not engage in the balancing of

37. *Id.*
38. 575 N.E.2d 630 (Ind. 1991).

factors suggested by *Webb*. The fourth factor, of course, lies entirely outside the *Webb* framework. By examining three series of cases decided by the Indiana Supreme Court, this section develops the four ways in which Indiana courts have analyzed the question of duty.

A. The Model of Relationship and Control: Landowner Liability Toward Those Injured on the Property

At common law the paradigmatic instance of a duty based on relationship was the duty of a landowner toward those injured on the landowner's property. Simply put, the relationship of the person entering on the land to the landowner—in other words, the injured person's status as invitee, licensee, or trespasser—defined the duty owed. Invitees were owed a general duty of reasonable care; licensees, which included all social guests, were owed a duty only to avoid wilful or wanton injury and to warn of latent dangers; and trespassers received a duty simply to avoid wilful or wanton injury.[39] The rule in Indiana was the same.[40]

In the past twenty-five years, however, this status-driven test has come under increasing attack for its arbitrary character and its finespun distinctions. Consequently, it has been replaced in a substantial number of jurisdictions with a general duty of reasonable care under the circumstances.[41]

In a series of five decisions, the Indiana Supreme Court entered the debate about the nature and extent of a landowner's duty to those injured on the premises.[42] It struck a middle ground, significantly reworking and expanding the present "invitee" category but nonetheless

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39. *See* RESTATEMENT (SECOND) OF TORTS §§ 328E-344 (1965). A fourth status-based distinction has been developed through legislation; every state has some form of a recreational use statute, in which landowners who hold land open for certain recreational purposes owe the entrants on the land a limited duty of care. *See, e.g.*, IND. CODE §§ 14-1-3-18, -19 (1988 & Supp. 1991) (limiting duty of landowner toward users of recreational vehicles and snowmobiles entering on the land).

40. *See* Burrell v. Meads, 569 N.E.2d 637 (Ind. 1991).

41. *See, e.g.*, Rowland v. Christian, 433 P.2d 561 (Cal. 1968); Basso v. Miller, 352 N.E.2d 868 (N.Y. 1976); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 62 (5th ed. 1984) (discussing fate of *Rowland* in other jurisdictions).

42. *Burrell*, 569 N.E.2d at 637; Parks v. Parks, 569 N.E.2d 644 (Ind. 1991); Risk v. Schilling, 569 N.E.2d 646 (Ind. 1991); LeLoup v. LeLoup, 569 N.E.2d 648 (Ind. 1991); Beresford v. Starkey, 571 N.E.2d 1257 (Ind. 1991). The first four cases were decided on the same day; subsequently, *Beresford* reversed a court of appeals judgment which had been rendered prior to the decision in *Burrell* and its progeny. *Burrell* involved a plaintiff injured while helping his neighbor remodel his garage. *Parks* involved a plaintiff injured while helping his brother build a carport at the brother's home. *Risk* involved a plaintiff injured while helping the defendant restore an antique tractor in the defendant's shop. *LeLoup* involved a son injured while returning a wrench to his father's home. *Beresford* involved a friend injured while diving off the defendant's dock during a party.

retaining the three status-based categories as the fundamental determinant of duty. The lead opinion, *Burrell v. Meads*,[43] enlarged the invitee category in two ways. First, it clarified the basic test for the determination of invitee status. Confusion in Indiana precedents over the proper test for invitee (the earlier "invitation test" as opposed to the subsequently developed "economic benefit" test) left the scope of the invitee category extremely murky. After definitively rejecting the "economic benefit" test because of the "sense late in this century that the economic benefit test promotes injustice when applied to social guest cases," *Burrell* held that the correct test for determining invitee status is the invitation test.[44]

Second, the court clarified the types of persons who are invitees entitled to claim this general duty of reasonable care. In the first instance, the "invitee" category now includes both public invitees (members of the public invited onto the land "for a purpose for which the land is held open to the public")[45] and business visitors (persons invited onto the land "for a purpose directly or indirectly connected with business dealings with the possessor of the land").[46]

More significant, however, was *Burrell*'s expansion of the invitee class to include social guests. Under traditional analysis, social guests were neither public invitees nor business visitors; they were only licensees.[47] Nonetheless, starting from the newly declared test for invitee status—the existence of an invitation—the court found no basis to distinguish between those persons invited for social reasons and those invited for business or public reasons. The claim that social guests can expect no more from a friend's home than the friend himself "simply does not comport with modern social practices."[48] Rather, persons typically prepare their premises more carefully for social guests than for public or business invitees, and the social guest is equally entitled to rely on the expectation that the premises are safe.[49] Therefore, the court held, landowners owe a duty of reasonable care to "all individuals known to the landowner who [come] to the premises upon actual invitation or arguably upon standing invitation."[50]

Although certainly expanding the number of persons entitled to expect a duty of reasonable care, the decisions in *Burrell* and its progeny should

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43. 569 N.E.2d 637 (Ind. 1991).

44. *Id.* at 642.

45. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 332 (1965)). These categories of business visitors and public invitees are standard in most jurisdictions which retain the status-based duties.

46. *Id.*

47. RESTATEMENT (SECOND) OF TORTS § 330 cmt. g (1965).

48. Burrell v. Meads, 569 N.E.2d 637, 643 (Ind. 1991).

49. *Id.*

50. *Id.*

not be read to represent a victory for a model of due care. Although it tinkers with the categories, *Burrell* retains the three classifications of invitee, licensee, and trespasser. When combined with the court's focus on the existence of an invitation, this classification scheme suggests that the duty of reasonable care cannot be extended to uninvited solicitors, public officers, and trespassers. *Risk v. Schilling*[51] suggests another significant limitation on the landowner's duty of care. In *Risk*, the plaintiff was a social guest injured in a workshop under the exclusive control of the occupier of the land. Although the court found that the possessor owed a duty of reasonable care, it further held that a landowner who is not in possession or control of land does not owe a duty of care to persons invited onto the land by the possessor.[52] Therefore, a model of relationship between the parties (as defined by invitation and control) is the key determinant of the duty owed to those injured on the land. Invitation and control, not due care under the circumstances, are the language of liability.

B. The Model of Due Care: Landowner Liability Toward Those Injured Off the Land

A different model for the determination of duty was suggested by the court in *Valinet v. Eskew*.[53] In *Valinet*, a dead 190-year-old oak fell across a road in a residential area of Hamilton County and seriously injured the plaintiff. The plaintiffs' evidence suggested that the tree had been dying for eight to twelve years and had finally died three to five years before the injury. The evidence also showed that the defendant

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51. 569 N.E.2d 647 (Ind. 1991).

52. *Id.* at 647-48. The same expansion of duty within the model of relationship is also apparent from three appellate court decisions which granted invitee status to injured plaintiffs who were arguably licensees. In Mead v. Salter, 566 N.E.2d 577 (Ind. Ct. App. 1991), a plaintiff who forgot the address of his attorney's office entered a building to see if his attorney's name was listed in the lobby's directory. The court found that the plantiff was an invitee because, even though his attorney did not have offices in the building, the lobby was held open to members of the public. In Markle v. Hacienda Mexican Restaurant, 570 N.E.2d 969 (Ind. Ct. App. 1991), a plaintiff entered the defendant's parking lot to eat dinner, but stopped to talk to a friend who agreed to take some business supplies for the defendant. Even though the plaintiff was injured while handing the friend the business supplies, the court held that his status did not automatically change from business visitor to licensee. Because a jury could find that the incidental use of the parking lot for the defendant's own purposes was foreseeable, the plaintiff's status (and thus the duty of care owed him) was a fact issue to be resolved by the jury. In Smith v. Syd's, Inc., 570 N.E.2d 126 (Ind. Ct. App. 1991), a tenant who fell down a stairway jointly owned and maintained by the landlord and the owner of the adjourning building was found to be an implied invitee of the owner of the adjacent building, even though the adjacent owner derived no direct economic benefit from the plaintiff's rent.

53. 574 N.E.2d 283 (Ind. 1991).

made periodic trips to his property. Prior to *Valinet*, the rule in Indiana was that a landowner owed no obligation to those injured off the property by a natural condition on the property.[54] As the court noted, this rule "arose at a time when land was largely unsettled and the burden imposed on a landowner to inspect it for safety was held to exceed the societal benefit of preventing possible harm to passersby."[55] With modern "urban landowners," however, "the risk of harm to highway users is greater and the burden of inspection on landowners is lighter in such populated areas."[56] Acknowledging the trend of other courts and the Restatement, the court imposed a duty on landowners in "an area of sufficient population density" to "inspect their trees to try to prevent their posing an unreasonable risk of harm to passing motorists."[57]

Like *Burrell*, *Valinet* does not entirely replace existing landowner obligations with a duty of reasonable care. The case does not change the rule of no liability for property owners in less populated areas, nor does it change the rule of no liability for conditions other than trees.[58] If *Valinet*'s rationale is taken seriously, however, it is difficult to believe that these areas of no liability can survive. In even the most rural areas, the harm caused by a failure to take care might strongly outweigh the precautions needed to prevent harm; the same is certainly true of natural conditions other than trees.

The most significant aspect of *Valinet*, however, is its relationship to *Burrell*. In many ways, the parallels between *Burrell* and *Valinet* are striking. Both involve the obligations of landowners. Both find that the prior duty rules for landowners ill reflect modern social circumstances. Both impose duties of reasonable care on defendants.

Indeed, given their similarities, it seems incredible that *Valinet* never cites *Burrell*, which was decided less than three months before. The explanation for the silent treatment is simple. In the final analysis, one difference between the cases outweighs their similarities: the model under

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54. The duty with respect to artificial conditions maintained on the land toward those injured off the land is one of reasonable care, at least where the condition is not abnormally dangerous. *See* RESTATEMENT (SECOND) OF TORTS §§ 364-69 (1965). For a recent application of this rule, see Suslowicz v. Mielcarek, 571 N.E.2d 1304 (Ind. Ct. App. 1991).

55. *Valinet*, 574 N.E.2d at 285.

56. *Id.*

57. *Id.*

58. There is a possible caveat to this statement: in dicta, the court mentioned that some courts also departed from the rule of nonliability for natural conditions when the landowner had actual knowledge of the danger. *Id.* Although it is not clear whether the court intended this observation to become another exception to the rule of nonliability, the creation of such an exception would be consistent in most instances with the *Valinet* court's reasoning.

which they resolve the duty issue. *Burrell* relies on relationship, particularly invitation and control, to define duty. *Valinet* relies on a model of due care: the obligation to use care exists whenever the expected harm outweighs the expected benefits. This balance of harm against benefit is, of course, simply one way of describing negligence.[59] Thus, *Valinet*'s approach ultimately collapses the questions of duty and negligence into each other; both the duty of care and the existence of negligence are determined by asking the same question.[60]

Without a consistent, overarching theory of duty, the Indiana Supreme Court simply failed to appreciate the conceptual link between the cases. Rather, the facts of *Burrell*, an injury on the land, invoked one paradigm of duty. The facts of *Valinet*, an injury off the land, invoked a different paradigm. The supreme court is obviously appealing to different models in seemingly related types of factual occurrences; the problem lies in discerning its reasons for speaking more than one language. None is apparent from either *Burrell* or *Valinet*.

Whatever the explanation, the breadth of *Valinet*'s model of due care now poses a critical question for duty analysis in Indiana. By staking the rule of *Valinet* on the rationale that duties exist when the expected harm outweighs the cost of precautions, the Indiana Supreme Court ultimately paves the way for a landowner's duty of reasonable care under the circumstances—both in the context of landowner liability toward those injured *off* the property and in the context of landowner liability toward those injured *on* the property.[61] Whether *Valinet* ultimately sounds the death knell for the remaining no-duty rules of landowner liability and for the invitee-licensee-trespasser categories already weakened by *Burrell* is now the pressing issue in landowner liability. Of

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59. *See* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947); Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 42-44 (1915).

60. This approach to the issue of duty was first advocated by Lord Esher in his famous concurrence in Heaven v. Pender, 11 Q.B.D. 503 (1883):

> [W]henever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

Id. at 509. It also underlies Judge Cardozo's famous equation of foreseeability of harm and relationship in Palsgraf v. Long Island Railroad, 162 N.E. 99, 100 (N.Y. 1928) ("The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation . . . .").

61. Whether the expected harm outweighs the cost of precaution is, of course, simply one way of deciding the issue of negligence. *See Carroll Towing*, 159 F.2d at 169. To use the same inquiry to decide the issue of duty ultimately collapses the questions of duty and breach.

even greater importance is the effect of *Valinet*'s analysis across the spectrum of tort duties.

C. *The Model of Public Policy: Liability for Wrongful Life*

A legal realist would probably have little difficulty explaining the disparate analysis in *Burrell* and *Valinet*: the Indiana Supreme Court was simply using legal rubric ("relationship" or "due care") to mask the results which the court wished to achieve for reasons of public policy.[62] Although the point is debatable as a general matter, there is no doubt that the Indiana Supreme Court has, in at least some instances, relied explicitly on a model of public policy to define the duty owed. In *Cowe v. Forum Group, Inc.*,[63] a profoundly retarded woman was raped in the defendant's institutional care facility. The woman gave birth to a boy with physical and mental impairments. The boy then brought two claims: negligence in the failure to protect his mother from rape and negligence in failing to diagnose his mother's condition until the fifth month of her pregnancy. For the first claim, the boy alleged that the damages suffered were the loss of a relationship with his birth mother; for the second claim, the damages were the physical and mental impairments he suffered as a lack of early and adequate treatment for his mother's pregnancy.

The supreme court rejected the first claim on public policy grounds. According to the court, the primary arguments against a "wrongful life" theory were that life, even life with a genetic defect, was not a damage in comparison to no life and that it was impossible to calculate the damages of an impaired life as opposed to no life.[64] The policy arguments favoring the duty were alleviation of the parents' financial burden, discouragement of malpractice, and the fostering of genetic counseling.[65] Because it believed that the latter policies were better left to the legislature,[66] the court held that "life, even life with severe defects, cannot

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62. There is at least some evidence that this was in fact occurring. In both cases, the court mentioned, although it did not explicitly rely on, the fact that modern social conditions made the former duties no longer tolerable. For a general discussion of the role of public policy in shaping the nature and extent of legal obligations, see, e.g., KEETON, *supra* note 41, §§ 3, 53.

63. 575 N.E.2d 630 (Ind. 1991).

64. *Id.* at 634.

65. *Id.* at 634-35.

66. *Id.* at 635. Of these three objectives, the fostering of genetic counseling was not implicated on the facts of the case. Contrary to the court's assertion, that the discouragement of malpractice and other negligence is not a matter typically left to the legislature.

be an injury in the legal sense."[67] The languages of relationship and due care did not enter into the court's calculus.

The same appeal to public policy permeated a court of appeals decision, rendered before *Cowe*, which also held that wrongful life and wrongful birth claims could not be brought in Indiana. In *Walker v Rinck*,[68] a laboratory and a doctor who negligently diagnosed a woman as Rh positive were sued for the damages to the children caused by the fact that the woman was Rh negative. Relying on the public policy analysis of *Albala v. City of New York*,[69] the court found that preconception torts would create unmanageable and potentially massive liability, that such torts lacked precedential support, and that the issue was better addressed by the legislature. Appealing to the model of due care, a vigorous dissent argued that a duty existed because the injury was foreseeable. The majority's appeal to the model of public policy, subsequently endorsed by *Cowe* for injuries of this type, carried the day.

From the perspective of duty analysis, however, the critical aspect of *Cowe* was not just its reliance on a public policy model. The plaintiff had also asserted a second, distinct claim for negligent failure to diagnose and treat his mother's pregnancy. The court's holding on the first claim would suggest that the second claim should have been dismissed on the same public policy grounds: life, even damaged life, is no damage, and in any event, the difference between the plaintiff's life and the condition in which he would otherwise have been born was incalculable. On the second claim, however, the court held that the nursing home had a duty of reasonable care to diagnose the mother's condition and that the child could sue for damages which resulted from a breach of that duty. In making this decision, the court did not rely on the models of relationship, due care, or public policy; it used a fourth language of duty.

D. The Model of Community Values: Liability for Negligent Infliction of Harm to the Unborn

In finding that the defendant in *Cowe* owed a duty of diagnosis and treatment to the plaintiff, the court's duty analysis was simple: a duty exists "where, in general, people would recognize it and agree that it exists."[70] It noted the trend of courts and the Restatement to impose

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67. *Id.* (quoting Azzolino v. Dingfelder, 337 S.E.2d 528, 532 (N.C. 1985)).

68. 566 N.E.2d 1088 (Ind. Ct. App. 1991).

69. 429 N.E.2d 786 (N.Y. 1981).

70. Cowe v. Forum Group Inc., 575 N.E.2d 630, 636 (Ind. 1991) (quoting Gariup Constr. Co. v. Foster, 519 N.E.2d 1224 (Ind. 1988)). *Gariup*'s phrasing is identical to the language found in KEETON, *supra* note 41, § 53, at 359 ("No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists.").

liability when a defendant negligently causes harm to the mother.[71] Then, limiting itself at least for the present time to the facts of the case, the court found that the child could assert a claim for his prenatal damage when his mother was extremely dependent on the defendant for care and protection and the defendant exercised complete control over the discharge of that obligation.[72]

A strong argument can be made that this second holding of *Cowe*, with its discussion of dependence and control, actually fits within the model of relationship. On the facts, of course, that argument is unassailable—at least assuming that the concept of relationship does not get the narrow reading given to it in *Webb v. Jarvis*.[73] However, the court's analysis—whether reasonable people in the community would impose the duty—ultimately suggests a source of duty different than relationship, due care, or public policy. Rather, duties spring from the community's shared values. In many circumstances, the community's values will be shaped by notions of relationship, due care, or public policy, but those values might also be grounded in entirely different concerns.[74] In spite of its drawbacks, the model of community values

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71. *Cowe*, 575 N.E.2d at 636-37. *See* RESTATEMENT (SECOND) OF TORTS § 869 (1965).

72. *Cowe*, 575 N.E.2d at 637.

73. Indeed, *Cowe* begins its analysis of the failure to render medical care issue by stating that "[t]he question of whether a duty to exercise care arises is governed by the relationship between the parties." *Id.* at 636. If *Webb*'s analysis of relationship is correct, the absence of privity between the defendant and the fetus and the defendant's lack of knowledge about the fetus's arguable reliance on the defendant for health care, would doom the argument that a relationship which could sustain a duty existed. *See supra* notes 33-34 and accompanying text.

74. There are significant problems with a duty based on consensus values. The relevant community must be identified, its values must be discerned, and care must be taken not to trample on the rights of those systematically excluded from the community. The court's reasoning helps little in this task. The court seems to assume that, because legal precedent has widely moved to accept a new duty, reasonable people have done the same. If the test of shared values is the wide recognition of a legal obligation, then no factual circumstance for which the existing precedents in other jurisdictions gave different answers could give rise to a duty, nor could Indiana ever be the first state, or even one of the first states, to recognize an unprecedented theory of liability. For instance, the court's resolution of the duty issue in *Burrell* was novel; courts in other jurisdictions have not typically retained the three categories of invitee, licensee, and trespasser, but moved social guest into the invitee category. *See* KEETON, *supra* note 41, at 62. If the test of duty under consensus values requires a consensus in the legal community, then *Burrell* was clearly wrong. On the other hand, if the test is whether society in general recognizes the obligation of due care toward social guests, the decision may well have been correct; most people recognize that their obligations of care toward friends invited onto their property are greater than the obligations of care toward door-to-door solicitors. *Cf.* Burrell v. Meads, 569 N.E.2d 637, 643 (Ind. 1991) (noting that limiting the duty of care toward social guests to the obligations owed a licensee "simply does not comport with modern social practices").

presents an intriguing alternative to the other three models of duty. Although its full implications lie beyond the scope of this Article, it remains a language which lawyers and judges can use when they find that appeal to the languages of relationship, due care, and public policy does not result in the correct adjustment of the parties' responsibilities.

Choosing the relevant language for duty will be particularly important for two questions left unanswered by *Cowe*. The first is whether a parent (as opposed to the child) can sue for the expenses of raising an unwanted child or for the special expenses and the emotional distress of raising an impaired child.[75] Should the courts choose the language of public policy, then the factors identified in the first holding of *Cowe* might well preclude damages under any of these theories. On the other hand, the languages of relationship, due care, and in some instances, community values, all suggest that a claim for some or all of these expenses is appropriate.

Second, *Cowe* leaves open the scope of the duty of other defendants toward unborn children.[76] It seems that the only logical distinction between the two holdings in *Cowe* (and between their appeals to different models of duty) is that the court will refuse to recognize a duty toward those not yet conceived at the time of the negligence—at least for those injuries inherently associated with the process of conception and birth—while it will recognize a duty toward existing fetuses harmed by negligence.[77] If true, the distinction would suggest that doctors and drivers would owe a duty toward existing fetuses to prevent harm.[78] Although that result is not at all objectionable, the distinction on which the result is based is ultimately unsatisfying. Consider a doctor who negligently prescribed medication that harmed an existing fetus and also caused genetic damage to the mother, with the result that her future children were also harmed. Under *Cowe*'s logic, even though the conduct and the harm are the same, the doctor is liable to the first child, but not to the future children.

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75. *See* Procanik v. Cillo, 478 A.2d 755 (N.J. 1984).

76. Persons who perform abortions are likely to be protected as long as Roe v. Wade, 410 U.S. 113 (1973), survives because a tort suit would likely be preempted by the constitutional right recognized in *Roe*. *Cf.* Boyle v. United Technologies Corp., 487 U.S. 500 (1987) (product liability suit preempted when unique federal interest and state tort claim were in significant conflict).

77. The court's reliance on the notion of control to create a duty of reasonable diagnosis and care cannot serve as a valid ground for distinction of the two holdings. The defendant also had control over the mother when she was raped; if control is the touchstone of duty, the court should have upheld the wrongful life theory.

78. The duty would still require proof of proximate cause where some defendants might succeed in proving that the type of harm was unforeseeable.

As this hypothetical example shows, the appeal to different models as the determinant of duty can create considerable inequities among similarly situated claims and claimants. We saw the same result when *Burrell* and *Valinet* appealed to different models of duty. The extraordinary thing about *Cowe*, however, is that it explicitly uses different models to decide two duty issues presented within a single case. The result is all the more extraordinary when we remember that *Cowe* failed to appeal to the hybrid model which *Webb v. Jarvis*, a case involving similar issues, had declared a month before to be the sole framework for the resolution of all duty issues. The failure of Indiana courts to develop a single, coherent view of duty is manifest.

III. Applying the Models

The remaining duty decisions of the Indiana courts reflect the same inconsistency of theoretical foundation as the cases already discussed. Some duty decisions were premised on notions of relationship and control, some on notions of due care, and some on notions of public policy. If there was a reason that different duties were captured by different models, it was not apparent from the decisions themselves. If duty analysis in Indiana is to become coherent, every line of duty doctrine will need to be re-examined.

In this section, I review the year's duty decisions for the three types of harm which invoke tort liability: harm to body or property, harm to human dignity or psychic peace, and harm to economic interests. For each line of duty decisions, I identify the primary language used by the court to decide the issue of duty. My purpose in doing so is not to suggest the specific revisions which a consistent theory would require for each area of duty; it is rather to describe the range of existing duties and to highlight the duties which need re-examination if a consistent theory of duty, whatever its content, is to be developed.

A. Physical Harms

1. Medical Malpractice.—The quintessential duty based on an existing relationship is medical malpractice. During the past year, the lack of a relationship of patient-doctor privity was fatal to two cases which sought to recover for alleged malpractice committed on a person other than the plaintiff, while the existence of a direct doctor-patient relationship between the defendant and the plaintiff led two other courts to read the duty of care generously. The two cases refusing to find a duty in the absence of a doctor-patient relationship were *Webb v. Jarvis*, whose effect on the duty analysis has already been considered, and *Smith v. Methodist Hospital of Indiana, Inc.*[79] In *Smith*, the plaintiffs allegedly

79. 569 N.E.2d 743 (Ind. Ct. App. 1991).

suffered emotional distress because of a hospital's failure to advise them that their son, whom the hospital was maintaining on life support equipment for possible organ donation, was already brain dead. In order to recover for emotional distress, the plaintiffs needed to demonstrate the existence of fraud. The court affirmed a dismissal of the case, holding that there was no fraud because the hospital "did not owe a duty to [plaintiffs] to advise them of [their son's] condition where that information was not related to a course of medical treatment."[80] Because of its close relationship to the issue of psychic harm, I defer a fuller discussion of *Smith* until later in the Article. At this point, however, it is important to note that the lack of a relationship regarding the matter for which recovery was sought was the key variable in the court's ultimate decision.

When the doctor-patient relationship did exist, however, the courts were willing to read the duty of care more generously. *Centman v. Cobb*[81] declared the relevant standard of care for a physician in the first year of postgraduate work. Because the Medical Malpractice Act and its duty of care—that of a reasonably skilled practitioner in the same or similar locality—technically apply only to physicians holding unlimited licenses, the standard of care for first-year physicians practicing with temporary licenses was unclear before *Centman*. On review of a motion to determine a preliminary question of law for the Medical Review Panel, the court of appeals found that first-year physicians must be held to the same standard of care as doctors with unlimited licenses in the same or similar locality.[82] As the court reasoned, the common-law duty it imposed was proper because the first-year physicians in the case had a relationship in which they treated patients; they were supervised by hospital staff, they were continuing their medical studies, they held themselves out to possess the reasonable and ordinary qualifications of a doctor with an unlimited license, and the absence of contract or representations specifying their first-year status led the plaintiff to rely on their possession of a licensed practitioner's skills and judgment.[83] This language of relationship, control, and reliance highlights the model of relationship on which medical malpractice is based.

Another generous reading of the physician's obligation occurred in the context of an informed consent case. In *Griffith v. Jones*,[84] a court of appeals again considered the appropriate standard for breach of the physician's duty to inform a patient. The defendant's position was that

80. *Id.* at 746.
81. 581 N.E.2d 1286 (Ind. Ct. App. 1991).
82. *Id.* at 1288.
83. *Id.* at 1288-89.
84. 577 N.E.2d 258 (Ind. Ct. App. 1991).

a doctor needed to advise only of those risks of which a prudent physician would inform the patient. The plaintiff's position was that the doctor needed to advise of those risks which would be material to a prudent patient. Finding prior Indiana precedent supportive of the plaintiff's position,[85] the court opted for the "prudent patient" standard. As the court indicated, this standard better protected the patient's right of self-determination[86] and placed Indiana in line with the general (although by no means uniform) trend toward a patient-oriented duty of informed consent. Once again, the decision is consistent with a model of relationship, in which doctor control and patient reliance are significant variables. Had the court relied on the model of due care, the defendant's position would have prevailed.

Unfortunately, *Griffith* failed to resolve crucial issues such as the standard of causation[87] and the nature of the exceptions to the "prudent patient" rule.[88] Another informed consent case, *Kerr v. Carlos*,[89] touched on the causal issue. In *Kerr*, a physician failed to inform the patient that his associate would perform surgery, and the associate failed to obtain consent. The court nonetheless affirmed the entry of summary

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85. *See, e.g.*, Payne v. Marion Gen. Hosp., 549 N.E.2d 1043 (Ind. Ct. App. 1990).; Revord v. Russell, 401 N.E.2d 763 (Ind. Ct. App. 1980); Joy v. Chau, 377 N.E.2d 670 (Ind. Ct. App. 1978). *But see* Ellis v. Smith, 528 N.E.2d 826 (Ind. Ct. App. 1988) (suggesting need for expert testimony on informed consent issues).

86. *Griffith*, 577 N.E.2d at 263. One matter which *Griffith* did clarify was a procedural one: because informed consent turns on the patient's right to know rather than the physician's standard practice, the court precluded the Medical Review Panel from rendering an opinion about whether there had been a lack of informed consent. *Id.* at 264. Had the panel done so, of course, its opinion could have been submitted to the jury. IND. CODE §§ 16-9.5-9-7, -9 (1988). *Cf.* Dickey v. Long, 575 N.E.2d 339 (Ind. Ct. App. 1991) (admission into evidence of panel opinion on a lack of breach of standard of care permissible even when plaintiff claimed that the breach was obvious to laypersons).

87. A patient must, of course, prove that the information not supplied by the physician would have made a difference in the patient's decision. Various standards for proving this counter-factual hypothesis are possible: whether the information would make a difference to the reasonable person, Canterbury v. Spence, 464 F.2d 772, 790-91 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1973), whether it would have made a subjective difference to the plaintiff, Scott v. Bradford, 606 P.2d 554 (Okla. 1979), or whether it would have made a difference to a reasonable person with the plaintiff's characteristics and quirks, *see* KEETON, *supra* note 41, § 32, at 192. In order to recover damages, the plaintiff might also need to show that she was worse off after the procedure performed without consent than she would have been after a procedure performed with consent.

88. Canterbury v. Spence, 464 F.2d 772, 788-90 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1973), recognized two exceptions: (1) emergency procedures in which the patient cannot give consent and (2) procedures for which the physician must withhold information in order to protect the patient's well-being. This latter, therapeutic exception could swallow the rule of disclosure if read broadly enough, and its existence and scope will ultimately need to be addressed by the Indiana courts.

89. 582 N.E.2d 860 (Ind. Ct. App. 1991).

judgment because the patient failed to prove through expert opinion "a causal connection between the inadequate disclosure and the resulting damages."[90] Thus, when consent to a procedure has been given, *Kerr* requires the plaintiff to prove two separate causal issues: that the patient would have consented to the change of physicians (presumably a question not requiring expert testimony),[91] and if not, that the outcome of the procedure was worse because of the change in physicians.[92] Although *Kerr* can technically be reconciled with *Griffith,* this second causal question gives little deference to *Griffith*'s right of patient self-determination or to the model of relationship on which informed consent is based. If self-determination truly underlies informed consent, then the plaintiff in *Kerr* should have been entitled to whatever damages ensued from a procedure violating his autonomy regardless of whether similar damages might have been occasioned by a procedure for which proper consent was obtained.[93] Nor would the issue of the associate's exercise of due care, which is implicit in the second question, even be relevant to the causal issue.

It was undoubtedly this concern for the preservation of plaintiff autonomy which moved the court in *Kerr* to observe that the patient would have had a valid claim for battery had he bothered to assert one.[94] It makes little sense to create, as *Kerr* apparently did, different elements of causal proof for informed consent and battery when the relevant conduct and the injury suffered is identical for both claims, when the relationship, control, and reliance are identical for both claims, and when the only claim against the physician who obtained the consent is likely to be lack of informed consent.[95] By relying on notions derived

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90. *Id.* at 864.

91. *See supra* note 87 and accompanying text.

92. *Kerr,* 582 N.E.2d at 864-65.

93. *See* Canterbury v. Spence, 464 F.2d 772, 790 (D.C. Cir. 1972), *cert. denied,* 409 U.S. 1064 (1973). The "no harm, no foul" rule of the court of appeals fails to acknowledge that the harm flows from the lack of consent, rather than from the quality of the procedure performed.

94. *See* Kerr v. Carlos, 582 N.E.2d 860, 864 (Ind. Ct. App. 1991).

95. *See* Perna v. Pirozzi, 457 A.2d 431 (N.J. 1983) (holding that claim against physician who operated was battery, while claim against physician who obtained consent was malpractice, but failing to resolve ambiguity regarding the exact measure of damages against the latter physician). Curiously, *Kerr* cited *Perna* for its holding that the operating physician could be liable for battery, but failed to acknowledge *Perna*'s holding that the claim against the referring doctor sounded in informed consent. *See Kerr,* 582 N.E.2d at 864. The holding in *Kerr* is also somewhat at odds with Boruff v. Jesseph, 576 N.E.2d 1297 (Ind. Ct. App. 1991). The facts in *Boruff* are nearly identical to those in *Kerr,* but the plaintiff there attempted to file a battery claim in order to bypass the Medical Review Panel. The court of appeals held that the performance of surgery by an associate whom

from the model of due care rather than from the model of relationship within which informed consent is better understood, *Kerr* ends up suffering from the schizophrenia already diagnosed in *Burrell*, *Valinet*, and *Cowe*.

2. Liability Created by Injuries to or the Actions of Contractors.— Injuries associated with the work of contractors resulted in numerous reported decisions. None of the decisions altered existing law, although several involved interesting new factual applications of the existing rules. Two cases clarified the scope of the contractor's own liability. *Lynn v. Hart*[96] reiterated the rule that a contractor is no longer liable for an injury after the work has been accepted by the owner and found that the exception to this rule—that the work is left in a condition defectively dangerous, inherently dangerous, or imminently dangerous—did not apply to a parking lot plowed by the contractor the day before the plaintiff slipped and fell.[97] *Alexander v. City of Shelbyville*[98] held that an engineering firm who contractually agreed to supervise the work of a construction contractor owed no duty to an employee of the contractor.[99] The engineering firm's right to inspect and control the performance of the construction contractor did not, without evidence of negligent inspection or actual control, create a duty of reasonable care.[100]

Alexander was also one of two cases to discuss the duties of an employer of a contractor for injuries caused to others because of the negligence of the contractor. The *Alexander* court found that the employer of the construction contractor owed no duty under its contractual reservation of a right to inspect and control performance, but that the employer did owe a nondelegable duty of care imposed by statute to supervise and control sewage projects.[101] This nondelegable duty gave rise to vicarious liability for the construction contractor's negligence.[102] Similarly, *Christensen v. Sears, Roebuck & Co.*[103] found that the seller

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the plaintiffs specifically did not wish to be involved arose out of the provision of health care services, and the claim of battery therefore needed to be submitted to the Medical Review Panel. *Id.* at 1299.

96. 565 N.E.2d 1162 (Ind. Ct. App. 1991).

97. Another application of the same rule can be found in Hamilton v. Roger Sherman Architects Group, Inc., 565 N.E.2d 1136, 1139 (Ind. Ct. App. 1991), in which the court said that an owner's acceptance of a contractor's work ends a contractor's liability unless "the work is so negligently defective as to be imminently dangerous to third persons" or "when the plans relied on by the contractor are so obviously defective that no reasonable independent contractor would follow them." *Id.*

98. 575 N.E.2d 1058 (Ind. Ct. App. 1991).

99. *Id.* at 1061.

100. *Id.* at 1062.

101. *Id.* at 1061.

102. *Id.* at 1062.

103. 565 N.E.2d 1103 (Ind. Ct. App. 1991).

of a furnace could be vicariously liable for the installer's alleged negligence.[104] As the court stated, one exception to the rule of nonliability for the negligence of contractors is the employer's assumption of the contractor's duty.[105] The court then held that the seller's somewhat ambiguous sales contract created responsibility for the contractor's work.[106]

Finally, two cases considered the liability of employers for injuries to their employees or contractors. *Whitebirch v. Stiller*[107] started from the proposition that an employer owes a duty to provide a reasonably safe workplace to an employee. *Whitebirch*, however, found an exception to that rule dispositive of the plaintiff's case: the employee could not recover for an unsafe condition which she created and maintained if that condition arose from the failure to discharge the responsibility for which she was employed.[108] On the other hand, *McClure v. Strother*[109] started from the opposite premise: that the employer of a contractor owes no duty to supply a safe workplace.[110] The court also seized upon an exception to this rule: the employer can be liable when he or she assumes control of a dangerous instrumentality. Because the employer refused to permit the contractor to tie a ladder to the gutters, the court found that a reasonable jury could infer that the employer had assumed control over the ladder and reversed a summary judgment entered for the employer.[111]

As these cases show, the exceptions to the rules of nonliability for the actions of contractors are often more significant than the rules themselves.[112] From the viewpoint of a model of due care, these finespun technicalities of rule and exception are senseless and unduly resistant to the modern notion of due care under the circumstances. Yet, from the viewpoint of a model of relationship, with its language of privity, control, and reliance, the cases actually make a great deal of sense. The lack of direct relationship between the parties, control by the defendant, or reliance by the plaintiff explains the decisions for the contractors in *Lynn* and *Alexander*. On the other hand, the statutory or contractual relationship between the parties explains the contrary decisions against the employer in *Alexander* and the retailer in *Christensen*. Likewise, the

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104. *Id.* at 1109.
105. *Id.* at 1107.
106. *Id.* at 1108.
107. 580 N.E.2d 262 (Ind. Ct. App. 1991).
108. *Id.* at 264.
109. 570 N.E.2d 1319 (Ind. Ct. App. 1991).
110. The employer must, however, keep the property in reasonably safe condition. *Id.* at 1321.
111. *Id.* at 1323.
112. *See* RESTATEMENT (SECOND) OF TORTS § 409 cmt. b (1965); KEETON, *supra* note 41, § 71, at 510.

degree of the employer's control and of the plaintiff's legitimate reliance on the employer's conduct marks the difference between *Whitebirch* and *McClure*. Indeed, when relationship, control, and reliance are understood to be the critical variables in the duty analysis, the rules of contractor liability typically come out in the right way. Only the unsophisticated "general" rule that employers have no liability for the acts of contractors—a rule which is not grounded in the relevant language of relationship—is wrong.

3. Liability for the Actions of Franchisees.—One court of appeals considered the duty of a franchisor to an injured employee of a franchisee. In *Whitten v. Kentucky Fried Chicken Corp.*,[113] the employee was severely burned while cleaning out a fryer. The fryer was purchased by the franchisee, apparently without any direction or control by the franchisor. A subsequent franchise agreement, however, obliged the franchisee to use equipment approved by the franchisor and to make modifications ordered by the franchisor to existing equipment. A subsequent agreement between the franchisor and the fryer manufacturer made the manufacturer an approved source of fryers. In addition, the franchise agreement gave the franchisor the right to inspect the restaurant to determine compliance with contract specifications.

The case presented a strong factual analogy to the employer's liability for the actions of its contractors, and it is not surprising that the court of appeals turned to that relationship to define the duty. It found two potential sources of duty: the employer's liability for negligence in the work over which it retains control and the Good Samaritan obligation of a person who undertakes to render services for another.[114] Because there were factual issues concerning the extent of control over the selection of equipment and the scope of the franchisor's undertakings to select safe equipment and inspect the premises, the court reversed a summary judgment in favor of the franchisor.[115] In this area of duty, the court's reliance on the model of relationship was manifest. The crucial words in the court's vocabulary were contractual relations, control, and undertaking for another. The language of due care, public policy, and community values was missing.

4. Liability for Another's Criminal Conduct.—The duty of reasonable care to prevent another's criminal conduct is a modern invention which has begun to supplant, in some instances, the no-duty rule of the common law.[116] During the past year, the relevant decisions of the Indiana courts

113. 570 N.E.2d 1353 (Ind. Ct. App. 1991).
114. *Id.* at 1356.
115. *Id.* at 1359.
116. *See, e.g.*, Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477

appeared to be somewhat inconsistent at the level of legal rule. Once we appreciate that Indiana's dominant model of liability for another's criminal conduct is that of relationship, and thus presents the same fundamental issues as liability for the acts of a contractor or franchisor, the apparent inconsistencies resolve themselves into a consistent pattern of decisions.

The leading case this year was *Webb v. Jarvis*, in which the Indiana Supreme Court held that a doctor who negligently prescribed steroids to a patient owed no duty to third persons criminally harmed by the patient.[117] As already discussed, *Webb* developed a three-prong test for the existence of duty (relationship, foreseeability, and public policy).[118] There is no doubt, however, that the critical factor for the court was the lack of a relationship on which the plaintiff relied.[119] Although decided before *Webb*, two appellate court decisions provide excellent examples to test the centrality of relationship in *Webb*'s analysis. In *Nalls v. Blank*,[120] a tenant was assaulted inside her apartment. The building was locked, but the assailant gained entry by breaking into a key retaining box which held the key used by the Postal Service to enter the building. The court of appeals held that the landlord was liable because he gratuitously assumed the duty of providing security measures.[121]

Based on an analysis of *Webb*'s three factors, the existence of a duty in *Nalls* is problematic. The foreseeability of harm is certainly no greater in *Nalls* than in *Webb*, and public policy arguments as credible as the unsophisticated and one-sided arguments used in *Webb* can be concocted in favor of the landlord. Thus, the only factor which clearly distinguishes the two cases is the existence of a relationship in *Nalls* and the lack of a relationship in *Webb*. Indeed, had *Nalls* focused directly on the relationship rather than a dubious "gratuitous assumption," it could have made even shorter work of the duty question. A contractual relationship existed between the parties, the defendant had control over the security measures, and the defendant knew of the plaintiff's reliance on those measures. Relationship is thus the key feature which allows the imposition of a duty.

(D.C. Cir. 1970); Tarasoff v. Regents of Univ. of Cal., 551 P. 2d 334 (Cal. 1976). *Cf.* RESTATEMENT (SECOND) OF TORTS § 315 (1965) (no duty to control conduct of another to prevent him from causing harm in the absence of a special relationship).

117. Webb v. Jarvis, 575 N.E.2d 992, 993 (Ind. 1991).

118. *See supra* note 27 and accompanying text.

119. The court's foreseeability analysis was weak, and its public policy analysis focused on far fewer than all of the potentially relevant policy factors.

120. 571 N.E.2d 1321 (Ind. Ct. App. 1991).

121. *Id.* at 1324.

The same lesson can be derived from *Foster v. Purdue University Chapter, The Beta Mu of Beta Theta Pi.*[122] In *Foster*, a freshman fraternity member was rendered a quadriplegic when he apparently got drunk at a fraternity party and fell off a makeshift slide. The freshman, who was not of legal drinking age, sued the liquor store which had supplied the alcohol, the fraternity's house association, and the national fraternity. Using the language of relationship and control, the court dismissed the claims against all three defendants. The liquor store had policies which ensured the sale of alcohol only to students of legal age and "had no right to control [plaintiff's] consumption of alcohol."[123] The national fraternity had a policy against underage drinking, but had no power to implement its policy and had never undertaken to enforce a ban on underage drinking in the fraternity. The house association had the power to prescribe rules to prevent underage drinking, but never exercised any actual control over the fraternity. Moreover, there appeared to be a lack of reliance by the plaintiff on any actions or policies of the defendants, and there was a lack of knowledge by the defendants that the plaintiff would rely on their actions and policies. In the absence of evidence of control or reliance, therefore, none of the defendants were held to have a duty to prevent the illegal provision of alcohol to a minor.[124]

Although the factor of relationship strongly favors a lack of duty, the issue is much closer when *Webb*'s other factors (foreseeability and public policy) are blended in. As *Webb* itself recognized, the foreseeable dangers of allowing the supply of excessive liquor are well established.[125] Similarly, unlike the health care policy issues which counseled against a duty in *Webb*, the public interest in the protection of the relationship between a fraternity house and its liquor store and its controlling organizations and in the protection of the free flow of alcohol to minors are obviously weak public policy reasons on which to stake a lack of duty.

If *Foster* is correct, then it ultimately must be because of the lack of control and the lack of plaintiff reliance—in other words, the lack of relationship. It is hardly surprising, therefore, that the language of relationship and control permeates the opinion. That approach stands in stark contrast to the approach of *Valinet v. Eskew* and *Cowe v. Forum Group*, whose respective languages of due care and public policy would certainly have led to the imposition of a duty in *Foster*. The

122. 567 N.E.2d 865 (Ind. Ct. App. 1991).
123. *Id.* at 869.
124. *Id.*
125. *See* Webb. v. Jarvis, 575 N.E.2d 992, 997 (Ind. 1991).

critical choice in *Foster*, as in all duty cases, was the selection of the proper model for analysis. The court of appeals chose the model of relationship. The rest was a matter of technique.

5. The Duty of a Supplier of Chattels.—Viewed as a failure to prevent the criminal conduct of another, the decision in *Foster* not to hold the liquor store liable makes sense: without control there is no relationship and without relationship there is no duty. Viewed as a negligent supply of a chattel, however, the court was clearly wrong. A supplier's right to control of the use of a chattel is not an element of a claim for negligent supply. Rather, the critical issues are whether the supplier warned the user of those dangers of which the user was not aware, whether the alcohol was used by a person ignorant of its unreasonably unsafe nature, and whether the supplier knew or had reason to know that alcohol would be supplied to persons who, because of their youth and incompetence, would be endangered by its use. The reason for the different focus is simple. Unlike the duty to prevent criminal conduct, the duty of a supplier is based on a model of due care under the circumstances.[126]

Three cases decided during the year demonstrate the reliance of the supplier's duty on the model of due care. In *Cox v. American Aggregates Corp.*,[127] summary judgment for the seller of a respirator was reversed because there was evidence that the seller recommended the respirator to the plaintiff's employer with the knowledge that it would not filter out the types of fumes to which the plaintiff was exposed.[128] Even though there was a lack of control over the use of the respirator, the court found that the recommendation implied a duty of reasonable care in the sale of the product.[129] In *Billingsley v. Brown*,[130] the court found that a defendant who supplied his neighbor with a power saw owed no duty when the plaintiff realized that the saw was old and the defendant had warned him that the saw occasionally jammed.[131] In *Johnson v. Patterson*,[132] a court of appeals recognized for the first time the tort of negligent entrustment of a firearm to an incompetent person, but found that the duty elements (entrustment to an incapacitated person or one who cannot use the chattel with reasonable care with actual and specific knowledge of the incapacity) were not established on the peculiar facts of the case.[133]

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126. *See* MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).
127. 580 N.E.2d 679 (Ind. Ct. App. 1991).
128. *Id.* at 685-86.
129. *Id.* at 686.
130. 569 N.E.2d 687 (Ind. Ct. App. 1991).
131. *Id.* at 688.
132. 570 N.E.2d 93 (Ind. Ct. App. 1991).
133. *Id.* at 96-97.

The duty of care in each of these cases does not hinge on relationship, control, or reliance; it hinges on a defendant's superior knowledge of possible harm.[134] This language of foreseeability is simply not consistent with the language of relationship which defines the duties in the areas of malpractice, contractors' liability, and prevention of criminal conduct. Claims against liquor stores and gun suppliers are easily resolved against the plaintiff when the relevant issue is whether there is relationship and control sufficient to prevent criminal conduct, but they are far more problematic to resolve when the issue is whether the defendant had knowledge of possible harm or incompetence. As long as Indiana courts speak both languages, the courts' choice of language, and not the reasonableness of the defendant's conduct, will define the legal obligations owed.

6. Products Liability.—Products liability is a special application of the general duty of the suppliers of chattels. After the significant developments in Indiana products liability during 1990,[135] 1991 had few notable cases. In one case, the obligations of Indiana's Product Liability Act were extended to defendants who become so sufficiently involved in the reconditioning of a product that they were no longer performing a service but were instead selling a product.[136] In another case, an instruction sheet was not found to be a "product" within the meaning of the Product Liability Act.[137] Furthermore, the design of a car with

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134. In both *Cox* and *Billingsley*, the element of plaintiff reliance could have served as a critical feature in the creation of duty; the plaintiff in *Cox* had relied on the advice of the defendants, while the defendant's warnings in *Billingsley* made reliance on the safety of the chattel unjust. In neither case, however, did the courts specifically inquire into the existence of reliance or knowledge of reliance, as had *Webb*. In any event, the issue of reliance was entirely irrelevant to the negligent entrustment decision in *Johnson*.

135. *See generally* John Vargo, *Strict Liability for Products: An Achievable Goal*, 24 IND. L. REV. 1197 (1991).

136. Lilge v. Russell's Trailer Repair, Inc., 565 N.E.2d 1146 (Ind. Ct. App. 1991).

137. Alexander v. Beech Aircraft Corp., 952 F.2d 1215 (10th Cir. 1991). The exact circumstance of the holding was that, in 1979, an airplane manufacturer issued an instruction sheet for a plane which was initially sold in 1967. The ten-year statute of repose barred a claim brought in 1986 for negligent design of the airplane. The plaintiff tried to resurrect the case by contending that the instruction sheet was itself a product which failed to warn of the defect in the plane.

air bags was held to be preempted by federal law.[138]

The more important opinions centered on aspects of the seller's duty of care. The view that Indiana's "state of the art" defense[139] requires proof of a product's conformity to the existing technological capabilities for the product garnered additional support.[140] The terms "defective condition" and "unreasonably dangerous," which are the bedrock elements necessary to demonstrate a strict products liability claim,[141] received a restrictive interpretation in three cases. In *Hamilton v. Roger Sherman Architects Group, Inc.*,[142] a waitress, who banged her head on a bar she was forced to stoop under in order to fill drink orders, sued the architect and construction contractor on theories of design defect and negligence. Avoiding the interesting issues of whether the bar was a "product" and the defendants "sellers" of a product,[143] the court found that this "stationary wooden object" was not "defective" because it posed no risk of harm "not contemplated by reasonable persons among the bar's expected users,"[144] nor was the bar unreasonably dangerous because its risk of harm was not "beyond the risk of harm contemplated by the 'ordinary consumer' of the bar."[145] *Cox v. American Aggregates Corp.* held that a respirator not intended or designed to filter out the fumes to which the plaintiff was exposed could not be defective.[146] The court frankly seemed to ignore the fact that a product is defective when it fails to meet the consumer's expectations, not the manufacturer's intentions. Finally, *Condon v. Carl J. Reinke & Sons, Inc.*[147] found that a reinforcing bar did not pose an unreasonably dangerous risk when the plaintiff's testimony revealed only that the need to rebend the bars was a common problem at construction sites.[148]

In theory, of course, products liability is concerned with the hazards of the product, not the conduct of the manufacturer. Yet, liability is

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138. Heath v. General Motors Corp., 756 F. Supp. 1144 (S.D. Ind. 1991).

139. IND. CODE § 33-1-1.5-4(b)(4) (1988).

140. Phillips v. Cameron Tool Corp., 950 F.2d 488 (7th Cir. 1991); Weller v. Mack Trucks, 570 N.E.2d 1341 (Ind. Ct. App. 1991). This interpretation of Indiana's "state of the art" defense was first espoused in Montgomery Ward & Co. v. Gregg, 554 N.E.2d 1145 (Ind. Ct. App. 1990).

141. *See* IND. CODE §§ 33-1-1.5-2, -2.5(a) (1988).

142. 565 N.E.2d 1136 (Ind. Ct. App. 1991).

143. *Id.* at 1137 n.2. *See* IND. CODE § 33-1-1.5-2.5(a) (1988) (limiting strict product liability to sellers of products).

144. *Hamilton*, 565 N.E.2d at 1138.

145. *Id.* Negligence claims against the architect and the contractor were also dismissed. *Id.* at 1138-39.

146. Cox v. American Aggregates Corp., 580 N.E.2d 679, 685 (Ind. Ct. App. 1991).

147. 575 N.E.2d 17 (Ind. Ct. App. 1991).

148. *Id.* at 19.

far from strict and ultimately turns on the care exercised by the manufacturer to avoid unreasonable risks through the use of the best available technology. The model of due care, albeit somewhat modified around the edges, lies at the heart of the products liability scheme in Indiana.

B. Psychic Harms

With the exception of claims for wrongful life and negligent harm to the fetus, the past year's duty decisions in the area of physical harm invariably revolved around either the model of relationship or the model of due care. 1991 was also a year of truly significant movement in the area of recovery for psychic harms. Until this year, Indiana's rules on psychic harm remained mired in the first half of this century: recovery for intentional infliction of emotional distress was not recognized unless accompanied by another intentional tort, and negligent infliction of emotional distress was only recognized when it resulted from a direct physical impact.[149]

In four cases which are perhaps destined to become the most far-reaching tort decisions in many years, the courts pushed the law toward greater recognition of psychic harms. The recognition was grudging and somewhat illogical. The reason is that the courts overthrew the model of public policy which had refused to recognize naked emotional distress claims, but they did not rest the new duties on the models of relationship or due care. As a result, the decisions in the area of psychic injury were both confusing in their ultimate import and subject to the charge of arbitrary, ipse dixit line drawing.

The four decisions were *Cullison v. Medley*,[150] *Shuamber v. Henderson*,[151] *Smith v. Methodist Hospital of Indiana, Inc.*,[152] and *Eakin v. Kumiega*.[153] *Cullison* involved a plaintiff who had invited a teenage girl to his house trailer for a soda one afternoon. Late that evening, he heard a banging at his door, and invited a girl outside into the trailer. When he returned to the living room after putting on some

149. For a description of the law existing in Indiana prior to 1991, see New York, Chicago & St. Louis R.R. Co. v. Henderson, 146 N.E.2d 531 (Ind. 1957); Naughgle v. Feeney-Hornak Shadeland Mortuary, Inc., 498 N.E.2d 1298 (Ind. Ct. App. 1986). Elsewhere, the tort of intentional infliction of emotional distress has been widely recognized, and recovery for negligent infliction of emotional distress is not typically dependent on a physical impact. *See, e.g.*, Molien v. Kaiser Found. Hosps., 616 P.2d 813 (Cal. 1980); George v. Jordan Marsh Co., 268 N.E.2d 915 (Mass. 1971); Rockhill v. Pollard, 485 P.2d 28 (Or. 1971).

150. 570 N.E.2d 27 (Ind. 1991).

151. 579 N.E.2d 452 (Ind. 1991).

152. 569 N.E.2d 743 (Ind. Ct. App. 1991).

153. 567 N.E.2d 150 (Ind. Ct. App. 1991).

clothes, he found the teenager, her father, her mother, and her brother-in-law sitting in the dark. The father had a gun strapped to his thigh, and the mother had her hand held in her coat pocket as though she had a gun as well. The father kept clutching his gun and shaking it while the girl and her mother berated the plaintiff and called him a "pervert."[154] At one point the father said that he would "jump astraddle" the plaintiff if he did not leave his daughter alone.[155] Although no one ever touched him, the plaintiff said he was constantly afraid that he would be shot. His fear continued over the course of the next several weeks, when he saw the teenager and her mother walk past his trailer "in a taunting manner"[156] and when he saw the father, still wearing a gun, glare at him in a restaurant and even, on one occasion, stand over him with the gun approximately one foot from his face.

Because of the lack of physical impact, the court of appeals affirmed summary judgment for the defendants. The supreme court took a different view. The court began by noting that the plaintiff had alleged four causes of action: trespass, assault, invasion of privacy, and intentional infliction of emotional distress.[157] The court admitted that, in the absence of physical impact, the occurrence of a trespass had not previously given rise in Indiana to a claim for emotional distress.[158] The reasons which supported this rule were based in policy: "mental anguish is speculative, subject to exaggeration, likely to lead to fictitious claims, and often so unforeseeable that there is no rational basis for awarding damages."[159]

Rejecting these policy arguments in favor of an appeal to the model of due care, the court found that the impact rule, "whatever its historical foundation, is no longer valid and . . . does not apply to prohibit recovery for emotional distress when sustained in the course of a tortious trespass."[160] The court reasoned that the intentional invasion of another's property can "provoke a reasonably foreseeable emotional disturbance or trauma."[161] Starting from this language of foreseeability and due care, the court then refuted each of the policy arguments supporting the impact rule. The fact of physical impact "does not make mental injuries any less speculative, subject to exaggeration, or likely to lead

154. *Cullison*, 570 N.E.2d at 28.
155. *Id.* at 29.
156. *Id.* at 31.
157. *Id.* at 28.
158. *Id.* at 29.
159. *Id.*
160. *Id.* at 30.
161. *Id.*

to fictitious claims."[162] Nor is the inundation of the court system a valid ground to deny legitimate claims.[163]

Nevertheless, the court's disposition of the invasion of privacy and intentional infliction of emotional distress claims demonstrated that the court was unwilling to extend this model of due care too far. Although the supreme court stated that the uninvited intrusion of the defendants into his home constituted an "invasion of Cullison's right of privacy,"[164] it held that the plaintiff could not simultaneously maintain an action for invasion of privacy and trespass.[165] With respect to the defendants' conduct in walking past his home and in the restaurant, the court held that the "plaintiff had no legal right to be left alone on a public street or in a public place."[166]

Similarly, the court refused to allow the claim for intentional infliction of emotional distress.[167] The court began by noting that the theory of intentional infliction of emotional distress was not previously recognized in Indiana. Then, without any discussion beyond a quotation of the Restatement section which describes the tort in intentional infliction,[168] the court changed the law. "We hold," the court said, "that under proper circumstances, liability will attach to a defendant for an intentional infliction of emotional distress."[169]

Like its invasion of privacy decision, however, the court withdrew the broad promise of its holding by finding that "the facts of this case do not support a finding that the Medleys intended to cause emotional distress to Cullison."[170] This narrowing is subject to one of two interpretations. First, because it would be difficult to conceive of a set of facts more extreme than those presented in the case, the court may have been effectively preventing any real change in the law of intentional infliction of emotional distress by allowing the theory but never finding a set of facts egregious enough to meet that theory. Second, the court may have been saying that the most egregious conduct was adequately

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162. *Id.*

163. *Id.*

164. *Id.* at 31.

165. *Id.*

166. *Id.* The court seemed to ignore that the plaintiff was in his home when the teenager and her mother walked by. If the court intended to suggest that an invasion of privacy can occur only when there has been a physical invasion of the plaintiff's property, then the tort of intrusion on seclusion is a useless appendage on the doctrine of trespass. It remains to be seen whether intrusion on seclusion will be given a broader reading in future cases.

167. *Id.*

168. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 46 (1965)).

169. *Id.*

170. *Id.*

redressed by the claims for trespass and assault,[171] and the only conduct which fell outside of the trespass and assault claims was not egregious enough to establish an intentional infliction of emotional distress. Therefore, like the invasion of privacy claim, the court may have been saying only that there was no need for another theory which compensated for the same injury.

This latter interpretation, which has some support in the opinion[172] and is certainly a more reasonable reading of the case, suffers from a serious flaw: it forces a plaintiff to elect a theory of recovery before completion of discovery and trial. As the court itself admitted, the plaintiff's trespass and assault claims could fail before a jury. Without his intentional infliction of emotional distress claim, the plaintiff would then be unable to recover for the emotional distress inflicted in his home. Conversely, if the plaintiff elected to proceed only on the emotional distress theory, it would be possible for the defendants to demonstrate that an assault occurred and thus avoid liability under the plaintiff's theory. This sharp practice, which smacks of the rigors of the common-law writs long since abandoned in favor of liberal pleading, will need to be corrected if the new theory of intentional infliction of emotional distress is to be meaningful.

The more general point, however, is that *Cullison* abandoned a duty rule grounded in policy through an appeal to the language of foreseeability and due care. The court's unwillingness to allow the theories of invasion of privacy and intentional infliction of emotional distress to be pleaded in conjunction with trespass and assault indicates that, for the time being at least, public policy concerns about the scope of this new liability lurk beneath the surface.

The same conclusion applies to the Indiana Supreme Court's decision in *Shuamber*, which concerned negligent (rather than intentional) infliction of emotional distress. In *Shuamber*, the defendant negligently collided with a car occupied by a mother and her two children. The son was killed. Both the mother and sister sued the defendant only for the emotional distress they suffered as a result of watching a member of their family die; they made no claim for the emotional trauma caused by their own injuries.

The court began by finding that, under then-existing Indiana precedent, the Shuambers had no claim for the simple reason that their emotional distress was not a direct consequence of the physical injuries

171. The court found that the facts of the case could support a claim for assault. *Id.* at 30-31.

172. There is some textual support for this interpretation. In finding a lack of intent to inflict emotional harm, the only actions the court specifically discussed were the mother's walks past the plaintiff's home and the encounters in the restaurant. *Id.* at 31.

which they themselves sustained.[173] The court noted that three policy considerations—flood of litigation, concern for fraudulent claims, and difficulty in proving a causal connection between conduct and distress—supported the no-duty rule.[174] Quoting from the paragraph in *Cullison* which refuted nearly identical policy arguments,[175] the court found that recovery for emotional distress could extend to instances in which the emotional distress occurred because of a physical injury negligently inflicted on a third person.[176]

Like all courts which have recognized this claim of emotional distress by bystanders,[177] the court was then faced with putting certain limitations on bystander recovery. Other courts have chosen one of three lines: recovery only when the bystander suffers a physical impact from the negligence, recovery when the bystander is in the "zone of danger," or recovery when there is a physical, temporal, and relational proximity between the bystander and the injured person.[178] Only four courts hued to the physical impact line;[179] the remainder were split between the more liberal theories of recovery. Noting that the facts of the case did not require it to go further, *Shuamber* cast its lot, at least for the time, with the four other courts drawing the most conservative line: the physical impact rule.[180]

Two aspects of *Shuamber* stand out. The first is the difficult evidentiary burden which the court puts on the plaintiff. According to the court, the plaintiffs will be unable to recover for the general emotional distress they suffered from the loss of a family member; they can be compensated only for the extra emotional distress they suffered from being involved in the collision and witnessing the death.[181]

The second significant aspect of *Shuamber* is its lack of principled justification for the "physical impact" line it ultimately chooses. The line is certainly not supported by the model of due care. In fact, *Shuamber*'s quotation of *Cullison* conspicuously deletes the crucial sentence in which the *Cullison* court pinned its duty on the foreseeable

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173. Shuamber v. Henderson, 579 N.E.2d 452, 455 (Ind. 1991).

174. *Id.*

175. *Id.*

176. *Id.*

177. According to *Shuamber*, Indiana was only one of three states which had not yet allowed for bystander emotional distress in some circumstances. The others were Arkansas and Kansas. *Id.* at 455 n.1.

178. *See* KEETON, *supra* note 41, § 54.

179. According to *Shuamber*, the four jurisdictions were the District of Columbia, Georgia, Kentucky, and Oregon. Shuamber v. Henderson, 579 N.E.2d 452, 455 n.1 (Ind. 1991).

180. *Id.* at 456.

181. *Id.*

emotional harm which a trespass might engender. Nor does the model of relationship explain the line of physical impact. The line can be justified, if at all, only through a model of community values, which seems unlikely,[182] or through a model of public policy, whose policy arguments for limited recovery of emotional distress were thoroughly discredited both in *Cullison* and in the earlier portions of *Shuamber*.

Thus, *Shuamber* remains a rule in search of a reason. Indeed, it appears that the court has itself sown the seeds of the physical impact rule's destruction. *Shuamber*'s precise holding is that when 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* . . . a plaintiff is entitled to maintain an action to recover for that emotional trauma."[183]

At the core of the holding is the language of foreseeability and due care. That language, taken to its logical conclusion, rejects the physical impact rule. Therefore, when the court returns to the issue in a case not involving physical impact, as eventually it must, it will need to decide whether to pay attention to this model of due care and allow recovery for foreseeable emotional distress or return to a model of public policy and provide a reasoned explanation for the seemingly arbitrary requirement of physical impact.

The same tension between due care and public policy informs *Smith* and *Eakin*. In *Smith*, the plaintiffs' son was involved in a serious accident and was known by the hospital to be brain dead at some point during the day. Apparently because they were interested in using the son's organs for transplant, the hospital maintained the son on life support equipment. The hospital's physicians and chaplain never told the parents about the test results, but allowed the parents to spend time with the son before they finally made a decision to take him off the life support equipment without allowing any organ harvesting.

After they discovered that their son was brain dead all day, the parents sued the hospital for the emotional distress they suffered. Consistent with *Cullison*, the court of appeals noted that, in the absence of an intentional tort which acts as a "host," emotional distress can

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182. Whatever the community's values concerning the allowance of an emotional distress claim for a mother who sees her child die, it is unlikely that the community would choose the physical impact as the place to draw the line. Moreover, the model of community values, as interpreted in *Cowe*, relies heavily on the legal consensus in other jurisdictions. The fact that 43 of the 50 jurisdictions in the United States have drawn a more generous line than *Shuamber* puts the case out of touch with the legal trend.

183. *Shuamber*, 579 N.E.2d at 456 (emphasis added).

be recovered only as a result of a physical impact.[184] Because there was no impact on the parents, the court turned to the plaintiffs' argument that the hospital committed the intentional tort of fraud in failing to disclose their son's condition. Assuming that fraud could serve as such a host, the court of appeals held that doctors have no duty to disclose matters concerning a patient's condition which are not relevant to that patient's course of treatment; hence, there was no fraud and no way to overcome the physical impact requirement for recovery of emotional distress.[185]

Eakin presented the horrifying situation of two parents and a daughter who watched another daughter die in a hospital bed. While the daughter was recuperating from surgery, one of her arteries ruptured, and the projectile bleeding splashed onto the mother's clothes. Accepting the premise, later confirmed in *Shuamber*, that a physical impact could sustain a claim for negligent infliction of emotional distress, the court was faced with the issue of whether the blood splashed onto the mother's clothes satisfied the physical impact requirement. Retreating to the policies which underlay the impact rule—the fear of fictitious claims, speculativeness, and exaggeration—the court found that a physical injury, not mere physical impact, was required.[186]

It is not at all clear that *Eakin* survives *Shuamber*, which held that emotional distress could be recovered following a "physical impact"[187] and which refuted the policy arguments on which *Eakin* relied.[188] Whether it does or not, however, the case demonstrates the inherently arbitrary decisions the physical impact rule requires. The plaintiff's emotional distress from witnessing her daughter's death would be no different if the splattering blood had caused some minor injury to the mother's eye or if it had missed the mother altogether. The case also demonstrates that the model of public policy lurks just beneath the surface of emotional distress, ready to derail any effort to orient the theory of emotional distress along the model of due care.

Thus, *Cullison* and *Shuamber* point generally toward the emergence of the model of due care in an area long held captive by the model of public policy. *Smith* and *Eakin* suggest a contrary trend. The rules themselves are not entirely consistent with any model. It remains to be seen whether due care will ultimately triumph or whether compensation

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184. Smith v. Methodist Hosp. of Ind., Inc., 569 N.E.2d 743, 745 (Ind. Ct. App. 1991).

185. *Id.* at 746.

186. Eakin v. Kumiega, 567 N.E.2d 150, 152-53 (Ind. Ct. App. 1991).

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

188. *Id.* at 455.

for foreseeable emotional injury will be recaptured by the concerns of public policy.

C. *Economic Harms*

The final type of harms for which tort plaintiffs can recover are economic harms. The story of economic harms mirrors that of physical and psychic harms: a general trend to expand the categories of conduct subject to liability when they cause economic loss, with a significant minority of cases which counter the trend. Unlike the prior types of harm, however, the dominant model of liability is relationship. Only in limited circumstances do the models of due care, public policy, and community values play a role in the definition of the scope of liability for economic harm.

1. Fraud and Constructive Fraud.—Indiana's doctrine of fraud turns on the model of relationship. The duty to speak truthfully arises during the course of certain (but not all) business and trust relationships; the lack of reliance effectively defeats the duty. In the past year, the central issue in cases of actual fraud was liability for misrepresentations which could have arguably been statements of fact, which are actionable in Indiana, and statements of law, opinion, or future conduct, which are not. *Nestor v. Kapetanovic*[189] held that a step-father's promise to leave the entire estate to a daughter in return for the step-daughter's forbearance in asserting a claim against the assets of the intestate mother was a future promise for which no liability in fraud attached.[190] On the other hand, *Scott v. Bodor, Inc.*,[191] found that fraudulent statements regarding the tax deductibility of a pension plan were actionable because the nature of the misrepresentations may have precluded the plaintiffs from discovering the law regarding tax deductibility.[192] The defendants' professed expertise in tax law, which induced the plaintiffs to rely on their opinions, constituted an exception to the usual rule denying recovery for misstatements of law. Similarly, over a dissent that the defendants' representations were mere opinion and "trade talk," *Warren v. Wheeler*[193] held that a jury properly found fraud by a vendor of a human resources computer network which contained fewer clients than the vendor represented and which was rigged to prevent the participants from realizing the limited nature of the network.[194] On a side issue of increasing

189. 573 N.E.2d 457 (Ind. Ct. App. 1991).
190. *Id.* at 458.
191. 571 N.E.2d 313 (Ind. Ct. App. 1991).
192. *Id.* at 320.
193. 566 N.E.2d 1096 (Ind. Ct. App. 1991).
194. *Id.* at 1101.

importance in a technological age, the court held that the rigging of the network in a manner which concealed the network's limited membership constituted fraud, even though the defendant "never lied to [plaintiff's] face."[195]

On the other hand, constructive fraud, which arises from a defendant's breach of a moral or equitable duty not to deceive, to violate a public or private confidence, or to injure the public interest, uses the models of community values, relationship, and public policy. A relationship is not essential to a finding of constructive fraud; the key inquiry is whether the failure to recognize a duty will result in an injustice.[196] At the same time, the claim of constructive fraud almost always arises in the context of pre-existing relationships of control and reliance. For instance, *Swain v. Swain*[197] found that an ex-husband who induced his ex-wife to refinance her mortgage at a time when they were attempting to reconcile with the promise that he would pay off the mortgage was found to have breached his duty when he stopped making the monthly payments.[198]

The same pre-existing relationship and reliance existed in *Sanders v. Townsend*,[199] the constructive fraud case with the most far-reaching impact. In *Sanders*, the plaintiff alleged that her attorney coerced her into accepting an inadequate settlement for a personal injury suit. She presented two causes of action: negligence and constructive fraud. The court of appeals affirmed a summary judgment on the negligence claim, but found unresolved factual issues on the constructive fraud claim. After summarily affirming the appellate court's decision on the negligence issue,[200] the Indiana Supreme Court turned to the central issue in the case: "whether a lawyer's alleged breach of a fiduciary duty to a client gives rise to a claim for constructive fraud."[201]

The court said no. It began its analysis by noting that, unlike an actual fraud, a constructive fraud does not require an intent to deceive;

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195. *Id.* at 1102.

196. Scott v. Bodor, 571 N.E.2d 313, 324 (Ind. Ct. App. 1991); Swain v. Swain, 576 N.E.2d 1281, 1284 (Ind. Ct. App. 1991).

197. 576 N.E.2d 1281 (Ind. Ct. App. 1991).

198. *Id.* at 1284.

199. 582 N.E.2d 355 (Ind. 1991).

200. The court of appeals found that, although there were questions of fact concerning the attorney's breach of duty, the plaintiff had failed to establish damages, i.e., that she would have received more money had she continued to press her case. The court rejected the personal opinions of the plaintiff and her husband on the value of her damages and found evidentiary difficulties with the use of the jury verdict reports prepared by her attorney. Thus, the plaintiff had no competent evidence to rebut the defendant's affidavit that the settlement was reasonable. Sanders v. Townsend, 509 N.E.2d 860, 863-64 (Ind. Ct. App. 1987).

201. *Sanders*, 582 N.E.2d at 357.

rather, it is inferred "from the relationship of the parties and the circumstances which surround them."[202] It then noted that the breach of a legal or equitable duty in a fiduciary relationship can amount to a constructive fraud.[203] It also acknowledged that the relationship between attorney and client is "indisputabl[y] . . . of a confidential and fiduciary nature."[204]

The court then refused to complete the syllogism. The reason, the court said, is that "[u]nlike most other fiduciary obligations, the relationship between attorney and client, as well as the professional and private conduct of attorneys, is subject to several forms of 'policing.'"[205] Among those forms are a malpractice action, an action for actual fraud, the Rules of Professional Responsibility, the sanctions of the supreme court for breaches of these Rules, and the requirement of legal education, bar examinations, and continuing legal education.[206] In *Sanders*, there was no malpractice or fraud,[207] and the court specifically rejected the proposition that the Rules of Professional Conduct create standards for civil liability because use of the Rules "would create unreasonable, unwarranted, and cumulative exposure to liability."[208]

Clearly, *Sanders* does not foreclose all legal actions against attorneys. Nor does it allow an attorney to breach a Rule of Professional Conduct without fear of legal consequence; after all, a Rule can define the applicable standard of care in a malpractice or fraud claim.[209] Yet, it significantly confines a plaintiff by restricting her to these theories. The way it does so is also instructive. Simply put, *Sanders* abandons the models of relationship and community values which undergird constructive fraud in favor of the models of due care and public policy. First, it appeals to the model of due care to argue that an action for malpractice acts as a check on attorney overreaching. It then appeals to other deterrent mechanisms on attorneys, making the public policy judgment that too much regulation of the attorney-client relationship is counter-productive and unnecessary.

The extent to which *Sanders* signals a shift in other factual situations which might give rise to a claim of constructive fraud remains to be

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202. *Id.* at 358.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* at 359. The court was careful to note that its opinion does not foreclose the possibility of a disciplinary action against an attorney who breaches a fiduciary obligation. *Id.*
209. *Id.*

seen. The court's language suggests that the opinion should be read narrowly and should extend only to other relationships with similar external mechanisms to deter overreaching.[210] Constructive fraud is now a battleground on which relationship is competing with public policy for dominance.

2. Legal Malpractice.—Aside from *Sanders*, there were two significant decisions affecting the lawyer's duty toward the client. In *Driver v. Howard County*,[211] a deputy public defender transferred a case to a colleague without informing the defendant of the transfer or of the trial date. Because the deputy public defender had no reason to believe that the colleague was incompetent and the defendant had knowledge of the transfer and the trial date sufficiently far in advance of trial that he was able to retain his own counsel, the court found no malpractice.[212] On an issue of greater significance, the court also found that the chief public defender could not be liable for malpractice on the theory of a failure to supervise the two deputy public defenders who represented the plaintiff. Because each deputy had a duty to exercise professional judgment, the chief defender had "no right to interject himself into the attorney client relationship by controlling [their] decision."[213] The application of this holding to law office and other supervisory settings is evident.[214]

Another malpractice case, *Hacker v. Holland*,[215] was the only bright spot for plaintiffs claiming legal malpractice. When a buyer's note became uncollectible, a seller of real estate sued the attorney who prepared the closing. At trial, the defendant called a former judge who testified that the seller could not, as a matter of law, sue the attorney until she had sued the buyer on the valid contract. The court reversed a judgment entered for the attorney, holding that experts cannot testify about conclusions or interpretations of law.[216] It also clarified the proof the plaintiff would need on retrial to show that she had an attorney-client relationship with the defendant, who was the buyer's lawyer. According to the court, she needed to demonstrate either an agreement to act on her behalf or a prior, continuous attorney-client relationship on which she detrimentally

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210. *Id.* at 358.

211. 575 N.E.2d 1001 (Ind. Ct. App. 1991).

212. *Id.* at 1005-06.

213. *Id.* at 1006. The court also noted that the chief public defender could not be vicariously liable when his deputies were not liable. *Id.*

214. In rendering its decision, the court did not rely on any features peculiar to the public defender's office or a public defender's relationship to his or her clients.

215. 570 N.E.2d 951 (Ind. Ct. App.).

216. *Id.* at 953-54.

relied.[217] As the court's insistence on the seller's proof of an attorney-client relationship shows, the area of legal malpractice relies entirely on the model of relationship. There was no suggestion in the cases of any movement away from that model.

3. Intentional Interference with Contract or Business Relationship.— Two reported decisions further elaborated the scope of a person's liability for intentional interference with contract or business relationship. *Eden United, Inc. v. Short*[218] rejected the defendant's argument that a party to a contract must breach the contract in order to hold a defendant liable for interference; rather, the defendant need only make it difficult or impossible for the contract to be performed.[219]

The most important decision concerning interference with contract was *Bochnowski v. Peoples Federal Savings & Loan Association*.[220] In *Bochnowski*, the plaintiff left the defendant bank's employment in order to work for a real estate office with which the bank had a significant business association. Ultimately, the plaintiff was forced to sever his relationship with this employer, allegedly because of improper pressure placed on the real estate office by the bank.

The plaintiff then sued the bank for intentional interference with his employment contract. The bank contended that, since the plaintiff's contract was at will, it could not be liable for interference. Relying on the great weight of authority in other jurisdictions, the Indiana Supreme Court held that a person could be found liable for interference with an at-will contract.[221] Its reasoning sounded in the language of relationship: "[t]he parties in an employment relationship have no less of an interest in the integrity and security of their contract than do parties in any other type of contractual relationship."[222] Therefore, although the "legitimate business purposes" which might excuse an interference with contract might be grounded in notions of public policy,[223] the prima facie tort is grounded in the model of relationship.

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217. *Id.* at 955-57. The court also found that there was no constructive fraud in the case, a holding which has since been superseded by *Sander*.

218. 573 N.E.2d 920 (Ind. Ct. App. 1991).

219. *Id.* at 925.

220. 571 N.E.2d 282 (Ind. 1991). For a further discussion of the labor law implications of *Bochnowski*, see Barbara J. Fick, *Labor and Employment Law*, 25 IND. L. REV. 1311, 1314-15 (1992).

221. *Bochnowski*, 571 N.E.2d at 284.

222. *Id.*

223. For a description of some legitimate business purposes which justify contractual interference, see RESTATEMENT (SECOND) OF TORTS § 767 (1965); KEETON, *supra* note 41, § 129, at 982-89.

4. Retaliatory Discharge.—In *Stivers v. Stevens*[224] the court of appeals extended the protection of employees from retaliatory discharge. Previously, in *Frampton v. Central Indiana Gas Co.*,[225] the supreme court had held that employers who fire at-will employees because they file workers' compensation claims can be sued for the tort of retaliatory discharge.[226] In *Stivers*, an at-will employee threatened to file, but never actually filed, a workers' compensation claim prior to being let go. The court of appeals upheld a jury verdict in the employee's favor, ruling that *Frampton* included discharges of at-will employees who merely intend to file workers' compensation claims.

The result of the case is not surprising, but its reasoning demonstrates an interesting choice of the model of duty. The tort of retaliatory discharge necessarily begins with the model of relationship between employer and employee. In expanding the duty, however, *Stivers* relied instead on a model of public policy rather than the model of relationship. The court reasoned that the failure to protect employees who merely intend to file workers' compensation claims would undermine the important public policy of workers' compensation, and that its rule would better deter efforts to thwart the filing of workers' compensation claims.[227] Therefore, in the midst of the economic harm cases which appeal mostly to the model of relationship, the tort of retaliatory discharge appears at first blush to be grounded in notions of public policy. As the next section shows, however, appearances do not entirely reflect reality.

5. Spoliation of Evidence.—In *Murphy v. Target Products*,[228] the plaintiff was injured on the job when he used an allegedly defective power saw. The plaintiff commenced a products liability suit against the manufacturer, but was unable to prove his case because the employer had apparently destroyed the saw before it knew of the pending lawsuit. The plaintiff then turned against the employer, suing under the increasingly fashionable tort of "spoliation of evidence." Recognizing that this tort is really a special application of the tort of interference with prospective economic advantage, the court analyzed the duty issue by using the three duty factors akin to those declared in *Webb v. Jarvis*: the

224. 581 N.E.2d 1253 (Ind. Ct. App. 1991). For a further discussion of the labor law implications and context of the case, see Fick, *supra* note 220, at 1315.

225. 297 N.E.2d 425 (Ind. 1993).

226. *Id.* at 427. *Frampton* was limited in 1990 by Smith v. Electrical Systems Division of Bristol Corp., 557 N.E.2d 711 (Ind. Ct. App. 1990), which held that an employee could be fired pursuant to a neutral absence control policy even though the reason for the employee's absence was an accident for which the employee had claimed workers' compensation benefits.

227. *Stivers*, 581 N.E.2d at 1254.

228. 580 N.E.2d 687 (Ind. Ct. App. 1991).

nature of the relationship, a party's knowledge, and the circumstances surrounding the relationship.[229]

Like *Webb*, however, the court's holding was ultimately based on the model of relationship. The court's precise holding was that, in the absence of a special relationship arising from contract, statute, or independent tort by the employer, an employer has no duty to preserve evidence for use in a future suit.[230] Although the end of the opinion bolstered the holding with two policy arguments—a desire not to encourage continuous litigation and the plaintiff's ability to preserve evidence by means of subpoena[231]—the question of relationship was central to the court's reasoning. The court reads this relationship narrowly: when the employer does not harm the employee in a manner directly related to the work which forms the basis of the relationship, then there is no relationship and consequently, no duty.

This line between harms directly related to the work relationship and harms indirectly related to the relationship is the only way to reconcile *Stivers* with *Murphy*. In all other respects, the two cases are identical: conduct by the employer which harms an employee's prospective economic advantage arising from a workplace injury. Yet *Stivers* is extremely solicitous of the policy arguments which protect employees' rights to file workers' compensation claims, while *Murphy* never mentions the negative effect that its decision will have on an employee's ability to file a products liability claim. It seems that *Stivers*, as well as the tort of retaliatory discharge, relies far more on the model of relationship than its language is willing to acknowledge.

6. The Insurer's Duty of Good Faith.—The principles of relationship also lie at the heart of the last of the frequently litigated economic torts: the insurer's duty of good faith and fair dealing. The court in *Egnatz v. Medical Protective Co.*[232] was unwilling to find a relationship still in existence when a doctor sued his insurer of thirty-nine years for its failure to renew his insurance. The court refused to accept the theory that the duty of good faith and fair dealing includes a duty not to deny renewal arbitrarily.[233] On the other hand, *Liberty Mutual Insurance Co. v. Blakesley*[234] held that an insurance company which knew of a mort-

229. *Id.* at 688. Curiously, *Murphy* cited an appellate decision from 1983 to support its use of these three factors; it never cited *Webb*, whose third factor of public policy varies from the third factor used in *Murphy*. *Murphy* constitutes plain evidence that Indiana courts are not accepting the seemingly binding command of *Webb* to use its three factors to determine issues of duty.

230. *Murphy*, 580 N.E.2d at 690.

231. *Id.*

232. 581 N.E.2d 438 (Ind. Ct. App. 1991).

233. *Id.* at 439-40.

234. 568 N.E.2d 1052 (Ind. Ct. App. 1991).

gagee's retained interest in property sold by the mortgagee had a duty to communicate to the mortgagee that the mortgagor was unable to obtain insurance.[235]

Likewise, in a case in which there was strong evidence of plaintiff reliance, one court found that an insurance company had a duty to advise a plaintiff injured by an insured of the scope of the release.[236] But in another case in which the insured was represented by counsel and was engaged in coverage litigation with its insurer, the court found that no duty to advise of matters material to the extent of coverage existed.[237] The only way to explain these two cases, in which an insured received less protection than persons whose relationship with the insurer is more attenuated, is to appeal to the concept of reliance which is so central to the establishment of an actionable relationship.

D. The Plaintiff's Obligation of Care

Until now, this Article has focused on the models used by the courts to decide whether to impose a duty of care on a defendant. However, the defendant is not the only person under a duty to avoid injury; the plaintiff has a similar duty. Encapsulated in the terms "comparative fault" and "incurred risk," this obligation requires plaintiffs to exercise due care for their own safety and to accept the consequences of their voluntary assumption of subjectively known and appreciated risks.[238] Unlike the various models which explain the disparate duties of defendants, however, the duty of the plaintiff involves a single model: the model of due care. The plaintiff's obligation of care does not depend on the relationship between the parties or on concerns for public policy or community values. Rather, it rests on the obligation of a plaintiff to use care to avoid foreseeable harm.

For the most part, the cases raising plaintiff conduct defenses accepted this model; therefore, although they added to the practical un-

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235. The jury verdict for the plaintiff was overturned on other grounds related to the breadth of instructions given to the jury. *Id.* at 1058.

236. McDaniel v. Shepherd, 577 N.E.2d 239 (Ind. Ct. App. 1991). The case proceeded on a constructive fraud theory when the insurance company told the plaintiff that she did not need a lawyer and that the insurance company would assist her with any legal problems. For another instance of an insurance company allegedly misrepresenting the terms of a release to a person injured by the company's insured, see Fultz v. Cox, 574 N.E.2d 956 (Ind. Ct. App. 1991).

237. Wedzeb Enters. v. Aetna Life & Casualty Co., 570 N.E.2d 60 (Ind. Ct. App. 1991).

238. *See* IND. CODE §§ 34-4-33-1 to -13 (1988 & Supp. 1991) (recognizing doctrine of contributory fault); Get-N-Go v. Markins, 544 N.E.2d 484 (Ind. 1989) (discussing doctrine of incurred risk); Beckett v. Clinton Prairie Sch. Corp., 504 N.E.2d 552 (Ind. 1987).

derstanding of the scope of these defenses, these cases developed no significant theoretical issues.[239] Three sets of cases, however, suggested some limitations on the model of due care. The first set of cases involved instances in which the courts held that the plaintiffs had no duty to exercise due care on their behalf. In *Valinet v. Eskew*,[240] the defendant claimed that the plaintiff, who drove past the tree every day for several years, was contributorily negligent. The Indiana Supreme Court held as a matter of law that a plaintiff has no duty to inspect the trees along her route, and cannot be found contributorily negligent unless she has notice of a tree and appreciates its danger.[241] Likewise, in *Handrow v. Cox*,[242] the Indiana Supreme Court held that a passenger has no duty to look out for other cars.[243]

These cases are hard to reconcile with a pure model of due care; indeed, the result in *Valinet* is especially ironic, as well as internally

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239. The most interesting of these "routine" plaintiff conduct cases was Foster v. Purdue Univ. Chapter, The Beta Mu of Beta Theta Pi, 567 N.E.2d 865 (Ind. Ct. App. 1991), in which the court held that a drunken freshman who fell off a makeshift water slide intended his injuries because of the substantial certainty that injuries would result from his actions; thus, his claim was barred by the "intentional acts" exception to the Comparative Fault Act, IND. CODE § 34-4-33-2(a) (1988). If generally accepted, the court's generous reading of "substantial certainty" could signal trouble for plaintiffs in a host of self-inflicted injury cases.

For sometimes contradictory results in cases involving claims of contributory negligence, comparative negligence, and incurred risk, see Brownell v. Figel, 950 F.2d 1285 (7th Cir. 1991) (holding that plaintiff's negligence in operating vehicle while intoxicated and in resisting arrest barred claim that police failed to communicate severity of accident to emergency room doctors); McGill v. Duckworth, 944 F.2d 344 (7th Cir. 1991) (finding that prisoner incurred risk of rape when he knew of other prisoners' sexual interest, knew other prisoners were following him, and chose to proceed to shower room rather than avoiding other prisoners); Smith v. Norfolk & Western Ry. Co., 776 F. Supp. 1335 (N.D. Ind. 1991); Forbes v. Walgreen, 566 N.E.2d 90 (Ind. Ct. App. 1991) (holding that patient's continued use of wrong prescription even after patient should have realized mistake was governed by comparative fault principles); Forrest v. Gilley, 570 N.E.2d 934 (Ind. Ct. App. 1991) (holding that intoxicated plaintiff incurred risk of falling from horse); Hacker v. Holland, 570 N.E.2d 951 (Ind. Ct. App. 1991) (recognizing existence of contributory negligence and incurred risk defenses in attorney malpractice action); Hamilton v. Roger Sherman Architects Group, Inc., 565 N.E.2d 1136, 1138 n.3 (Ind. Ct. App. 1991); Kreigh v. Schick, 575 N.E.2d 1063 (Ind. Ct. App. 1991); Lilge v. Russell's Trailer Repair, Inc., 565 N.E.2d 1147 (Ind. Ct. App. 1991); Mead v. Salter, 566 N.E.2d 577 (Ind. Ct. App. 1991); Roddel v. Town of Flora, 580 N.E.2d 255 (Ind. Ct. App. 1991) (holding that plaintiff's failure to stop when police officers flagged him down was negligence per se which barred his claim for personal injuries); State v. Snyder, 570 N.E.2d 947 (Ind. Ct. App. 1991); Whitten v. Kentucky Fried Chicken Corp., 570 N.E.2d 1353 (Ind. Ct. App. 1991).

240. 574 N.E.2d 283 (Ind. 1991).

241. *Id.* at 287.

242. 575 N.E.2d 611 (Ind. 1991).

243. *Id.* at 614.

inconsistent, because the court had appealed to the model of due care in defining the defendant's duty. In both cases, it appears that the court believed that the plaintiffs' lack of control over the accident-causing instrumentality (whether the tree or the car in which the plaintiff was riding) absolved them of any responsibility for their own safety. If broadly interpreted, this model of relationship and control suggests a very different basis for a plaintiff's liability for her own conduct, as well as a new language to which plaintiffs seeking to avoid liability for their conduct can appeal.

The second set of cases involved the viability of the sudden emergency doctrine. In *Compton v. Pletch*,[244] the Indiana Supreme Court held that the sudden emergency doctrine survived the passage of the Comparative Fault Act, so that a defendant's failure to use reasonable care in the face of an emergency of the plaintiff's making could bar the plaintiff's case.[245] Here, of course, there is no direct inconsistency with the model of plaintiff's due care, but the holding highlights, as does *Valinet*, that the issue of duty is not resolved consistently even for both parties in a single case.

A third pair of cases reveals an inconsistency of another type. In *Foster v. Purdue University Chapter, The Beta Mu of Theta Beta Pi*[246] the court of appeals held that a drunken fraternity member could not sue the fraternity for the negligent supply of alcohol to minors like himself.[247] Rejecting the plaintiff's argument that he did not significantly participate in the decision to throw a party at which alcohol would be served, the court appealed to the rule that members of unincorporated associations cannot sue the association for injuries which result from the association's decisions to engage in certain conduct.[248] On the other hand, in *Robbins v. McCarthy*,[249] a passenger and a driver, who had been drinking heavily together, were subsequently involved in an accident. As a defense to the passenger's suit against the driver, the driver interposed a defense of "complicity" based on the passenger's drinking and his purchase of drinks for the driver. According to the defendant, this defense was not subject to the Comparative Fault Act and would

244. 580 N.E.2d 664 (Ind. 1991).

245. In Frito-Lay v. Cloud, 569 N.E.2d 983 (Ind. Ct. App. 1991), the court of appeals also found that the sudden emergency doctrine had survived the passage of the Comparative Fault Act. *Cf.* Brownell v. Figel, 950 F.2d 1285 (7th Cir. 1991) (finding that the last clear chance doctrine also survived passage of the Act, but finding the doctrine inapplicable on the facts of the case).

246. 567 N.E.2d 865 (Ind. Ct. App. 1991).

247. *Id.* at 872.

248. *Id.* at 870.

249. 581 N.E.2d 929 (Ind. Ct. App. 1991).

absolutely bar a claim by a person with some complicity in the defendant's wrongful conduct. Noting that complicity developed from the dram shop cases and thus, was not a creature of the common law, the court refused to extend the doctrine beyond its present bounds. Unless complicity rises to the level of contributory negligence or incurred risk, the court said, it does not reduce or bar a plaintiff's claim for damages.[250]

The inconsistency of result in *Foster* and *Robbins* is obvious. Both involved the negligent supply of alcohol, and both involved a plaintiff with some measure of complicity in the defendant's conduct. Yet the minimal complicity of the plaintiff in *Foster* was sufficient to bar his claim, while the overt complicity of the plaintiff in *Robbins* was insufficient. The only way to explain the different results is the model of duty on which each case was based. *Foster* based its view of the defendant's duty on a model of relationship and control.[251] Carrying this model over to the plaintiff's conduct, it found that the relationship of fraternity member to fraternity absolved the fraternity of responsibility for its actions toward a member. *Robbins*, however, proceeded on the notion that a driver owes a duty to avoid foreseeable injury. That same model of due care was used to measure the plaintiff's conduct, so that the court was unwilling to change to a relationship-based model of complicity to define the plaintiff's duty.

Unlike *Valinet* and *Compton*, *Foster* and *Robbins* are internally consistent in their use of a single model to impose duty on both plaintiffs and defendants. Yet, their initial choice of different models for duty analysis (relationship in *Foster* and due care in *Robbins*) dooms the factually similar conduct of plaintiffs to disparate outcomes.

IV. The Direction of Duty in Indiana

In this Article I traced the four approaches—relationship, due care, public policy, and community values—which Indiana courts have used in deciding questions of duty and personal responsibility. Because my study has been empirical rather than normative, I have not attempted to suggest which approach (or combination of approaches) is best.[252] My more modest goals have been to point out the muddle of present duty analysis in Indiana and to demonstrate that any consistent theory will require revamping of significant portions of the law of duty. It is easy to declare, as *Webb v. Jarvis* does, a new test for duty. It is

250. *Id.* at 931.

251. *See supra* notes 122-24 and accompanying text.

252. To explain my own normative vision of tort law, which answers the duty question through a combination of community value and utilitarian considerations, is an enterprise far removed from the purpose and scope of this Article.

difficult to apply that analysis to existing duty rules, many of which cannot be justified under *Webb*'s analysis. If Indiana's law of duty is ever to lose its arbitrary and contradictory flavor, however, the courts must have the courage to test even the most traditional rules of obligation and responsibility in the crucible of consistent analysis.

Indiana courts will ultimately need to decide whether they will impose a consistent analysis for determining the parties' duties within the broader context of the direction of tort law. It is impossible to answer the question "What should be the test of duty?" without some sense of the nature, the history, and the aspirations of the tort system,[253] as well as the costs and benefits of its alternatives.[254] *Webb v. Jarvis*, which declared a comprehensive new test for duty, failed to provide that sense. It is hardly surprising, therefore, that this "test" was ignored—even by the Indiana Supreme Court itself—before the year was out.

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253. For various perspectives on these matters, see AMERICAN LAW INSTITUTE, 1 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, 29-33 (1991) [hereinafter ENTERPRISE RESPONSIBILITY]; GUIDO CALABRESI, THE COST OF ACCIDENTS (1970); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW §§ 6.1 to -.16 (3d ed. 1986); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 416 (1985); Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981); Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. L. REV. 485 (1989).

254. *See, e.g.*, ENTERPRISE RESPONSIBILITY, *supra* note 253, at 33-50; STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW (1989).