

Comment

Comparative Fault: A Need for Reform of Indiana Tort Law

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I. INTRODUCTION

For over 160 years Indiana has progressively developed the theory of negligence as a basis of recovery.¹ The expansion of negligence law in Indiana is evidenced by many well-reasoned decisions which have extended beyond negligence and now include recovery for breaches of warranty,² strict liability,³ and various other causes of action in tort.⁴ Apart from these highly sophisticated opinions, Indiana is presently in the backwash of tort law. During the last decade, most jurisdictions have developed a more equitable approach to recovery for tortiously-caused injuries through the implementation of the doctrine of comparative fault.⁵ Herein I urge Indiana courts to consider seriously the judicial adoption of this doctrine, not because a majority of other jurisdictions recognize the theory, but because of its logical basis and fairness to all parties.

The two major bars to recovery in negligence are contributory negligence and assumption of risk.⁶ Both defenses emerged during

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¹Negligence law in Indiana dates to the early 19th century. See, e.g., *Durham v. Musselman*, 2 Blackf. 96 (Ind. 1827).

²*Neofes v. Robersshaw Controls Co.*, 409 F. Supp. 1376 (S.D. Ind. 1976) (discusses the privity requirement of IND. CODE § 26-1-2-318 (1976)). Indiana distinguishes implied warranty actions which are tortious in nature from those which are based upon contract. See Vargo, *Products Liability, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 270 (1975).

³*Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965). For a discussion of other Indiana cases involving strict liability and other products liability theories for recovery, see Vargo, *Products Liability in Indiana—In Search of a Standard for Strict Liability in Tort*, 10 IND. L. REV. 871 (1977) [hereinafter cited as *In Search of a Standard*]. See also Vargo, *Products Liability, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 202 (1977) [hereinafter cited as *Vargo, 1977 Survey*].

⁴*Berrier v. Beneficial Fin., Inc.*, 234 F. Supp. 204 (N.D. Ind. 1964) (privacy); *AAF-CO Heating & Air Cond. Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), cert. denied, 424 U.S. 913 (1976) (defamation); *Helvey v. O'Neill*, 153 Ind. App. 635, 288 N.E.2d 553 (1972) (interference with contractual relations); *Galbreath v. Engineering Const. Corp.*, 149 Ind. App. 347, 273 N.E.2d 121 (1971) (extra-hazardous activities, blasting); *Dwyer v. McClean*, 133 Ind. App. 454, 175 N.E.2d 50 (1961) (malicious prosecution).

⁵Comparative fault and comparative negligence are used interchangeably throughout this discussion. Approximately two-thirds of the states have adopted some form of comparative fault. V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 1.4, at 3-4 (1974 & Supp. 1978). See *id.* at 367-69 app. for a complete list of adopting states.

⁶W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 65, at 416 (4th ed. 1971).

the Industrial Revolution as a response to the societal demand for protection of growing industry.⁷ With the passage of time, however, it has become apparent to both the lay and judicial communities that contributory negligence and assumption of risk as complete bars to plaintiff's recovery are no longer rational, fair, or needed approaches to tort law.⁸ In light of social change, an examination of the historical basis of the twin defenses and a critical evaluation of their continued existence is necessary.

II. CONTRIBUTORY NEGLIGENCE

Contributory negligence, the most common negligence defense, was first recognized in England in 1809.⁹ Prior to that time a plaintiff's contributory negligence was not uniformly considered to be a complete defense to his action, and damages were apportioned when both the plaintiff and defendant were at fault.¹⁰ In 1809, *Butterfield v. Forrester*¹¹ pronounced contributory negligence to be a complete bar to plaintiff's recovery in England. This concept invaded the United States in 1824¹² and, until the mid-20th century, was the law in most jurisdictions.¹³

Contributory negligence is determined by an objective standard based on the acts of the reasonable person of ordinary prudence under like or similar circumstances, with adjustments for certain traditional physical and mental infirmities.¹⁴ Whether the plaintiff has acted for his own protection as the reasonable person would have is determined on the basis of a risk versus utility test. In other words, the interest furthered by the actor is weighed against the probability and gravity of harm to himself.¹⁵ Although it has been contended that contributory negligence is governed by the same tests and standards as negligence, the two principles can be distin-

⁷Hoffman v. Jones, 280 So. 2d 431, 437 (Fla. 1973); Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1, 3-4 (1953).

⁸See W. PROSSER, *supra* note 6, § 67.

⁹*Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809).

¹⁰Hoffman v. Jones, 280 So. 2d 431, 434 (Fla. 1973).

¹¹103 Eng. Rep. 926 (K.B. 1809). "One person being in fault will not dispense with another's using ordinary care for himself." *Id.* at 927.

¹²*Smith v. Smith*, 19 Mass. (2 Pick.) 621 (1824).

¹³See W. PROSSER, *supra* note 6, §§ 65, 67.

¹⁴RESTATEMENT (SECOND) OF TORTS § 464, Comments a & b (1965); Wilderman, *Presumptions Existing In Favor Of The Infant In Re: The Question Of An Infant's Ability To Be Guilty Of Contributory Negligence*, 10 IND. L.J. 427 (1935).

¹⁵*United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947); *Conway v. O'Brien*, 111 F.2d 611 (2d Cir. 1940), *rev'd on other grounds*, 312 U.S. 492 (1941). See also Vargo, *The Defenses To Strict Liability In Tort: A New Vocabulary With An Old Meaning*, 29 MERCER L. REV. 447, 449 n.21 (1978).

guished. Prosser stated that negligence is conduct which creates undue risk of harm to others, thus involving a duty towards others; whereas contributory negligence is conduct which creates an undue risk of harm to the actor himself.¹⁶ The burden of proving contributory negligence is on the defendant.¹⁷

Various explanations for the existence of contributory negligence have been proffered—proximate cause, a penal basis, unclean hands, accident deterrence, and assumption or risk—none of these theories, however, logically justify the defense.¹⁸ Contributory negligence is best explained by Prosser as an “expression of the highly individualistic attitude of the common law and its policy of making the personal interest of each party depend upon his own care and prudence.”¹⁹ The doctrine was encouraged by three major factors: Distrust of the plaintiff-minded jurors of the 19th century, the courts’ tendency to find a single cause for every injury, and the courts’ inability to conceive of a method by which a single injury could be apportioned among the parties.²⁰

Used by the courts as a means of controlling jury awards to the plaintiff during the 19th century, contributory negligence was the primary factor depriving the plaintiff of recovery even where his

¹⁶W. PROSSER, *supra* note 6, § 65, at 418.

¹⁷RESTATEMENT (SECOND) OF TORTS § 477 (1965).

¹⁸The weaknesses of these traditional justifications are explained by Prosser: Most of the decisions have talked about “proximate cause,” saying that the plaintiff’s negligence is an intervening, insulating cause between the defendant’s negligence and the injury. But this cannot be supported unless a meaning is assigned to proximate cause which is found nowhere else. If two automobiles collide and injure a bystander, the negligence of one driver is not held to be a superseding cause which relieves the other of liability; and there is no visible reason for any different conclusion when the action is by one driver against the other. It has been said that the defense has a penal basis, and is intended to punish the plaintiff for his own misconduct; or that the court will not aid one who is himself at fault, and he must come into court with clean hands. But this is no explanation of the many cases, particularly those of the last clear chance, in which a plaintiff clearly at fault is permitted to recover. It has been said that the rule is intended to discourage accidents, by denying recovery to those who fail to use proper care for their own safety; but the assumption that the speeding motorist is, or should be, meditating on the possible failure of a lawsuit for his possible injuries lacks all reality, and it is quite as reasonable to say that the rule promotes accidents by encouraging the negligent defendant.

Prosser, *supra* note 7, at 3-4 (footnotes omitted). See also 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 22.2, at 1192-1207 (1965).

¹⁹W. PROSSER, *supra* note 6, § 65, at 418.

²⁰*Id.*; see Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946) (emphasizing distrust of the plaintiff-minded jury).

fault was slight in comparison with the defendant's.²¹ During this period, contributory negligence achieved its societal goal—the costs of accidental injuries were placed on the injured plaintiff, thereby preserving the defendant-manufacturer's needed capital and encouraging the growth of the newly emerging industries.²²

III. ASSUMPTION OF RISK

The doctrine of assumption of risk evolved at about the same time as contributory negligence.²³ In its simplest form, this doctrine consists of the plaintiff consenting to undertake a risk, thereby relieving the defendant of his duty towards the plaintiff.²⁴ This defense requires the plaintiff to have actual knowledge, understanding, and appreciation of the risk he chooses to undertake.²⁵ In addition, the plaintiff must have viable choices before his conduct is considered voluntary.²⁶ The defendant has the burden of proving the four essential elements: Knowledge, understanding, appreciation, and voluntariness.²⁷ Thus, assumption of risk differs from contributory negligence in that the former is subjective and inquires into the individual plaintiff's state of mind, whereas the latter is based upon an objective reasonable man standard.²⁸ Both defenses are similar, however, insofar as they completely bar a plaintiff's recovery and accomplish the same 19th century social goals.²⁹

The rationale of assumption of risk was attacked early.³⁰ Professor Bohlen, the reporter for the first *Restatement of Torts*, per-

²¹W. PROSSER, *supra* note 6, § 67, at 433, *quoted with approval in* Kaatz v. State, 540 P.2d 1037, 1048 (Alaska 1975).

²²Hoffman v. Jones, 280 So. 2d 431, 437 (Fla. 1973).

²³W. PROSSER, *supra* note 6, § 65, at 416.

²⁴*Id.* § 66; RESTATEMENT (SECOND) OF TORTS § 496A, Comment c. (1965).

²⁵RESTATEMENT (SECOND) OF TORTS § 496D (1965).

²⁶*Id.* § 496E (1965). *See also In Search of a Standard, supra* note 3, at 893.

²⁷RESTATEMENT (SECOND) OF TORTS § 496G (1965).

²⁸*See* authorities cited in note 26 *supra*.

²⁹W. PROSSER, *supra* note 6, §§ 65, 68; RESTATEMENT (SECOND) OF TORTS § 496A, Comments c & d (1965). In fact, contributory negligence and assumption of risk have "overlapped" to a large degree. *See* notes 58-62 *infra* and accompanying text.

³⁰Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14 (1906). Many later articles were written which discussed assumption of risk including an excellent symposium in the *Louisiana Law Review*. *See* Greene, *Assumed Risk as a Defense*, 22 LA. L. REV. 77 (1961); Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122 (1961); Mansfield, *Informed Choice in the Law of Torts*, 22 LA. L. REV. 17 (1961); Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5 (1961). Professor James has also severely attacked the defense. *See* James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968). *See also* Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1, 4-10 (1974).

sueded the delegates to reject assumption of risk as a defense separate from contributory negligence.³¹ After Bohlen's death and after vigorous debate among legal scholars,³² the *Restatement (Second) of Torts*, with the encouragement of Dean Prosser, adopted specific sections recognizing the defense.³³ The *Restatement's* adoption of assumption of risk, however, did not end the debate over whether it should be considered separate from either contributory negligence or the duty element of negligence.³⁴ Recent court decisions and statutes have severely limited or abrogated assumption of risk as a defense.³⁵

An excellent example of the restriction of assumption of risk is the Florida Supreme Court decision in *Blackburn v. Dorta*,³⁶ wherein assumption of risk was merged with the defense of contributory negligence. The *Dorta* court refused to address the area of express assumption of risk and dealt only with implied assumption of risk, which it divided into two categories—primary and secondary.³⁷ Primary assumption of risk merely means that the defendant either owed no duty or breached no duty. Therefore, as a duty issue it has no useful purpose as a separate defense.³⁸ Bifurcating secondary implied assumption of risk into *pure* and *qualified* assumptions, the *Dorta* court said that the pure variety consisted of reasonable conduct, whereas qualified assumption of risk consisted of unreasonable conduct of the plaintiff in consenting to the risk.³⁹ An example of pure assumption of risk, according to the courts is where the plaintiff rushes into a burning building to rescue a child and is injured in the process. Under prevailing law prior to *Dorta*, the plaintiff would have been barred from recovery because he voluntarily exposed himself to a known risk notwithstanding the reasonableness of his conduct under the circumstances.⁴⁰ The *Dorta* court rejected pure assumption of risk because of its harsh results.⁴¹ An example of qualified assumption of risk is the same plaintiff attempting to

³¹Twerski, *supra* note 30, at 4-10. See RESTATEMENT OF TORTS § 893 (1939).

³²Twerski, *supra* note 30, at 4-10.

³³RESTATEMENT (SECOND) OF TORTS §§ 496A-G.

³⁴See James, *supra* note 30; Twerski, *supra* note 30.

³⁵For a thorough breakdown of the case law and statutory treatment of assumption of the risk, see *Brown v. Kreuser*, 560 P.2d 105, 107-08 (Colo. App. 1977); *Blackburn v. Dorta*, 348 So. 2d 287, 289 n.3 (Fla. 1977).

³⁶348 So. 2d 287 (Fla. 1977).

³⁷*Id.* at 290.

³⁸*Id.* at 291.

³⁹*Id.*

⁴⁰*Id.* (construing *Morrison & Conklin Const. Co. v. Cooper*, 256 S.W.2d 505 (Ky. 1953)).

⁴¹348 So. 2d at 291.

rescue his favorite fedora from the blazing premises. Under these circumstances the conduct of the plaintiff is unreasonable and can be characterized as contributory negligence. Thus, according to the *Dorta* court, assumption of risk can be completely rejected because it more readily fits into the categories of duty or contributory negligence under modern tort law.⁴²

IV. THE NEED FOR CHANGE

The common law has become disenchanted with the harshness of contributory negligence and assumption of risk because both defenses completely bar a plaintiff's recovery without any inquiry into the extent of each party's deviation from societal norms. This dissatisfaction is understandable because traditional negligence law places the entire burden of loss on one party when, in reality, both parties are usually responsible to some degree.⁴³ Although the plaintiff may be at fault, the negligence of the defendant still plays a role in causing the injury. Thus, even though the wrongful conduct of the plaintiff may be slight in comparison to that of the defendant, the entire injury will still remain on the plaintiff. Also, the plaintiff is generally the less able of the two to bear the financial burden of the loss.⁴⁴ In an attempt to mitigate such harshness, the common law has developed certain exceptions to the absolute defenses. These exceptions include the doctrine of last clear chance,⁴⁵ the choice of ways doctrine,⁴⁶ the sudden emergency doctrine,⁴⁷ and a more sophisticated

⁴²*Id.* at 293. Several other jurisdictions have reached the same conclusion as the *Dorta* court and have abolished assumption of risk as a separate defense. See *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 829, 532 P.2d 1226, 1241, 119 Cal. Rptr. 858, 875 (1975); *Bulatao v. Kauai Motors, Ltd.*, 49 Haw. 1, 15-17, 406 P.2d 887, 894-95 (1965); *Messmer v. Ker*, 96 Idaho 75, 80, 524 P.2d 536, 541 (1974); *Wilson v. Gordon*, 354 A.2d 398, 401-02 (Me. 1976); *Springrose v. Willmore*, 292 Minn. 23, 24-25, 192 N.W.2d 826, 827 (1971); *Lyons v. Redding Constr. Co.*, 83 Wash. 2d 86, 94-95, 515 P.2d 821, 826 (1973); *McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis. 2d 374, 378-79, 113 N.W.2d 14, 16-17 (1962). *But see* *Southland Butane Gas Co. v. Blackwell*, 211 Ga. 665, 666-68, 88 S.E.2d 6, 8-9 (1955); *Munson v. Bishop Clarkson Mem. Hosp.*, 186 Neb. 778, 780, 186 N.W.2d 492, 494 (1971).

⁴³See W. PROSSER, *supra* note 6, § 67.

⁴⁴*Hoffman v. Jones*, 280 So. 2d 431, 437 (Fla. 1973); W. PROSSER, *supra* note 6, § 67.

⁴⁵W. PROSSER, *supra* note 6, § 66.

⁴⁶Although the choice of ways doctrine appears to enhance the defense to negligence actions, its application in Indiana seems to be less harsh. See *Easley v. Williams*, 321 N.E.2d 752, 754 (Ind. Ct. App. 1975); *City of Mitchell v. Stevenson*, 136 Ind. App. 340, 347-48, 201 N.E.2d 58, 61-62 (1964).

⁴⁷*Bundy v. Ambulance Indianapolis Dispatch, Inc.*, 158 Ind. App. 99, 301 N.E.2d 791 (1973).

proximate cause rationale.⁴⁸ In each of these exceptions, however, the "all or nothing" approach is retained. The total loss is merely shifted from one party to another, when, in reality, both parties are at fault.

For example, assume that *A*, a motorist, strikes *B*, a pedestrian crossing the street, and, at the same time, *C*, a passenger in *A*'s automobile, is injured in the accident. *A*'s conduct is the same with respect to both *B* and *C*. Assuming it is possible to attribute a percentage of causation or fault to *A*'s conduct, for instance ninety percent, fairness would dictate that *A* should be responsible for ninety percent of the injuries received by both *B* and *C*. But, under the common law negligence rules, different results are attainable with only slight variations of the type of conduct attributable to the parties. If *A*'s conduct is considered mere negligence, *C*, whether or not his conduct is considered contributory negligence, cannot recover if the jurisdiction has a guest statute.⁴⁹ Thus, even though *A*'s conduct was ninety percent responsible for *C*'s injuries, *C* recovers nothing. However, if *A*'s conduct is considered willful and wanton *C* may recover all of his damages.⁵⁰ If *C*'s conduct contributed to ten percent of his injuries, should he then recover all of his damages?

Assume that in the accident *B*, the pedestrian, contributed to ten percent of his injuries. If *B*'s conduct is considered to be contributory negligence, then he recovers nothing although *A* was ninety percent responsible for his injuries. However, if the doctrine of last clear chance applies, then *B* can recover all of his damages from *A* even though his (*B*'s) conduct contributed ten percent to his total damages.⁵¹ Events can become even more complicated in products liability cases. For example, assume that *A*, a manufacturer, places on the market a defective machine which injures *B*. Assume further that the defect causes sixty-five percent of *B*'s injury, and *B*'s conduct causes thirty-five percent of his injury. If *B*'s conduct is con-

⁴⁸See Vargo, *Products Liability, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 265, 277-78 (1976).

⁴⁹Indiana's guest statute allows recovery only for the willful and wanton conduct of the host, IND. CODE § 9-3-3-1 (1976). See also *Sidle v. Majors*, 536 F.2d 1156 (7th Cir. 1976), certifying questions of state law, 341 N.E.2d 763 (Ind. 1976), cert. denied, 429 U.S. 945 (1976). Contributory negligence of the guest does not deprive him of recovery. See *Pierce v. Clemens*, 113 Ind. App. 65, 75, 46 N.E.2d 836, 840 (1943) (distinguishes contributory negligence from assumption of risk).

⁵⁰See note 49 *supra*.

⁵¹For an explanation of the Indiana version of the doctrine of last clear chance and its constituent elements, see *Elgin, Joliet & E. Ry. v. Hood*, 336 N.E.2d 417, 419 (Ind. Ct. App. 1975) (quoting *Chesapeake & Ohio Ry. v. Williams*, 114 Ind. App. 160, 170-71, 51 N.E.2d 384, 388 (1943)).

sidered contributory negligence, he may still recover all of his damages despite the fact that the machine caused only sixty-five percent of his injury.⁵² If *B*'s conduct amounts to assumption of risk (incurred risk), or misuse, *B* recovers nothing although sixty-five percent of his damages were caused by the defective machine.⁵³

The inequities of Indiana's "all or nothing" approach are illustrated by *Phillips v. Croy*.⁵⁴ In *Croy* the plaintiff had been injured while attempting to start a pick-up truck. He first towed the disabled vehicle onto a portion of the two-lane road that offered excellent visibility. The plaintiff then positioned himself between the two vehicles and with battery cables tried to "jump start" the disabled truck. The defendant, driving a southbound vehicle, collided with the parked vehicles, thereby pinning the plaintiff. The court of appeals recognized that the defendant "was guilty of negligence which was a proximate cause of the collision."⁵⁵ Nonetheless, the court reversed the jury verdict holding that no reasonable person would have acted as the plaintiff did under the circumstances.⁵⁶ Clearly, *Croy could have been* resolved on more equitable grounds by application of the doctrine of comparative fault. Under that approach the plaintiff would recover to the extent that defendant's negligence caused the injury.⁵⁷

Another confusing issue which could be resolved via comparative fault is the "overlap" between contributory negligence and assumption of risk (incurred risk).⁵⁸ In Indiana, assumption of risk is

⁵²Assuming that *B* brings a strict liability action pursuant to RESTATEMENT (SECOND) OF TORTS § 402A (1965), contributory negligence will not defeat his recovery. *Gregory v. White Trucking & Equip. Co.*, 323 N.E.2d 280 (Ind. Ct. App. 1975); RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965). See also *Vargo*, *supra* note 48, at 278-80.

⁵³Assumption of risk is a defense to strict liability when the plaintiff voluntarily and unreasonably encounters a known danger. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965). Assumption of risk and its necessary elements are best explained in *Restatement (Second) of Torts* §§ 496A-G (1965). The Indiana version of assumption of risk appears to differ from the *Restatement* version. See *Vargo*, 1977 *Survey*, *supra* note 3, at 210-12.

⁵⁴363 N.E.2d 1283 (Ind. Ct. App. 1977).

⁵⁵*Id.* at 1284.

⁵⁶*Id.* at 1286.

⁵⁷Under comparative fault, the court could have assessed the percentage of fault attributable to both the defendant and plaintiff and allowed the plaintiff to recover his damages minus the amount he contributed to his injury, *e.g.*, if the plaintiff was 40% at fault and the total damages were \$10,000, the plaintiff could recover \$6,000. Thus, the finder of fact must determine the total damages plaintiff has received, then deduct the amount he contributed to his own injury. See *W. Prosser*, *supra* note 6, § 67.

⁵⁸See *In Search of a Standard*, *supra* note 3, at 893; *Vargo*, 1977 *Survey*, *supra* note 3, at 210-12.

not a "pure form" of the doctrine, but includes much of what is considered contributory negligence. The Indiana doctrine of assumption of risk is defined as follows:

The doctrine of incurred risk is based upon the proposition that one incurs all the ordinary and usual risks of an act upon which he voluntarily enters, so long as those risks are known and understood by him, *or could be readily discernible by a reasonable and prudent man under like or similar circumstances.*⁵⁹

The italicized section of the above quote sets forth the objective reasonable man standard of negligence law; however, assumption of risk is generally based upon a subjective standard based upon the plaintiff's *actual* knowledge, appreciation, and voluntary consent.⁶⁰ By injecting the reasonable man standard of negligence into the assumption of risk definition, Indiana's interpretation of the defense is really a form of contributory negligence. This "overlap" between contributory negligence and assumption of risk causes no problem in common law negligence actions because both defenses are considered complete bars to liability. In strict liability actions, the overlap creates a problem because only assumption of risk is a defense.⁶¹ Without a clear definitional division between the two defenses, much that was intended to be excluded as contributory negligence in strict liability actions will be reinjected into the case through the guise of assumption of risk.⁶²

Comparative negligence offers the most satisfactory solution. Under this theory the conduct of the plaintiff, whether defined as contributory negligence or assumption of risk, would offset the amount he could recover in any type of action.⁶³ An excellent example of the problem with the "overlap" between contributory negligence and assumption of risk is *Sullivan v. Baylor*.⁶⁴ The defendant had asked the plaintiff to assist him in erecting a basketball goal on the defendant's property. The defendant instructed plaintiff regarding his intended method of raising the goalpost into position. The defendant attempted to install the goalpost with a tractor that was

⁵⁹*Stallings v. Dick*, 139 Ind. App. 118, 129, 210 N.E.2d 82, 88 (1966) (emphasis added).

⁶⁰See RESTATEMENT (SECOND) OF TORTS §§ 496A-G (1965).

⁶¹See notes 52 & 53 *supra*.

⁶²See *In Search of a Standard*, *supra* note 3, at 894-96.

⁶³For cases which consider contributory negligence and assumption of risk as offsets to recovery under a comparative fault doctrine, see V. SCHWARTZ, *supra* note 5, § 9.4, at 167.

⁶⁴325 N.E.2d 475 (Ind. Ct. App. 1975).

attached by chains to the top of the goal, while the plaintiff attempted to guide the goalpost with a board. The defendant warned the plaintiff to flee if the goalpost began to fall. During the raising procedure the goalpost began to fall, and the plaintiff, while attempting to escape, was struck by the goal. After plaintiff's case in chief, the trial court granted the defendant's motion for judgment on the evidence. In affirming, the *Baylor* court found that plaintiff had assumed the risk because he acted voluntarily and either knew or understood the risk involved or *in the exercise of reasonable care should have known and understood those risks*.⁶⁵

Baylor did not decide whether defendant's conduct was negligent.⁶⁶ Under a comparative fault approach, *Baylor* would have been decided on a more equitable basis. Fault would have been assigned to both the plaintiff and defendant according to the totality of the circumstances surrounding the accident. The plaintiff's knowledge, understanding, appreciation, and voluntariness would have become a part of the percentage factor of plaintiff's fault. Thus, whether the plaintiff either actually knew, understood, and appreciated the risk, or should have known of the risk through reasonable care, would have been irrelevant because his total conduct would have been considered by the fact finder without reference to the doctrinal distribution between contributory negligence and assumption of risk.

Numerous other examples could be given to express the obvious unfairness of the tort law system as it now exists in Indiana; however, it is clear, even to a layman, that the "all or nothing" approach cannot be justified as a logical or fair expression of the proper apportionment of damages among the parties.

V. REJECTION OF THE "ALL OR NOTHING" RULE OF CONTRIBUTORY NEGLIGENCE

Comparative negligence, in its simplest form, is merely a method of allocating a percentage of fault to the respective parties in litigation and assessing damages in accordance with those percentages.⁶⁷ If the defendant was responsible for seventy-five percent of the plaintiff's damages, he should pay only seventy-five percent. Proper implementation of this principle would result in a more equitable and effective fault system.⁶⁸ The liability of each wrong-

⁶⁵*Id.* at 477.

⁶⁶*Id.* at 476.

⁶⁷See V. SCHWARTZ, *supra* note 5, § 3.2, at 46.

⁶⁸In *Hoffman v. Jones*, 280 So. 2d 431, 437 (Fla. 1973), the court stated:

Perhaps the best argument in favor of the movement from contributory to comparative negligence is that the latter is simply a more equitable

doer, under this system, would more accurately reflect his responsibility.⁶⁹ Such change, however, was not acceptable to the 19th century judicial and legislative system.

In the early 20th century, criticism of the "all or nothing" approach to liability began to emerge.⁷⁰ Because contributory negligence was based upon the protection of industry, particularly the transportation industry of the 19th century, the changes in social customs, which by mid-20th century demanded more protection for the consumer and the individual,⁷¹ demanded a change in the strict adherence to the total bar of contributory negligence.⁷² Some protection was available through the use of the doctrine of last clear chance. This doctrine, however, merely shifts a total loss from one party to another without consideration of the respective percentage of responsibility.⁷³

system of determining liability and a more socially desirable method of loss distribution. The injustice which occurs when a plaintiff suffers severe injuries as the result of an accident for which he is only slightly responsible, and is thereby denied any damages, is readily apparent. The rule of contributory negligence is a harsh one which either places the burden of a loss for which two are responsible upon only one party or relegates to Lady Luck the determination of the damages for which each of two negligent parties will be liable. When the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of the total damages he has caused the other party.

⁶⁹ See V. SCHWARTZ, *supra* note 5, § 21.2, at 340.

⁷⁰ See Mole & Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 333 (1932); Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROB. 476, 482-83 (1936). See also V. SCHWARTZ, *supra* note 5, § 1.4, at 12-13.

⁷¹ As explained by Schwartz:

Modern defendants do not need to be protected from the harms they negligently cause as did the infant industries of the early nineteenth century Today in light of the fact that most enterprises are insured against liability, the need to protect enterprise does not justify putting the entire cost of the accident on the contributorily negligent plaintiff.

V. SCHWARTZ, *supra* note 5, § 21.2, at 339-40.

⁷² In *Hoffman v. Jones*, 280 So. 2d 431, 436 (Fla. 1973), the court stated:

The contemporary conditions must be met with contemporary standards which are realistic and better calculated to obtain justice among all of the parties involved, based upon the circumstances applying between them at the time in question. The rule of contributory negligence as a complete bar to recovery was imported into the law by judges. Whatever may have been the historical justification for it, today it is almost universally regarded as unjust and inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of the other party to produce the loss. If fault is to remain the test of liability, then the doctrine of comparative negligence which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise.

⁷³ W. PROSSER, *supra* note 6, § 66, at 433.

Early in the 20th century, legislators responded by enacting specific statutes limiting the effect of contributory negligence.⁷⁴ By 1920, Congress had enacted the Federal Employer's Liability Act,⁷⁵ the Jones Act,⁷⁶ and the Death on the High Seas Act,⁷⁷ all providing that the contributory negligence of the plaintiff would not bar his action, but would only reduce his recovery in proportion to his negligence. As early as 1910, the state legislatures began to adopt comparative negligence standards.⁷⁸ Now approximately two-thirds of the states have adopted some type of comparative fault.⁷⁹ Comparative fault principles are found in a considerable number of foreign countries including Canada, Austria, France, Germany, Portugal, Switzerland, Italy, China, Japan, Poland, Russia, and Turkey.⁸⁰ England, the country which originated contributory negligence as a complete bar to recovery, now recognizes comparative fault.⁸¹

Advocates of traditional negligence theory contend that, without specific legislative enactments, comparative fault can not be adopted.⁸² Three jurisdictions have adopted comparative fault by judicial decision despite such contentions.⁸³

In 1973, the Florida Supreme Court, in *Hoffman v. Jones*,⁸⁴ rejected the complete bar of contributory negligence in favor of a pure form of comparative fault. Although the legislature of Florida had failed to pass proposed legislation for the enactment of comparative fault, the court found this to be no obstacle because the problem was determined to be judicial.⁸⁵ The court found that the doctrine of contributory negligence was not so clearly a part of the common law that it was included in Florida statutory law by virtue of the statute

⁷⁴See V. SCHWARTZ, *supra* note 5, § 1.4, at 11.

⁷⁵Federal Employers' Liability Act of 1908, ch. 149, § 3, 35 Stat. 66 (codified at 45 U.S.C. § 55 (1970)).

⁷⁶Act of June 5, 1920, ch. 250, § 33, 41 Stat. 1007 (codified at 46 U.S.C. § 688 (1970)).

⁷⁷Act of March 30, 1920, ch. 111, § 6, 41 Stat. 537 (codified at 46 U.S.C. § 766 (1970)).

⁷⁸Act of April 16, 1910, ch. 135, § 1, 1910 Miss. Laws 125 (codified at MISS. CODE ANN. § 11-7-15 (1972)).

⁷⁹See note 5 *supra*.

⁸⁰Maloney, *From Contributory To Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135, 154 (1958), noted in *Hoffman v. Jones*, 280 So. 2d 431, 436 (Fla. 1973).

⁸¹Maloney, *supra* note 80, at 154.

⁸²See, e.g., *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 813, 532 P.2d 1226, 1232, 119 Cal. Rptr. 858, 864 (1975).

⁸³*Kaatz v. State*, 540 P.2d 1037 (Alaska 1975); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1225, 119 Cal. Rptr. 858 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

⁸⁴280 So. 2d 431 (Fla. 1973).

⁸⁵*Id.* at 438.

adopting the common law as the law of the state.⁸⁶ Thus, the doctrine was judicially-created and subject to judicial reconsideration.

Following the Florida precedent, the California Supreme Court, in *Li v. Yellow Cab Co.*,⁸⁷ adopted a pure form of comparative fault. That court there faced the additional obstacle of a recent legislative enactment adopting contributory negligence as a complete defense. The defendant argued that the court could not judicially adopt the comparative fault doctrine because the doctrine of separation of powers required that any change come from the legislature. The court held that such a result was not intended by the legislature in enacting the Civil Code: "[R]ather it was the intention of the Legislature to announce and formulate existing common law principles and definitions for purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution."⁸⁸ Thus, the enactment did not preclude further judicial development of the law.

The Alaska Supreme Court followed *Hoffman* and *Li* in the adoption of a pure form of comparative fault in *Kaatz v. State*.⁸⁹ The court stated: "[C]ontinued adherence to the contributory negligence rule, absent legislative change, represents judicial inertia rather than a reasoned consideration of the intrinsic value of the rule."⁹⁰

These cases serve as examples that the law of negligence in this area may be modified by judicial action to fit society's needs.

VI. THE STATUS OF COMPARATIVE FAULT IN INDIANA

During 1977 a comparative fault bill was proposed in Indiana, but failed to become law.⁹¹ Prior to this proposed legislation, the Indiana Court of Appeals, in *Birdsong v. ITT Continental Baking Co.*,⁹² rejected the application of comparative negligence. In *Birdsong*, the plaintiff was injured when his vehicle was hit in the rear by the defendant. The defendant contended that the plaintiff was contributorily negligent because he had failed to use a seat belt. The trial court instructed the jury that any damages incurred by the

⁸⁶*Id.* at 435 (construing FLA. STAT. § 2.01 (1973)).

⁸⁷13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

⁸⁸*Id.* at 814, 532 P.2d at 1233, 119 Cal. Rptr. at 865.

⁸⁹540 P.2d 1037 (Alaska 1975).

⁹⁰*Id.* at 1049. The court was also influenced by *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975) in which the United States Supreme Court replaced the historic rule of divided damages in maritime collision cases with a pure comparative negligence rule. In response to argument that such a change was the province of Congress, the Court stated that admiralty law was an area which Congress left to the Court, and that "[n]o statutory or judicial precept precludes a change in the rule of divided damages . . ." *Id.* at 409.

⁹¹H.B. 1958, 100th Gen. Assembly, 1977 IND. HOUSE J. 129.

⁹²160 Ind. App. 411, 312 N.E.2d 104 (1974).

plaintiff as a result of his failure to wear the seat belt were not recoverable. The court of appeals reversed, stating that the instruction was based upon comparative negligence principles that are not recognized in Indiana.⁹³

Although the "seat belt" defense has been rejected in most jurisdictions,⁹⁴ Wisconsin⁹⁵ and New York⁹⁶ recognize the defense. In New York, the plaintiff's recovery is reduced by the *amount of injury* attributable to the non-use of his seat belt.⁹⁷ In Wisconsin the plaintiff's recovery is reduced by the *percentage of fault* attributable to the non-use of his seat belt.⁹⁸ New York considers the seat belt defense one of apportionment of damages while Wisconsin apportions fault. Dean Twerski suggests a third approach to the seat belt defense. First, there should be apportionment of damages attributable to the original collision and the damages attributable to the non-use of the seat belt (add-on injury), then the fault between the plaintiff and defendant as to those add-on injuries should be compared.⁹⁹ Under Dean Twerski's analysis the defendant would be responsible for all of the original collision and a percentage attributable to his fault for the add-on injuries.¹⁰⁰

In refusing to accept the seat belt defense, the *Birdsong* court cited three prior Indiana decisions refuting comparative negligence.¹⁰¹ All three cases merely state that comparative negligence does not apply in Indiana and do not provide any explanation or analysis for the rejection of the doctrine.¹⁰² The judicial rejection of comparative negligence seems to have originated in *Pennsylvania v. Roney*,¹⁰³ in which the court stated: "We agree with counsel that the doctrine of comparative negligence is unsound."¹⁰⁴ The *Roney* court gave absolutely no explanation of the statement. Indiana law, therefore, is relatively void of a rationale for either the rejection or adop-

⁹³*Id.* at 413, 312 N.E.2d at 106.

⁹⁴See Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797, 820 & n.7 (1977).

⁹⁵*Bentzler v. Braun*, 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

⁹⁶*Spier v. Barker*, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974).

⁹⁷*Id.* at 449-50, 323 N.E.2d at 167, 363 N.Y.S.2d at 920.

⁹⁸34 Wis. 2d at 385, 149 N.W.2d at 639.

⁹⁹See Twerski, *supra* note 94, at 821-22.

¹⁰⁰*Id.*

¹⁰¹160 Ind. App. at 413 (citing *Hoesel v. Cain*, 222 Ind. 330, 53 N.E.2d 165 (1944); *Pennsylvania Co. v. Roney*, 89 Ind. 453 (1883); *Lewis v. Mackley*, 122 Ind. App. 247, 99 N.E.2d 442 (1951)).

¹⁰²*Hoesel v. Cain*, 222 Ind. at 337, 53 N.E.2d at 168; *Pennsylvania Co. v. Roney*, 89 Ind. at 455; *Lewis v. Mackley*, 122 Ind. App. at 253, 99 N.E.2d at 445.

¹⁰³89 Ind. 453 (1883).

¹⁰⁴*Id.* at 455.

tion of comparative fault as a basis of distribution of the costs of accidental injury in tort law. In light of the precedents of *Hoffman*, *Li*, and *Kaatz*, it would be appropriate for Indiana courts to reconsider the rejection of comparative negligence.

VII. PROBLEMS OF ADMINISTRATION

Considerable resistance to comparative negligence is based upon the difficulties in determining the specific percentage of fault attributable to the parties.¹⁰⁵ Sufficient guidelines for the jury, through the use of special verdicts and interrogatories, will overcome most problems.¹⁰⁶ Defendants have argued that comparative negligence will thwart settlements and raise insurance rates,¹⁰⁷ and will, therefore, be detrimental to the consumer. Recent studies indicate, however, that settlements can be achieved as readily under a comparative negligence system as under the contributory negligence rule,¹⁰⁸ and, in addition, other research has indicated that the effect on insurance rates is minimal.¹⁰⁹

Additional objections to comparative negligence have been based upon the confusion created by established doctrines of assumption of risk and last clear chance.¹¹⁰ Opponents of comparative negligence state that assumption of risk and the last clear chance doctrines do not readily fit into the percentage-of-fault framework of comparative negligence, and, even if some type of comparative negligence were adopted, both assumption of risk and

¹⁰⁵This argument was considered in *Li v. Yellow Cab Co.*, 13 Cal. 3d 894, 822-27, 532 P.2d 1226, 1239-42, 119 Cal. Rptr. 858, 871-74 (1975).

¹⁰⁶The *Li* court stated:

Guidelines might be provided the jury which will assist it in keeping focussed upon the true inquiry . . . and the utilization of special verdicts or jury interrogatories can be of invaluable assistance in assuring that the jury has approached its sensitive and often complex task with proper standards and appropriate reverence.

Id. at 824, 532 P.2d at 1240, 119 Cal. Rptr. at 872 (citations omitted). For a thorough discussion of the practical measures which can be taken to overcome this problem, see V. SCHWARTZ, *supra* note 5, § 17.4.

¹⁰⁷See, e.g., *Kaatz v. State*, 540 P.2d 1037, 1048 (Alaska 1975).

¹⁰⁸See Rosenberg, *Comparative Negligence in Arkansas: A Before and After Survey*, 36 N.Y. S.B.J. 457. The author concludes: "The 98 lawyer responses show by a distinct consensus that the new rule [comparative negligence] had a discernible effect upon the settlement rate in these cases. Generally speaking, the effect was 'favorable,' in the sense that more settlements were promoted than under the former rule." *Id.* at 466.

¹⁰⁹See Peck, *Comparative Negligence And Automobile Liability Insurance*, 58 MICH. L. REV. 689, 717-18, 726-28 (1960).

¹¹⁰These arguments were also considered in *Li v. Yellow Cab Co.*, 13 Cal. 3d at 824-25, 532 P.2d at 1240-41, 119 Cal. Rptr. at 872-73.

last clear chance should be complete bars to recovery.¹¹¹ These objections have caused the courts some doctrinal difficulty. With respect to last clear chance, several jurisdictions have abolished the "all or nothing" approach and now treat such conduct as only one factor in assessing each party's fault.¹¹² Those jurisdictions that have retained the doctrine have limited its scope.¹¹³ Last clear chance developed as a palliative for the hardships of traditional contributory negligence.¹¹⁴ With the adoption of the more equitable comparative fault system, such hardships need no longer exist.¹¹⁵ Furthermore, to allow plaintiff to recover his entire damages, despite his own contributing negligence, because the defendant had the last clear chance would provide plaintiff with a windfall and be inconsistent with the principles of comparative fault.

With respect to assumption of risk, the predominant approach in comparative fault states has been to merge the defense with contributory negligence, insofar as they overlap.¹¹⁶ Thus, the general trend is to treat assumption of risk and last clear chance as subcategories of contributory negligence. As such, the conduct relevant to establishing these defenses is to be considered in the total percentage of fault allocated to a party. For example, if the plaintiff consented to undertake a certain risk, his conduct in so doing would be one factor to be considered in assessing his share of responsibility.

Four distinct types of comparative fault have been offered:¹¹⁷ (1) *Pure comparative negligence*.—This form of comparative negligence allows the plaintiff to recover the exact percentage of defendant's fault whether it be one percent, one hundred percent or anywhere in between.¹¹⁸

(2) *The plaintiff's negligence not as great as defendant's*.—Most jurisdictions have adopted a "modified comparative fault" system which allows the plaintiff recovery only if his fault is

¹¹¹*Id.*

¹¹²See *Macon v. Seaward Const. Co.*, 555 F.2d 1 (1st Cir. 1977) (applying New Hampshire law); *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975); *Li v. Yellow Cab Co.*, 13 Cal. 3rd 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Cushman v. Perkins*, 245 A.2d 846 (Me. 1968).

¹¹³See V. SCHWARTZ, *supra* note 5, § 7.2, at 139-40.

¹¹⁴See W. PROSSER, *supra* note 6, § 66, at 426; V. SCHWARTZ, *supra* note 5, § 7.2, at 139.

¹¹⁵*Li v. Yellow Cab Co.*, 13 Cal. 3rd at 824, 532 P.2d at 1240, 119 Cal. Rptr. at 872 (citing V. SCHWARTZ, *supra* note 5, § 7.2, at 137-39; Prosser, *supra* note 7, at 27).

¹¹⁶See note 42 *supra* and accompanying text.

¹¹⁷Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 374 & n.6 (1978).

¹¹⁸See V. SCHWARTZ, *supra* note 5, § 3.2, at 46.

less than that of the defendant. Thus, if the plaintiff is forty-nine percent at fault and the defendant fifty-one percent at fault, the plaintiff can recover forty-nine percent of his damages; however, if the plaintiff's fault reaches fifty percent, he recovers nothing.¹¹⁹

(3) *Plaintiff's negligence "not greater than defendant's."*—A few jurisdictions allow the plaintiff to recover if his fault equals, but does not exceed the fault of the defendant. Thus, the plaintiff can recover fifty percent of his damages if he and the defendant are both found to be fifty percent at fault, but once the plaintiff's fault reaches fifty-one percent he can recover nothing.¹²⁰

(4) *Plaintiff's negligence slight in comparison with defendant's gross negligence.*—Some jurisdictions in the past have, in a loose frame-work, allowed the plaintiff to recover his entire loss if his percentage of negligence was only slight in comparison to defendant's gross negligence.¹²¹

The reason for four different systems of comparative negligence is that legislatures have been hesitant to abolish the "all or nothing" rule of negligence.¹²² All forms, other than pure comparative fault, can be considered compromises which attempt to retain some of the common law principles. For example, the "fifty percent system," where the plaintiff is deprived of recovery if his fault equals that of the defendant, is reminiscent of the contributory negligence bar, the premise of which was that when both parties were at fault the loss should remain on the injured party.¹²³ The general trend seems to favor the pure form of comparative negligence, as indicated by the recent adoption of pure "comparative fault" by the National Conference of Commissioners on Uniform State Laws.¹²⁴

VIII. THE UNIFORM COMPARATIVE FAULT ACT

Any serious consideration, by either the Indiana legislature or the Indiana Supreme Court, of adopting a comparative fault system should include close examination of the Uniform Comparative Fault Act.¹²⁵ This Act adopts a "pure form" of comparative fault, *i.e.*, it does not limit the plaintiff's recovery when his fault equals or ex-

¹¹⁹*Id.* at § 3.5, at 75. According to Schwartz, "[o]f the thirty-two states that had adopted comparative negligence by 1977, twenty-three selected a 50% system." *Id.* § 3.5, at 22 (Supp. 1978).

¹²⁰*Id.* § 3.5, at 75 (1974 & Supp. 1978).

¹²¹*Id.* § 3.4, at 64.

¹²²*Id.* § 3.5, at 78.

¹²³See note 19 *supra* and accompanying text.

¹²⁴The Uniform Comparative Fault Act was recommended for enactment in all states by the National Conference on Uniform State Laws in 1977.

¹²⁵For an excellent examination of the Act, see Wade, *supra* note 117.

ceeds the fault of the defendant.¹²⁶ The Act applies to negligence, warranty, and strict liability actions, but is not intended to apply to breaches of express or implied warranties in contract where the buyer has merely lost the benefit of his bargain.¹²⁷ The plaintiff's fault, which diminishes his recovery, includes negligence, recklessness, unreasonable assumption of risk, misuse and the unreasonable failure to avoid or mitigate damages.¹²⁸ Judgment may be entered against each of several joint *tortfeasors* for the full amount of plaintiff's damages less his fault. The amount of each defendant's responsibility is indicated in the judgment, and, if one joint tortfeasor's share is uncollectable, that amount is distributed proportionally among all parties at fault including the plaintiff.¹²⁹ Provisions for set-off and counterclaims are set forth in the Act.¹³⁰ Contribution among the tortfeasors is based upon their "equitable share of the obligation."¹³¹ Thus, any release given to a tortfeasor by the plaintiff will reduce the plaintiff's ultimate recovery by the released party's equitable share of the obligation.¹³² The percentage of fault of each party includes the nature and conduct of the parties and the causal relation of such conduct to the injury received by the plaintiff.¹³³

Although the Act may present problems in some areas,¹³⁴ it appears to formulate a both theoretical and practical approach to the apportionment of damages among the parties for injuries resulting from numerous types of tortious conduct.

IX. CONCLUSION

The common law approach to tort law, with its "all or nothing" rationale, is a remnant of archaic social demands prominent during the last century. Indiana's adherence to such concepts is unrealistic in view of the alternative of comparative fault which provides a logical and equitable basis for distribution of damages. Ample ex-

¹²⁶UNIFORM COMPARATIVE FAULT ACT § 1(a) (1977).

¹²⁷Wade, *supra* note 117, at 374.

¹²⁸UNIFORM COMPARATIVE FAULT ACT § 1(b) (1977).

¹²⁹*Id.* § 2.

¹³⁰*Id.* § 3.

¹³¹*Id.* § 4(a).

¹³²*Id.* § 6.

¹³³*Id.* § 2(b).

¹³⁴Dean Twerski suggests that application of comparative fault to causes of action based upon "products liability" may have some theoretical difficulties. See Twerski, *supra*, note 94, at 821. Dean Wade, however, favors the use of comparative fault. See Wade, *supra* note 117, at 386-88. In addition, the use of comparative fault raises serious problems with contribution among multiple defendants and third-party suits by an employee against manufacturers of capital machinery where Workmen's Compensation provides immunity to an employee. *Id.* at 388-91.

amples from other jurisdictions provide a safe and easy path to follow. Theoretical problems with assumption of risk and last clear chance defenses can be surmounted; assumption of risk can be merged with the doctrine of contributory negligence or the duty element of negligence,¹³⁵ and last clear chance can be allocated to a percentage factor of fault with little difficulty.¹³⁶ Application of comparative fault theories outside of negligence, such as in the area of strict liability, may prove more difficult, however, such difficulties have been overcome in some jurisdictions.¹³⁷

The practical application of comparative fault in the trial court system does not seem overly burdensome. As was stated in *Hoffman v. Jones*:

We feel the trial judges of this State are capable of applying this comparative negligence rule without our setting guidelines in anticipation of expected problems. The problems are more appropriately resolved at the trial level in a practical manner instead of theoretical solution at the appellate level. The trial judges are granted broad discretion in adopting such procedure as may accomplish the objectives and purposes expressed in this opinion.¹³⁸

For those who defend the present Indiana law and argue that contributory negligence is not harsh in its practical application because juries tend to disregard the court's instructions on the law in an effort to afford some measure of rough justice to injured parties, Dean Maloney's response seems applicable:

[T]here is something basically wrong with a rule of law that is so contrary to the settled convictions of the lay community that laymen will almost always refuse to enforce it, even when solemnly told to do so by a judge whose instructions they have sworn to follow. . . . [T]he disrespect for law engendered by putting our citizens in a position in which they feel it is necessary to deliberately violate the law is not something to be lightly brushed aside; and it comes ill from

¹³⁵See notes 36-42, 116 *supra* and accompanying text.

¹³⁶See notes 113-16 *supra* and accompanying text.

¹³⁷See *Butand v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976); *Daly v. General Motors Corp.*, 20 Cal. 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976).

¹³⁸280 So. 2d at 439-40, *quoted with approval in Li v. Yellow Cab Co.*, 13 Cal. 3d at 826-27, 532 P.2d at 1242, 119 Cal. Rptr. at 874.

the mouths of lawyers, who as officers of the courts have sworn to uphold the law, to defend the present system by arguing that it works because jurors can be trusted to disregard that very law.¹³⁹

The time is ripe for Indiana to join the 20th century.

¹³⁹Maloney, *supra* note 80, at 151-52.