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The Indiana Comparative Fault Act at First (Lingering) Glance

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I. Introduction

The principle of comparative fault will become part of Indiana tort law on January 1, 1985.[1] On that date, an injured party who was partially at "fault"[2] for his injury will no longer be subject to the complete defense of contributory negligence in a tort action. Instead, a plaintiff whose conduct satisfies the statutory definition of "fault" will be entitled to recover damages reduced in proportion to that fault. If the plaintiff's "fault" is assessed at greater than 50%, however, recovery will be totally barred. The Indiana Comparative Fault Act is, therefore, not a complete acceptance of the comparative fault principle because the common law contributory negligence bar continues to operate for some injured plaintiffs who are not wholly responsible for their injuries. In choosing to relegate contributory negligence to a subordinate role in tort litigation, however, the General Assembly has taken an important step and has brought Indiana in line with forty-one other states,[3] the federal government, and every other common law system in the world.

Because Indiana courts have continually deferred to the legislature and have refused to implement comparative fault on their own,[4] it was

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[1]Act of Apr. 21, 1983, Pub. L. No. 317-1983, 1983 Ind. Acts. 1930 (codified as amended at Ind. Code § 34-4-33-13 (Supp. 1984)).

[2]The statutory definition of "fault" departs significantly from general common law concepts of fault by including conduct that may not be, strictly speaking, characterized as faulty behavior on plaintiff's part. *See infra* notes 32-46 and accompanying text. In this Article, reference to a finding of "fault" under the Indiana Comparative Fault Act will be distinguished from common law fault by the use of quotation marks.

[3]Those forty-one states include Georgia and Tennessee, two states with rather unique approaches to comparative fault. See the discussions of those jurisdictions in V. Schwartz, Comparative Negligence § 1.5, at 18-19 (1974); H. Woods, The Negligence Case: Comparative Fault §§ 4.1, 4.3 (1978).

[4]State v. Ingram, 427 N.E.2d 444, 448 (Ind. 1981); Rhinebarger v. Mummert, 173 Ind. App. 34, 41, 362 N.E.2d 184, 187 (1977) (Buchanan, J., concurring).

inevitable that the legislature would finally act. The increasing acceptance of apportionment of liability commensurate to fault in other states during the 1960's and 1970's had made Indiana one of the last remaining strongholds for the anachronistic doctrine of contributory negligence.[5] Finally, by 1982, the tide of public policy favoring proportionate liability was strong enough to persuade Indiana legislators that passage of a comparative fault act was necessary.

Although statutory adoption of apportionment of liability may have been inevitable, the precise system accepted by the General Assembly was not. A pure comparative fault system was theoretically feasible, has been the choice in several jurisdictions,[6] and is the form recommended by the National Conference of Commissioners on Uniform State Laws.[7] However, political compromises necessary to enact some form of apportionment of liability militated against whatever theoretical chances a pure system may have had. In selecting one of the several available models of modified systems, the Indiana legislature adopted the "greater than 50%" system, the unique features of which this Article will examine. Analysis of Indiana's Act will include: (1) functional considerations, focusing on how the statute will operate and how tort litigation will be affected by its operation[8] and (2) policy considerations, focusing on whether the apparent effects of the Act are intended and whether those effects are desirable.[9] Because the statute will not completely displace common law tort principles, the discussion suggests possible interpretations and ramifications of the Act in light of the common law. This Article will demonstrate that these interpretations raise certain questions which warrant immediate legislative attention.[10] This Article will also raise other questions which should be left for resolution through careful consideration in case law.[11]

II. General Features of the Act

A. Operation of the Apportionment Principle

The Act purports to apply to "any action based on fault"[12] arising

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[5]*See generally,* V. Schwartz, *supra* note 3, § 1.2, at 2-3; H. Woods, *supra* note 3, at § 1.11.

[6]The following states have adopted, either by statute or judicial decision, a pure form of comparative negligence: Alaska, California, Florida, Illinois, Louisiana, Mississippi, New Mexico, New York, Rhode Island, and Washington. H. Woods, *supra* note 3, at § 4.2 (1978 & Supp. 1982).

[7]Unif. Comparative Fault Act § 1, 12 U.L.A. 36 (Supp. 1984) (*See* Commissioners' Prefatory Note at 35-36) [hereinafter cited as Uniform Act].

[8]*See infra* notes 12-26, 76-85 and accompanying text.

[9]*See infra* notes 27-55, 306-406 and accompanying text.

[10]*See infra* notes 56-75, 86-153, 154-162, 199, 306-406 and accompanying text.

[11]*See infra* notes 81, 86-153, 163-88, 192-98, 206-08, 237-39, 304-05, 449-501 and accompanying text.

[12]Ind. Code § 34-4-33-1(a) (Supp. 1984). Although the statutory language appears

from "injury or death to person or harm to property."[13] Apportionment applies whether the basis of liability is negligent conduct or willful, wanton, or reckless conduct.[14]

In any two-party action to which the Act applies, the statute requires the trial judge to instruct the jury to first assess the "percentage of fault of the claimant, of the defendant and of any person who is a nonparty."[15] If the jury assesses the claimant's fault at greater than 50% of the "total fault," the judge will instruct the jury to return a defendant's verdict.[16] However, if the claimant's fault is assessed at 50% or less, the judge will instruct the jury to ascertain the total amount of damages without regard to the claimant's fault.[17] Finally, the jury will multiply the total damage figure by the percentage of fault assessed to the defendant in the first step and render a verdict for the claimant equal to the product of that multiplication.[18]

In many cases, the "total fault" will simply be divided between the plaintiff and the defendant. For example, if the plaintiff has incurred a $10,000 injury, and the plaintiff has been assessed 30% of the fault, then the jury will multiply $10,000 by the defendant's 70% fault and enter a verdict against the defendant for $7,000. If the plaintiff had been found free of "fault," then the verdict would have been for the full $10,000. If the plaintiff had been assessed 51% of the fault, then the "greater than 50% rule" would totally bar the plaintiff's recovery.

When multiple actors are involved, the procedure for rendering a verdict is similar. The jury first determines the percentage of fault for each actor, including the plaintiff.[19] If the plaintiff's "fault" is greater than 50% of the "total fault" which caused the harm, then the defendants are not liable.[20] If the plaintiff's "fault" is 50% of the "total fault" or less, then the jury will determine its verdict as described in the two-party situation.[21] In certain cases, the jury is instructed to determine the "fault" of "nonparties" as well as those named in the action.[22] Consequently, in a proper case, the combined percentages of the named

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all-inclusive, it is modified by section 34-4-33-8 which states that the Act "does not apply in any manner to tort claims against governmental entities or public employees" brought under the Indiana Tort Claims Act. *See infra* notes 189-99 and accompanying text.

[13]IND. CODE § 34-4-33-1(a).

[14]*Id.* § 34-4-33-2(a).

[15]*Id.* § 34-4-33-5(a)(1). As will be seen in later discussion, the jury will consider the "fault" of a "nonparty" only in certain cases. *See infra* text accompanying notes 200-41.

[16]IND. CODE § 34-4-33-5(a)(2).

[17]*Id.* § 34-4-33-5(a)(3).

[18]*Id.* § 34-4-33-5(a)(4).

[19]*Id.* § 34-4-33-5(b)(1).

[20]*Id.* § 34-4-33-5(b)(2).

[21]*Id.* § 34-4-33-5(b)(3), (b)(4).

[22]*Id.* § 34-4-33-5(b)(1).

parties may total less than 100%. A "nonparty" is anyone subject to liability for the plaintiff's injury who has not been joined in the action.[23] The definition specifically excludes the plaintiff's employer. The "nonparty" definition was added by the 1984 amendments[24] in an attempt to clear up a troublesome feature of the original Act concerning the effect an employer's fault would have upon some plaintiffs' right of recovery.[25]

The jury's assessment of "fault" for persons not named in the action can be crucial even though the named defendant's "fault" exceeds the fault of the plaintiff. For example, if the plaintiff has incurred a $10,000 injury and two defendants have each been assessed 10% of the "fault" and one nonparty actor has been assessed 20% of the "fault," then the named defendants will not be liable. The plaintiff's 60% "fault" is greater than 50% of the "total fault" involved in the incident which caused the injury. However, if two nonparty actors have each been assessed 20% of the "fault," and the named defendants' "fault" has been assessed at 10% each, then the plaintiff's 40% "fault" is short of the "greater than 50%" threshold and the plaintiff will recover from the named defendants. Even though the combined percentages of the named defendants is only 20% and the plaintiff was assessed more "fault" than these defendants, each defendant is liable for $1,000.

The Act's fundamental concept is that a plaintiff who is in some way partly responsible for his own injury is entitled to compensatory damages reduced in proportion to the plaintiff's own fault. The concept is not applicable, however, to all cases. If the plaintiff has contributed a major element of culpable conduct, then recovery will be barred altogether. That major element of fault is established at "greater than 50% of the total fault" producing the injury.[26] The Act, therefore, is not a clear break from the traditional contributory negligence doctrine because the door of recovery is opened only for some plaintiffs who are partly responsible for their injuries.

The legislature should open the door completely rather than continue half-heartedly embracing comparative fault. The conceptual ambivalence of a statute that adopts the apportionment principle while retaining the total bar of contributory negligence is inherently complex, and fraught with potential for confusion. Even though most legislatures have preferred adoption of some modification of the pure comparative fault principle,[27] no feature of the "greater than 50% rule" is legally more attractive

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[23] *Id.* § 34-4-33-2(a).

[24] Act of Mar. 5, 1984, Pub. L. No. 174-1984, 1984 Ind. Acts 1468.

[25] *See infra* notes 200-34 and accompanying text.

[26] IND. CODE § 34-4-33-5(a)(2), (b)(2).

[27] H. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT §§ 4.3-4.5 (1978 & Supp. 1982).

than the pure form. Once the apportionment principle has been accepted, limiting the principle to cases where defendants' acts are greater than 49% of the fault cannot be justified on grounds of administrative efficiency. Where a percentage point makes such a drastic difference, litigation is more likely to arise from the complexities inherent in this mongrel offspring of the apportionment principle and the contributory negligence principle than would arise from either of the two parent systems. Furthermore, much of the value of expanding the compensatory function of tort law, which has been an important justification for the move to comparative fault, is lost in the adoption of the "greater than 50% rule."[28]

The Indiana Act borrows heavily from the Uniform Comparative Fault Act adopted by the National Conference of Commissioners on Uniform State Laws.[29] The Uniform Act contemplates a pure system. Unfortunately, the Indiana General Assembly disregarded the main thrust of the model upon which it relied for many of its provisions. Apparently choosing to ignore the experiences of other jurisdictions which have successfully employed a pure system, it succumbed to the politically more attractive incremental step[30] and selectively adopted only part of the Uniform Act's language.

Limited as it is, the Indiana Act is, nevertheless, a step in the right direction. If political compromise was necessary to initiate the reform, the Act must be viewed as a success. Yet, the Act must also be considered a limited experiment with fault apportionment—an experiment which has long been considered a success in other settings. If it succeeds in Indiana it may lead to more comprehensive reform.

Important as the statute may be as an evolutionary step toward pure comparative fault, it contains some flaws, even as a modified system. Some of those flaws are produced by the cafeteria-style method of selecting parts of the Uniform Act and rejecting other parts.[31] There are other flaws which are more fundamental and bear no relationship to Uniform Act provisions.[32] Some flaws can and should be promptly corrected by the legislature. Others can await and may benefit from the slow tempering effects of the judicial process.

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[28]Expansion of the compensatory function under the "greater than 50%" rule may even prove to be largely illusory if the speculation that juries have long been applying an informal comparative negligence principle is true. J. Ulman, A Judge Takes the Stand 30-32 (1933). *Cf.* J. Frank, Courts on Trial 120-21 (1949). *See also* Keeton, *Creative Continuity in the Law of Torts*, 75 Harv. L. Rev. 463, 508 (1962).

[29]Uniform Act, *supra* note 7, § 1, at 36.

[30]*See generally* Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465, 494 (1953).

[31]*See infra* notes 35-75, 151-53, 306-406 and accompanying text.

[32]*See infra* notes 86-150, 190-99 and accompanying text.

B. Section 1: Coverage

Like the Uniform Act, the Indiana version governs "any action based on fault that is brought to recover damages for injury or death to person or harm to property."[33] Although the phrase is inelegant, the coverage of the Act seems fairly clear. Both Acts fail, however, to specifically include injuries to relational interests. If one assumes that the omission is attributable to the common failure to address these interests, was unintentional, and that the Act applies to such cases, no problems should arise.[34] No policy supports a system which would permit apportionment of fault when a plaintiff proves destruction of a fence, for example, but would deny apportionment of fault when a plaintiff proves destruction of a family relationship. The statute's coverage language should have simply included "any action based on fault" and avoided specifying the types of actions covered. The language is serviceable, though, as long as interpreting courts avoid a rigid construction which excludes tort actions not expressly and specifically excluded by the statute.

C. Section 2: "Fault" Defined

The types of actions that the Indiana Comparative Fault Act covers are obscured by the Act's definition of "fault."[35] The basic definitional stock is the Uniform Act's language, but that stock has been sprinkled with Indiana legal ingredients which add a distinct flavor to the finished potion. Both Acts define "fault" to include any act or omission that is negligent or reckless toward person or property; however, the Indiana Act adds "willful" and "wanton" to the types of acts and omissions covered by the fault definition.[36] The Indiana version also engrafts the phrase "but does not include an intentional act"[37] onto the definition, perhaps because of a concern that the addition of "willful" or "wanton" might produce confusion. Both Acts include "unreasonable assumption of risk not constituting an enforceable express consent,"[38] but following that phrase, the Indiana Act includes "incurred risk."[39] The Uniform Act includes conduct that "subjects a person to strict tort liability,"

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[33]IND. CODE § 34-4-33-1(1)(a).

[34]While a wrongful death claim or loss of consortium may well arise from "the injury or death of a person," the purpose of the action is to vindicate the invasion of the plaintiff's relational interest in the person hurt or killed. *See* Green, *Protection of the Family Under Tort Law,* 10 HASTINGS L.J. 237 (1959).

[35]IND. CODE § 34-4-33-2(a).

[36]*Compare* UNIFORM ACT, *supra* note 7, § 1(b), at 36, *with* IND. CODE § 34-4-33-2(a).

[37]IND. CODE § 34-4-33-2(a).

[38]*Id.;* UNIFORM ACT, *supra* note 7, § 1(b), at 36.

[39]IND. CODE § 34-4-33-2(a).

"breach of warranty," and "misuse of a product for which the defendant otherwise would be liable."[40] The Indiana Act omits these three phrases from the definition.[41] Finally, both Acts contain the phrase "unreasonable failure to avoid an injury or to mitigate damages."[42] In the process of attempting to identify the situations to which the Act applies, this "patchwork quilt" definition has clouded the general concept of fault.

The first section, for example, invokes the apportionment principle in "any action based on fault,"[43] a phrase which would cause most attorneys to expect intentional wrongdoing to be included by virtue of the heavy content of fault in such torts. The Act, however, has defined "fault" as something less than the common law concept of fault, since section two specifically excludes intentional acts.[44] This exclusion seems curious. The Act is, after all, a comparative *fault* statute, not a comparative *negligence* statute. The limitations may be partially justified by viewing it as a legislative attempt to add some balance to the Act's operation upon plaintiffs' and defendants' interests. By excluding intentional conduct from the definition, the legislature has denied the benefits of apportionment to one class of defendants who have brought major contributions of fault into the injurious incident.[45] The effect is similar to the denial of apportionment to plaintiffs who have contributed major proportions of "fault" to the incident.[46]

Significant potential for confusion enters this mixed-bag definition of "fault" with the inclusion of "incurred risk."[47] Some risk-incurring conduct, whether intentional or not, may not be faulty. The same

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[40]UNIFORM ACT, *supra* note 7, § 1(b), at 36.

[41]The Indiana General Assembly deleted the phrases "subjects a person to strict tort liability," "breach of warranty" and "misuse of a product for which the defendant otherwise would be liable" which appeared in the state's original Comparative Fault Act. *Compare* Act of Apr. 21, 1983, 1983 Pub. L. No. 317-1983, Sec. 1, § 2(a), 1983 Ind. Acts. 1930, *with* Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2(a), 1984 Ind. Acts 1468 (codified at IND. CODE § 34-4-33-2(a) (Supp. 1984)).

[42]IND. CODE § 34-4-33-2(a); UNIFORM ACT, *supra* note 7, § 1(b), at 36.

[43]IND. CODE § 34-4-33-1(a).

[44]A certain measure of "Humpty-Dumptying" has applied to this definition of "fault" THE FUNDAMENTALS OF LEGAL DRAFTING 13, 101-04, 106, 108-09 (1965).

[45]The limitation presumably also applies to plaintiffs whose intentional acts produce the injury. To the extent that the legislature contemplated the phrase as a limitation on plaintiffs, the balancing justification loses its force. Nevertheless, the limitation remains consistent with the notion that major contributions of fault by plaintiffs carry full accountability.

[46]This balancing argument can be pressed too far. The point raised in the previous footnote illustrates one instance where it weakens. Outside the context of the definitional exclusion of intentional acts, the balance clearly favors tortfeasors. Compare a tortfeasor who is 60% at fault with a plaintiff (in a different case) who is 60% at fault. The tortfeasor is liable in proportion to her fault. The plaintiff must accept total accountability for his injury.

[47]IND. CODE § 34-4-33-2(a).

proposition is true with respect to assumed risk, but the legislature included only "unreasonable assumption of risk not constituting an enforceable express consent" in the definition.[48] Common law concepts of fault do not easily embrace the notions that "fault" includes some but not all faulty conduct, and that the exclusion of intentional acts may not mean what it says. Still, if one views the definition section as merely a description of the circumstances that trigger apportionment, one can comprehend that certain sets of circumstances invoke the apportionment principle while others do not. However, viewing the statute as such a description is something entirely different from accepting the Act's "fault" as a redefinition of fault. Section two does not redefine fault at all, but should be viewed rather as a more detailed statement of section one's coverage.[49] The legislature should have combined sections one and two into a single coverage section rather than attempting to construct a special codified definition of fault.

If the only effect of section two were that one would have to reconstruct the section to understand it, then perhaps an informal understanding among judges and practitioners would foreclose difficulty in application. However, reading the first two sections in conjunction induces an interpretation that is at odds with the purported function of the Act and raises a spectre of misunderstanding. Strange as it may seem, the ultimate conclusion of that interpretation would be that the Act does not require comparison of fault, even though it declares otherwise, but rather that the Act requires the comparison of causation. This interpretation is produced by a combination of two otherwise unrelated factors. The first is the relatively difficult task of quantifying and apportioning fault when compared with the task of quantifying and apportioning causation. The second is the Act's attempt to control the types of actions and defenses to which apportionment applies by defining "fault" in a way that distorts the concept of fault.

Because the concept of fault is blurred by section two, one construing the statute may be inclined to search for a unitary concept enveloping

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[48] *Id.* This feature of the Act is discussed *infra* at notes 306-406 and accompanying text. It is sufficient here to note that the definition of fault includes contradictory elements.

[49] The section might be reconstructed, for example, into separate lists of actions and defenses, like the following, which invoke the apportionment principle:

Sec. 1 (a) This chapter governs any action based on:
(1) negligence, or
(2) willful, wanton or reckless misconduct that is brought to recover damages for injury or death to persons or harm to property.
(b) This chapter governs any defense based on:
(1) contributory negligence,
(2) willful, wanton or reckless misconduct,
(3) unreasonable assumption of risk or incurred risk not constituting an enforceable express consent, or
(4) unreasonable failure to avoid injury or to mitigate damages.

the new formulation without disturbing the traditional meanings of fault. The suggestion that section two could be understood to be simply a list of actions and defenses is an example of this search for reconciliation.[50] Conceptualizing a system of accountability is extremely difficult when that system purports to apportion liability on the basis of fault but fails to subject faulty actions to apportionment while affecting some actions that are faultless. The statement that the following propositions can both be true is almost incomprehensible: (1) intentional wrongful acts are not subject to apportionment, and (2) some intentional and perhaps even non-wrongful acts trigger the Act. Consequently, the difficulty in understanding the Act's definition of "fault" may be so great that courts, attorneys, and jurors will seize upon causation[51] as the reconciling concept and will compare the parties' causal contributions to the injury. A jury would accordingly assign liability proportionate to each actor's share of causation. Such a verdict would declare, in essence, that the plaintiff caused *X*% of his own injury and that the defendant caused *Y*% of the plaintiff's injury.

This cause-comparison interpretation should be rejected because it can easily produce damage awards which are not commensurate with the actors' contributions of fault. Causation factors may remain constant even though fault factors vary between similar fact situations. A pair of hypothetical cases illustrate this problem. In both cases the following facts exist: The plaintiff is a pedestrian who ran into the street and was struck by a car; the car was driven by the defendant; the accident was caused by the defendant's failure to watch for pedestrians and the plaintiff's failure to watch for automobiles; each party's behavior was an equal cause (50% each) of the plaintiff's injuries. In the first hypothetical, the plaintiff dashed into the street to save a young child, and the defendant was, on a dare, driving with her eyes closed. If the jury employs cause-comparison, it will reduce the plaintiff's damages by 50%. In the second case, the plaintiff was playing a daredevil game in which he tried to run as close to oncoming cars as possible, and the defendant's eyes were momentarily averted by a firecracker exploding near her car. Application of cause-comparison would mandate that the plaintiff's award be reduced by only 50% on the logic that each was an equal cause of the injury. Fault comparison should produce drastic differences in these results.[52]

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[50]*See supra* note 49 and accompanying text.

[51]This discussion refers to cause-comparison and not to proximate cause. Similar concerns are involved when juries are permitted to make determinations of proximate cause. *See infra* notes 68-75 and accompanying text.

[52]In the first example, the defendant's fault greatly exceeds that of the plaintiff. Plaintiff's damages, if reduced at all, would be diminished by much less than the 50% necessary if cause-comparison is utilized. Similarly, the defendant's fault in the second

Realistically, a jury might manipulate cause-comparison and not reach the same verdict in both cases, even though theoretically strict cause-comparison would mandate otherwise. The comparative fault system should not rely upon the jury's distortion of the object of the comparison, whatever it might be, to avoid the problems it poses for assigning accountability. Starkly drawn differences between hypothetical cases such as those just posed may not raise much concern. A cause-comparison approach poses the very real danger, however, that a party whose *fault* is minimal will bear a disproportionate share of liability because his proportion of the *cause* is great.

The Act's suggested jury instructions state:

> The jury shall determine the percentage of fault of the claimant, of the defendant, and of any person who is a nonparty. The percentage of fault figures of parties to the action may total less than one hundred percent (100%) if the jury finds that fault *contributing to cause* the claimant's loss has also come from a nonparty or nonparties.[53]

This jury instruction is insufficient to prevent the jury from applying cause-comparison, and in fact even suggests that it adopt cause-comparison. The instruction should be revised to remove the reinforcement for cause-comparison.[54] The Act already provides that "legal requirements of causal relation apply to: (1) fault as the basis for liability; and (2) contributory fault."[55] If the trial court carefully adhered to this admonition and the phrase "fault contributing to cause" were removed from the instruction there would then be no real reason to believe that the jury would be permitted to assign "fault" where no cause-and-effect relationship existed between the alleged culpable behavior and the injury. The point to be made here is not that the jury should not be instructed on matters of causation. It is, rather, that matters of causation should be carefully kept separated from the comparison of "fault." The Act permits modification of the statutory instructions by agreement of the parties. Absent legislative revision, counsel should submit instructions which carefully separate the issues of causal contribution and comparison of fault, and which emphasize the proper task of fault apportionment. For now, attorneys and courts must bear the responsibility for instructing juries to base their calculations on fault comparison to insure that juries are measuring the parties' fault, not their causation.

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example is insignificant. If fault-comparison is employed, the plaintiff's award would be zero.

[53]IND. CODE § 34-4-33-5(a) (emphasis added).

[54]The 1984 amendments improved the suggested jury instructions by striking the phrase "proximately contributing to cause" in another part of those instructions, but the idea of contribution to cause remains in the portion quoted in the text of note 53, *supra*.

[55]IND. CODE § 34-4-33-1(b).

D. *Sections 3 and 4: Statement of the Comparative Fault Principle*

1. Form and Substance: Some Problems.—Sections three and four,[56] the Act's main substantive clauses, are excellent examples of patchwork drafting and its resultant problems. Section three was essentially borrowed from the Uniform Act and, consequently, contains well-considered language which details the comparative fault principle.[57] Section four expresses Indiana's modification of that principle.[58] Had the Indiana legislature adopted the commissioners' suggestions for a model modified system,[59] this section would be clear and concise. Under the commissioners' system, sections three and four would have been combined into a direct statement of modified comparative fault.[60] The Indiana Act's technique of stating the operative concept of its formula as an exception to a principle which it does not fully embrace invites misunderstanding and interpretative arguments.

A troublesome aspect of section four is that the claimant's recovery is barred if his "fault is greater than the fault of *all persons* who proximately contributed to the claimant's damages."[61] The commissioners proposed a bar if the claimant's fault is "greater than the *combined* fault of *all other parties* to the claim."[62] Whereas the commissioners' version clearly requires that the fault of other actors be considered a single quantity, the Indiana Act suggests, by omitting the word "combined," that the claimant is barred if *each* actor's fault is not greater than the claimant's fault.[63] However, the Indiana jury instructions do require a comparison of the claimant's fault to the "*total* fault involved in the incident."[64] In light of these instructions, the legislature probably intended that the claimant's fault would be measured against the total or combined fault of all other actors. The substantive sections, however, should not rely upon later nonsubstantive sections for clarification, especially when the latter sections are subject to modification by agreement of the parties.

Section four is also needlessly complex. The section divides actions

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[56]IND. CODE §§ 34-4-33-3, -4.

[57]*Id.* § 34-4-33-3.

[58]*Id.* § 34-4-33-4.

[59]UNIFORM ACT, *supra,* note 7, § 1, at 36, 38.

[60]*Id.*

[61]IND. CODE § 34-4-33-4(a) (emphasis added).

[62]UNIFORM ACT, *supra,* note 7, § 1(a), at 36 (emphasis added).

[63]If this interpretation is accepted, then the claimant's recovery will be barred in some cases where the claimant would recover under the commissioners' "combined fault" language. For example, where the claimant's fault is 40% and the fault of three tortfeasors is 20% each, the claimant's 40% is greater than the fault of each tortfeasor. Consequently, the claimant's recovery would be barred under this interpretation. However, the claimant's 40% fault is less than the combined fault of the three tortfeasors. Thus, under the commissioners' version, the claimant would clearly be entitled to apportioned recovery.

[64]IND. CODE § 34-4-33-5(a)(2), (b)(2) (emphasis added).

based on fault into three classes: those brought against (1) a single defendant, (2) two or more defendants who may be treated as a single party, and (3) two or more defendants.[65] These three classes seem to cover all imaginable actions based on fault, yet the section separates the third class from the first two and repeats the modification of the apportionment principle. The same division and repetition appears in the suggested jury instructions. Since no intention to treat the various classes of defendants differently is apparent from the language of section four or the jury instructions,[66] this section would have been more clear and concise if it had simply stated that the modified apportionment principle applied to all actions based on fault.[67]

2. Problems of "Proximate Contribution".—Both subsections of section four contain the phrase, "claimant is barred from recovery if his contributory fault is greater than the fault of all persons whose fault *proximately* contributed to the claimant's damages."[68] The suggested jury instructions, however, nowhere mention "*proximate* contribution," and in fact a phrase containing those words was deleted from those instructions in the 1984 amendments to the Act.[69] This discrepancy suggests that the proximity of contribution is to be determined by the court and not by the jury. Section one's admonition that "[i]n an action brought under this chapter *legal* requirements of causal relation apply to: (1) fault as the basis for liability; and (2) contributory fault"[70] bolsters this

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[65]*Id.* § 34-4-33-4.

[66]The original Act contained a class of defendants called "primary" defendants, who were defendants whose liability was "based upon [their] own alleged act, omission, or product and not based upon [their] relationship to another defendant." Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 2(a), 1983 Ind. Acts 1930. The definition and triparite classification of section four created doubts about whether a lawsuit against only nonprimary defendants (as in the case of suit against an employer on a theory of vicarious liability) was covered by the apportionment principle. The 1984 amendments struck all references to "primary" defendants, Acts of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1-3, §§ 2, 4, 5, 1984 Ind. Acts 1468, 1468-69, and removed the cloud, but the 103rd General Assembly missed the opportunity to concisely and precisely state the modification principle.

[67]A better approach would have been to actively impose the principle upon cases for which it is intended to operate. For example:

> In actions governed by this chapter, if the claimant's fault is not greater than the combined fault of all other persons who contributed to claimant's injury, the judge or jury shall diminish the amount awarded as compensatory damages to the claimant in proportion to claimant's fault.

This suggested arrangement also borrows from the Uniform Act, but affirmatively states the principle in a way that acts upon the people charged with the responsibility for carrying it out. *See* Kirk, *Elements of Legal Drafting*, 1977 *A.B.A. Comm. Legal Drafting; Int'l Seminar & Workshop on the Teaching of Legal Drafting* 225, 240.

[68]IND. CODE § 34-4-33-4(a), (b) (emphasis added).

[69]*Compare* Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 5(a)(1), (b)(1), 1983 Ind. Acts 1930, 1931-32, *with* Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 3, § 5(a)(1), (b)(1), 1984 Ind. Acts 1468, 1469-70 codified at (IND. CODE § 34-4-33-5(a)(1), (b)(1) (Supp. 1984)).

[70]IND. CODE § 34-4-33-1(b) (emphasis added).

suggestion if the phrase means anything more than that anyone asserting the fault of another party must establish a cause-in-fact connection between the fault asserted and the alleged injury. If the Act requires that the court make some determination of proximate causation prior to submitting the case to the jury, the jury should not be permitted to apportion the "fault" of those actors whose fault did not proximately contribute to (proximately cause) the plaintiff's injury.

Complications can quickly set in if the court and counsel do not carefully separate matters of proximity of contribution from the case, and determine those issues prior to the jury's apportionment of "fault." To illustrate, assume a suit brought by *P* against actors *A, B,* and *C*. If *C*'s conduct, even though substandard and a causal factor in *P*'s injuries, does not satisfy the requirement of "proximate contribution," that conduct should not be considered by the jury in its computation of "fault." If the court does not carefully instruct the jury to disregard *C*'s conduct in its deliberations, it may very well include that conduct in its apportionment, since the suggested instructions do not alert the jury to the issue of proximity.[71] If *C* had been dismissed from the case and the jury had "reinstated" her for purposes of its calculations, however, that fact should be quickly ascertained and corrective measures taken under section nine of the Act.[72]

If the court postpones a ruling on proximate contribution, permitting the jury to apportion "fault" taking *C*'s conduct into account, some difficulties will arise in later removing *C* from the case. For example, assume that the jury returned findings that *P* was 33% at "fault," *A* was 12%, *B* was 15%, and *C* was 40%. Under these findings, *P*'s " 'fault' is not greater than fifty percent . . . of the total fault involved in the incident."[73] When it is determined that *C*'s "fault" did not *proximately contribute* to *P*'s injuries, then *P*'s "fault" *does* exceed 50% of the "fault of all persons whose fault proximately contributed" to the injury. All of the "proximately contributing fault" before the court is represented by *P*'s, *A*'s and *B*'s conduct. If the relative proportions of fault found by the jury are any guide, then an extrapolation can be made to determine the percentages of fault of each of those three parties. To do that, all of the contributing conduct, whether "proximate" or not, is first taken into account and converted to the

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[71]Indeed, the instructions require the jury to take the "fault" of a "nonparty" into account. In a case where *C* has not been sued or has been dismissed, her "fault" may slip back into the case through the "nonparty" language of the instructions. For a discussion of the nonparty defense, see *infra* text at notes 200-34.

[72]IND. CODE § 34-4-33-9. This section is discussed *infra* at notes 83-85 and accompanying text.

[73]The quoted language is taken from the proposed jury instructions, IND. CODE § 34-4-33-5(a)(2), (b)(2), discussed *infra* at notes 77-151 and accompanying text.

numeric value of 100. Then, removing *C*'s 40/100 "nonproximately contributing" conduct leaves 60/100 remaining as the "proximately contributing" conduct. Ratios produce the conclusion that *P*'s "fault" is 33/60 or 55%, *A*'s is 12/60 or 20%, and *B*'s is 15/60 or 25%. This conclusion means that *P*'s action should be barred for having exceeded 50% of the fault proximately contributing to the injury. Whether the jury would have reached that conclusion on its own had it been instructed to disregard *C*'s conduct is a matter of extreme speculation.

This analysis suggests yet another reason for avoiding the determination of proportions of *fault* as if they are proportions of *causal contribution*. In the hypothetical case just related, all of the parties contributed to the events leading to the plaintiff's injury. Each is connected in the cause-and-effect relationship necessary to establish an element of the plaintiff's cause of action. Yet, because of the operation of the particular proximate cause formula applicable to the circumstances,[74] *C*'s conduct is not part of the "total fault" from which the ultimate proportions are to be drawn. To prevent confusion, the jury's consideration of the case must be carefully controlled to assure that it understands why *C*'s acts are to be removed from the apportionment decision. The suggested jury instructions of the Act appear to be directed toward ordinary, uncomplicated cases, and should not be routinely adopted for multiple party cases complicated with issues of "proximate contribution."

Assuming that the legislature did not intend that the term "proximate contribution" have some legally significant effect or that the meaning of the phrase be equivalent to "proximate cause" does not eliminate the problems just discussed. Conscientious counsel will likely notice and use the difference in phrasing between the substantive clauses of section four and the suggested jury instructions when the interests of their clients turn upon competing interpretations. The controversy raised by differences in interpretation may also lead to confusion in jury argument and deliberation. If the phrase was not intended to carry legal significance, it should be deleted. After all, the word "proximate" is freighted with quite enough confusion and controversy in the context of proximate cause without importing it into the realm of comparative fault.[75]

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[74] *See generally,* L. GREEN, RATIONALE OF PROXIMATE CAUSE (1927); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 236 (4th ed. 1971); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 20.1 (1956).

[75] *See* the Preface to L. GREEN, *supra* note 74. The chart he attempted to draw for correcting the judicial course, in the twenty-nine years intervening between the publication of his book and the Harper and James treatise, and the forty-four years between his statements and Prosser's fourth edition, had apparently not successfully steered the judicial mind completely free of dangerous shoals.

E. Sections 5, 6, and 9: Controlling the Jury

1. Introduction.—Apportionment of "fault" and the consequent allocation of recoverable damages is a complex task dependent upon explicit findings of percentages, careful determination of "unadjusted" damages, and accurate computations in applying the percentages to the "unadjusted" damages. A much greater potential for jury confusion and error exists in a comparative fault system than in the traditional system where the liability issue is answered yes or no, and damages remain "unadjusted." Sections five and six of the Act attempt to reduce potential confusion by setting out detailed instructions and requirements concerning the verdict form. Section nine spells out court instructions in the event of jury computational errors. These sections comprise the procedural implementation for the substantive provisions of sections three and four.

Because no single, ideal procedure for administering a system of apportionment exists, problems may arise from these pronounced procedures. For example, a series of decisional and computational steps satisfactory in one fact situation may be a source of difficulty with different facts and a different jury. Determining the percentages of "fault" and the ultimate damages may be an easy task in a simple case where liability is not hotly contested. But a case which involves multiple parties, complex damages issues, and vigorously refuted fault allegations may require a wholly different means of organizing the case for the jury's consideration. The ensuing sections will discuss potential problems with the legislature's detailed jury controls.

Because sections five and six control the jury by shaping the format of its decisions, they may be viewed as having a substantive effect. For example, the instructions may be interpreted as an abolition of joint and several liability. The subsequent discussion will consider first the abolition interpretation and the arguments supporting that view, based upon the premise that separate verdicts against multiple defendants mean several[76] but not joint liability. Next, the discussion will address an interpretation favoring the retention of joint and several liability, based upon the premise that the provisions of the Act do not purport to affect joint liability. Finally, even if the jury instructions are construed as intending to abolish joint and several liability, the doubtful validity of those provisions is discussed.

2. The Alternative Instructions.—The Act prescribes a set of instructions for single defendant cases (or multiple defendants who may be treated as a single party),[77] and another set for all other multiple defendant cases.[78] The requirements of the two sets are virtually the

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[76]*See* BLACK'S LAW DICTIONARY 1232 (5th ed. 1979).

[77]IND. CODE § 34-4-33-5(a).

[78]*Id.* at § 34-4-33-5(b).

same.[79] In each case the jury is instructed to perform the following tasks in the order presented:

> (1) determine the percentage of fault for each party and nonparty;
> (2) return a verdict for defendant(s) if plaintiff's fault is found to be greater than 50%;
> (3) determine the total damages disregarding contributory fault if plaintiff's fault does not exceed 50%;
> (4) enter a verdict for the amount(s) obtained by multiplying the percentage(s) of fault of the defendant(s) by the damages figure obtained in step (3).[80]

A potential problem lies in the required order of the jury's findings. First computing the percentages of the parties' "fault" is sensible when the plaintiff's contributory fault is strong and little or no rebuttal is offered by the plaintiff because needless expenditure of time and effort in computing damages will be avoided if the plaintiff's "fault" is found to be greater than 50%. The number of such cases which will come to litigation, however, is not likely to be large. The majority of cases will very likely be ones in which fault is a close and vigorously contested issue. In such cases, counsel should consider whether the jury might better make a computation of damages with their minds uncluttered by thoughts of who is at fault and in what proportions.[81] Juries are *supposed* to understand that they are to make independent findings on the issues of fault and damages, but some juries in trials involving difficult assessments of fault may be unable to fully disregard a party's culpability when assessing damages.

Of course, juries' deliberations on damages are not *always* going to be tainted by prior determinations of fault. The problem is the legis-

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[79]There are minor differences in the number of nouns, but the two sets of instructions are in large part redundant. The main difference lies in the language of section 5(b)(4), which requires a jury to:

> enter a verdict against each such defendant (and such other defendants as are liable with the defendant by reason of their relationship to such defendant) in the amount of the product of the multiplication of each defendant's percentage of fault times the amount of damages as determined under subdivision (3).

Section 5(a), which pertains to single defendants and multiple defendants treated as a single party, is written in the singular. The drafter apparently wanted to avoid confusion about how the verdicts were to be computed in a multiple defendant case (which might include some defendants who would be treated as a single party), and set out separate and complete sets of instructions. The significance of the language employed in section 5(b) to the joint and several liability issues is discussed *infra* at notes 90-91, 104-08 and accompanying text.

[80]IND. CODE § 34-4-33-5(a), (b).

[81]The Indiana Act's suggested instructions essentially parrot the language of the Uniform Act, except that the Uniform Act's version states general guidelines for the court rather than instructions for the jury and puts the finding of damages first in the order. UNIFORM ACT, *supra* note 7, § 2, at 39.

lature's presumption that those deliberations will *never* be tainted. Therefore, before acquiescing in the use of the Act's proposed instructions, counsel should consider carefully whether the tailored instructions will keep the fault and damage issues separate. If a case requires varying the order of determinations, the jury should be admonished not to depart from the instructed order. The findings on damages should be returned to the court as soon as made. Then the jury should deliberate on fault. This sequence avoids possible adjustments by the jury once they see the actual dollar amounts for which each party is responsible.

3. Errors in Computation.—The fourth subsection of the instructions directs the jury to render its verdict as the product of the multiplication of the defendants' fault percentages and the "unadjusted" damages figure.[82] Section nine of the Act prescribes procedures for when errors are detected in the jury's calculations.[83] The jury will be informed that there is an error, the error(s) will be pointed out, and the jury will be returned to the jury room "to correct the inconsistencies."[84] Under section nine, the jury is not bound by the findings in the erroneous verdict when correcting its error.[85]

4. Joint and Several Liability: The Opposing Interpretations of the Multiple Defendant Jury Instructions.—One of the Act's most controversial features is its purported effect of abolishing joint and several liability. Although the Act does not explicitly address joint and several liability, the jury instructions relating to multiple defendants may implicitly abrogate the common law doctrine.[86] The practical effect of the jury instructions, which require individual verdicts, may be that the plaintiff will be unable to reach beyond a verdict amount to hold a defendant responsible for more than her share of assessed "fault." This effect was supposedly one of the "bargaining chips" given up by the proponents in the political compromise necessary to obtain passage of the Act.[87]

In the political arena, give-and-take is an inevitable aspect of the

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[82]IND. CODE § 34-4-33-5(a)(4), (b)(4).

[83]*Id.* § 34-4-33-9.

[84]*Id.* By including section nine in the 1984 amendments, the legislature avoided some sticky issues that would have arisen when a jury returned a verdict amount that did not agree with the percentage and the "unadjusted" damages figure. For example, the issue of whether the percentage figures or the final verdict amount should control would surely arise. A question of who would correct and how the correction would be made would also arise.

[85]IND. CODE § 34-4-33-9.

[86]*Id.* § 34-4-33-5(b).

[87]The principal drafter of Senate Bill 287, the Comparative Fault Act, Mr. Edgar Bayliff, has stated that giving up joint and several liability was "what we understood was being achieved at the time . . . if we didn't agree to this we were not going to get the Act." E. Bayliff, remarks at the Indiana Trial Lawyers Association, Seminar on Comparative Fault: "Practicing with Comparative Fault," (Sept. 16, 1983) [hereinafter cited as Remarks of Mr. Bayliff].

legislative process. Legislators may rationally compromise on a point of contention on the ground that the number of people negatively affected by the "given" is much smaller than the number benefited by the "taken."[88] However, if the Act is ultimately construed as abrogating common law joint and several liability, a significant negative impact upon the right of recovery of some injured parties will result.[89] That effect is sufficient reason to examine carefully in the judicial arena the purported changes and to discover whether sufficient legal justification exists. The "pros" and "cons" of opposing interpretations of the jury instructions will be examined in the following sections.

a. The interpretation abolishing joint and several liability.—Section 5(b) of the Act suggests that in multiple defendant cases the court will instruct the jury to "enter a verdict against each such defendant . . . in the amount of the product of the multiplication of each defendant's percentage of fault times the amount of damages as determined under subdivision (3)."[90] Since the rule of joint and several liability permits a plaintiff, at his option, to seek recovery for the total amount of damages against any one or all joint tortfeasors, an immediate problem arises in a joint tortfeasor case under the Act. If the plaintiff obtains a damages verdict of $10,000, for example, and each of the two defendants' "fault" is assessed at 50%, the plaintiff has verdicts against each limited to $5,000. Any attempt by the plaintiff to obtain satisfaction for more than $5,000 against a single defendant would be attacked by that defendant as an attempt to reach beyond the plaintiff's verdict. Consequently, the practical effect of the Act is said to be to banish the joint portion of joint and several liability.

Arguments in support of this interpretation begin with the proposition that the abolition effect is certainly consistent with the general principle of the Act, which assures that each defendant's liability will be apportioned to that defendant's culpability as determined by the trier of fact. Since the judgment against the two defendants is, under this argument, limited by the sum-certain verdicts, either defendant will be able to withstand the plaintiff's attempts to hold one of them entirely liable by asserting that her judgment debt does not cover the entire $10,000. Thus, the equitable principle of fairness, so heavily invoked in favor of the plaintiffs' interests as a justification for the Act, is made applicable to the defendants' interests.

Proponents of the abolition position might also employ a "greater good for the greater number" balancing approach. The proponents' first contention would be that those plaintiffs deprived of the options provided by the old rule represent a small proportion of all those involved in

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[88]*See id.*

[89]*See infra* note 148 and accompanying text.

[90]IND. CODE § 34-4-33-5(b).

tort litigation. The second contention would be that the greater benefit of extending the right of at least partial recovery to many whose claims were once totally barred outweighs the relatively slight detriment to the plaintiffs' interest caused by the loss of joint liability. Similarly, since the Act does not require every possible tortfeasor to be brought dragnet-style into a lawsuit by the plaintiff, the plaintiff's burden in the process of apportioning fault among all of those truly at fault is not as great as it might have been. The Act requires that the trier of fact apportion the "fault" of persons not made party to the action,[91] so the plaintiff is not compelled to bring suit against everyone. An incentive to name all persons at fault exists because any attribution of "fault" to a nonparty effectively reduces the plaintiff's recovery in that proportion, but the plaintiff is afforded the option of leaving someone out of the lawsuit if he chooses.

Furthermore, precedent for the abolition of joint and several liability exists in some states which have adopted comparative fault. Five states, for example, have legislatively abolished the doctrine outright.[92] Three others have abolished it for cases where the plaintiff's fault exceeds the defendants',[93] and one has judicially abolished it when the plaintiff is also at fault.[94]

b. The interpretation retaining joint and several liability.—The best evidence pertaining to the issue of retention or abolition of joint and several liability is the language of the Act itself. Since the Act does not explicitly address the subject, the abolition argument is wholly dependent upon a "necessary implication"[95] contained in that language. Arguments for the retention of the common law rule would, therefore, include assertions challenging the implication's necessity as well as the implication itself.[96] Further arguments might accept the "necessary implication" interpretation at face value, but challenge the legal and institutional validity of the abolition interpretation.[97]

(1) The substantive provisions.—The starting point for the retention position is that the all-important substantive provisions of the Act,

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[91]*Id.* § 34-4-33-5(a)(1), (b)(1). There may be a problem with this segment of the instructions in the event that the defendant does not assert a "nonparty defense." *See infra* text accompanying note 213.

[92]KAN. STAT. ANN. § 60-258a(d) (Supp. 1984); LA. CIV. CODE ANN. art. 2323 (West Supp. 1984); N.H. REV. STAT. ANN. § 507:7a (1983); OHIO REV. CODE ANN. § 2315.19(a)(2) (Page 1981); VT. STAT. ANN tit. 12, § 1036 (Supp. 1983).

[93]NEV. REV. STAT. § 41.141(3) (1979); OR. REV. STAT. § 18.485 (1977); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1983).

[94]Berry v. Empire Indem. Ins. Co., 634 P.2d 718 (Okla. 1981); Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613 (Okla. 1980); Laubach v. Morgan, 588 P.2d 1071 (Okla. 1978).

[95]Remarks of Mr. Bayliff, *supra* note 87.

[96]*See infra* notes 99-108, 123-36 and accompanying text.

[97]*See infra* notes 109-22, 138-47 and accompanying text.

sections three and four, affect only the plaintiff's right of *recovery of damages* and not the defendants' *liability*. As comparison with the legislative enactments of other states illustrates, the Indiana Act's substantive provisions invoke the comparative fault principle only by reducing the amount of, or barring, damages in proportion to the plaintiff's fault, whereas all of the other states' schemes specifically address the extent of the defendants' liability.[98] A close look at those statutes will show that the substantive declarations are stated in specific terms which tie the reduction of damages in multiple defendants cases directly to the defendants' liability.

The Kansas statute provides:

> Where the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, *each such party shall be liable for that portion of the total dollar amount awarded as damages* to any claimant *in the proportion that the amount of his causal negligence bears to the amount of the causal negligence attributed to all parties* against whom such recovery is allowed.[99]

Louisiana's statute provides:

> He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, in solido, with that person, for the damage caused by such act.
>
> Persons whose concurring fault has caused injury, death or loss to another are also answerable, in solido; provided, however, when the amount of recovery has been reduced in accordance with the preceding article, a *judgment debtor shall not be liable for more than the degree of his fault* to a judgment creditor to whom a greater degree of negligence has been attributed, reserving to all parties their respective rights of indemnity and contribution.[100]

The New Hampshire provision states:

> . . . provided that where recovery is allowed against more than one defendant, *each such defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants* against whom recovery is allowed.[101]

The Ohio Statute's language is:

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[98]*See infra* notes 99-101 and accompanying text.

[99]KAN. STAT. ANN. § 60-258a(d) (Supp. 1984) (emphasis added).

[100]LA. CIV. CODE ANN. art. 2324 (West Supp. 1984) (emphasis added).

[101]N.H. REV. STAT. ANN. § 507:7a (1983) (emphasis added). The Vermont statute uses language almost identical to the emphasized portion of the New Hampshire provisions

> If recovery for damages determined to be directly and proximately caused by the negligence of more than one person is allowed under division (A)(1) of this section, *each person against whom recovery is allowed is liable* to the person bringing the action for a portion of the total damages allowed under that division. The portion of damages for which *each person is liable* is calculated by multiplying the total damages allowed by a fraction in which the numerator is the person's percentage of negligence, which percentage is determined pursuant to division (B) of this section, and the denominator is the total of the percentages of negligence, which percentages are determined pursuant to division (B) of this section to be attributable to all persons from whom recovery is allowed. Any percentage of negligence attributable to the person bringing the action shall not be included in the total of percentages of negligence that is the denominator in the fraction.[102]

The greater specificity of these statutes over the Indiana Act is immediately apparent. States intending to affect the rule of joint and several liability have employed specific terms with direct substantive impact upon the liability of those subject to the common law rule, whereas the Indiana Act is completely silent on the matter. The Indiana Act operates only to diminish the plaintiff's compensation in proportion to his own contributory fault. Therefore, the abolition argument's essential "necessary implication" finds no support in the substantive portions of the Indiana Act. Instead, the intent to abrogate the common law must stand or fall upon the effect of the *suggested* jury instructions.[103]

The Indiana Act's suggested jury instructions are not substantive provisions. They merely repeat the principles contained in sections three and four, and outline a procedure for implementing those principles. In effect, the instructions translate the substance of the Act for the jury's benefit. In fact, the translation reflects the same operation of the substantive provisions, directing the jury to reduce the plaintiff's compensation in proportion to his fault. Indeed, the instructions direct the jury to perform its computations by references to the defendants' "fault," but such directions should be viewed as merely an expedient way to perform rather complex calculations.[104] If the function of the suggested jury instructions is viewed simply as assuring ease in computations and

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quoted above. VT. STAT. ANN. tit. 12, § 1036 (Supp. 1983). The statutes limiting joint and several liability to situations where the plaintiff's fault is less than the defendant's fault are similarly specific. *See* OR. REV. STAT. § 18.485 (1977); TEX. REV. CIV. STAT. art. 2212a (Vernon Supp. 1983).

[102]OHIO REV. CODE ANN. § 2315.19(9)(2) (Page 1981) (emphasis added).

[103]*See supra* notes 86, 90 and accompanying text.

[104]It is easier, after all, for the jury to reduce the "unadjusted" damages figure by performing one multiplication function than it would be to first multiply the "unadjusted" damages figure by the plaintiff's percentage of "fault," then subtract the product of that

reducing occasion for error, the strength of an implied abolition of joint and several liability weakens.

(2) Assumption of the requirement of seriatim verdicts and separate judgments.—The abolition argument asserts that a plaintiff who seeks to collect more than a verdict amount against a joint tortfeasor exceeds the legal authority residing in him to execute on the judgment. The retention argument first counters by pointing out two assumptions underlying that assertion: (1) that the Act requires seriatim verdicts for each party-defendant and (2) that separate judgments would be entered on each verdict. Neither assumption is compelled by the language of the Act. Additionally, even if the Act were taken to compel such results, the validity of such requirements is open to serious challenge.[105]

First, the language of the proposed instruction does not compel the rendition of seriatim verdicts. Indeed, one reading of the lead sentence to the proposed instructions for multiple defendant cases would compel but a single verdict against all defendants with separate parts relating to proportionate shares of damages for each defendant: "In an action based on fault that is brought against two (2) or more defendants, and that is tried to a jury, the court, unless all parties agree otherwise, shall instruct the jury to determine its *verdict* in the following manner . . . ."[106] The singular term "verdict" in the lead sentence denotes a single verdict covering the case against all defendants.

On the other hand, the fourth subdivision of the proposed instructions requires the jury to "enter a verdict against each such defendant."[107] The singular usage of "verdict" and the term "each" in the connecting phrase in this subdivision connotes a number of individual verdicts equal to the number of defendants. However, an equally valid construction of the phrase would be that each defendant, and her proportionate share of damages, shall be named in *a verdict*. The fourth subdivision's phrase is syntactically ambiguous, but this ambiguity can be resolved by reading the subdivision against the background of the lead sentence quoted above. The construction given the subdivision should be one that agrees with the lead sentence's use of the singular "verdict." If the legislature intended to compel seriatim verdicts, it easily could have used the plural "verdicts" in the lead sentence and clarified the fourth subdivision by inserting the term "separate" before the term "verdict."[108] In this light,

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multiplication from the "unadjusted" damages figure and then enter the remainder as the verdict.

[105]*See infra* notes 109-22, 138-47 and accompanying text.

[106]IND. CODE § 34-4-33-5(b) (emphasis added).

[107]*Id.* § 34-4-33-5(b)(4).

[108]Section six of the Act also uses the singular "verdict," suggesting that the final verdict of the jury is to be expressed as a single damages figure, representing the sum of the figures derived for each defendant. Because the jury instructions are detailed, one might suppose the legislature would have required the expression of this "bottom line" figure—if it had thought about it.

the single verdict interpretation finds more support in the larger context of the Act's provisions than does the seriatim verdict interpretation.

Assuming arguendo that the Act requires seriatim verdicts, a conclusion that separate judgments should be entered for each separate verdict does not necessarily follow. In fact, some of the Indiana Rules of Trial Procedure strongly indicate a contrary conclusion. Rule 58, for example, requires that "upon a general verdict of a jury, or upon a decision announced, the court shall promptly prepare and sign the judgment, and the clerk shall thereupon enter it."[109] The Rule is expressly made "[s]ubject to the provisions of 54(B),"[110] which in turn deals with judgments involving multiple claims or parties.[111] Rule 54(B) contemplates situations calling for the expedition of multiple claims or multiple party lawsuits. The rule permits separate judgments upon less than all of the claims of parties when the subjects of the judgments are severable from the claims or parties which have not reached the judgment stage.[112] It confers discretion upon the trial court to enter such separate judgments, but "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment . . . ."[113] Separate judgments are clearly not mandated and the circumstances invoking the exercise of the rule's discretionary power are not suggested simply by the presentation of seriatim verdicts to the court in a comparative fault case. Rule 54(B) is designed to prevent delays with respect to severable matters in a multiple claim or multiple party case[114] and the ordinary multiple

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[109]IND. R. TR. P. 58.

[110]*Id.*

[111]*Id.* 54(B) reads:

> (B) Judgment upon multiple claims or involving multiple parties. When more than one [1] claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. A judgment as to one or more but fewer than all of the claims or parties is final when the court in writing expressly determines that there is no just reason for delay, and in writing expressly directs entry of judgment, and an appeal may be taken by the judgment; but in other cases a judgment, decision or order as to less than all the claims and parties is not final.

Id.

[112]*Id.*

[113]*Id.*

[114]*See*, 10 C. WRIGHT, A. MILLER, M. KANE, FEDERAL PRACTICE AND PROCEDURE §

party case calls for a single judgment. Moreover, Rule 54(E) provides that judgments

> against two [2] or more persons or upon two [2] or more claims shall be deemed joint and several for purposes of:
> (1) permitting enforcement proceedings jointly or separately against different parties or jointly or separately against their property; or
> (2) permitting one or more parties to challenge the judgment (by appeal, motion and the like) as against one or more parties as to one or more claims or parts of claims.[115]

It is the judgment, not the verdict, which creates the defendant's debt to the plaintiff and extinguishes the plaintiff's claim.[116] If the analysis that seriatim verdicts rendered by the jury would comprise a single judgment is correct, then the plaintiff would execute on the judgment which encompasses the entire findings on damages, and the plaintiff would not necessarily be prohibited from seeking satisfaction of the entire judgment from a joint tortfeasor.

In addition, the verdict form prescribed by the Act is defined generally, and requires only "the disclosure of: (1) the percentage of fault charged against each party; and (2) the calculations made by the jury to arrive at their final verdict."[117] It does not specify recitals linking specific damage figures to specific defendants. A verdict form similar to the example set out below[118] would satisfy the Act's requirements, respond to the proposed instructions which assist the jury in making

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2654 (1983) (discussing Federal Rule 54, after which the Indiana Rule is patterned). *See also,* 6 J. MOORE, MOORE'S FEDERAL PRACTICE ¶54.04 (1983).

[115] IND. R. TR. P. 54(E).

[116] *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 18, 24 (1982).

[117] IND. CODE § 34-4-33-6.

[118]

VERDICT

We, the jury find:

1. that Plaintiff's percentage of fault equals ____%
2. that Defendant One's percentage of fault equals ____%
3. that Defendant Two's percentage of fault equals ____%
4. that nonparty one's percentage of fault equals ____%
5. that the total fault of all of the parties above equals ____%
6. that Plaintiff's total amount of damages, disregarding contributory fault equals $____
7. that Defendant One's ____% of fault × (times) Plaintiff's total damages in #6 equals $____
8. that Defendant Two's ____% of fault × (times) Plaintiff's total damages in #6 equals $____

Therefore, we the jury further find and enter our Verdict for Plaintiff against Defendant One and Defendant Two in the amount of (#7 + #8) $____

the computations, and resolve the issue of whether one or multiple judgments should be entered.

Of course, the argument for abolishing joint and several liability is not wholly dependent upon seriatim verdicts and separate judgments. If the verdict is not simply a general form such as, "the jury finds for Plaintiff *A* against Defendants *B* and *C* in the amount of *X* dollars," the defendant against whom plaintiff seeks full satisfaction may still argue against joint and several liability. The defendant against whom satisfaction of full damages is sought might argue that with respect to her, the judgment[119] created a debt which is limited by the verdict relating to her. However, the plaintiff's counterassertions[120] have enlarged the issue, showing that the defendant's "practical effect" argument casts a longer shadow than the mere abrogation of a common law doctrine. The defendant's position must now sustain practical effects upon the Rules of Trial Procedure and the law of judgments. These effects are to be accomplished only by a "necessary implication."[121] Furthermore, the "necessary implication" must rest upon the thin reed of legislatively suggested jury instructions.[122] The defendant's "practical effects" argument thus begins to buckle under an onerous burden.

(*3*) *Effect of the Act's defendant definitions.*—Another argument in support of retention is based upon other segments of the Act which lack the specificity needed for an implied abolition of the doctrine. This argument contemplates the effects of the Act's distinction between two types of defendants. One type is simply "defendants," the second type is defendants who "may be treated along with another defendant as a single party."[123] A defendant who may be treated with another as a single party is one against whom "recovery is sought . . . not based upon his own alleged act or omission . . . but upon his relationship to the other defendant."[124] The first type of "defendant"is not defined in the Act, but the inference drawn from the definition of the other

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[119]In addition to section six requirements, a verdict form may include this statement: "We find for Plaintiff *A* against Defendant *B* in the amount of *X* dollars," and a separate statement, "we find for Plaintiff *A* against Defendant *C* in the amount of *Y* dollars." Although the verdict involves separate and limited findings, it is not a special verdict requiring the court to reach conclusions based upon those findings, and absent Rule 54 circumstances, a court would enter a single judgment.

[120]*See supra* notes 109-16 and accompanying text.

[121]*See* Remarks of Mr. Bayliff, *supra* note 87 and accompanying text.

[122]The jury instructions, after all, may be modified upon the agreement of all the parties. While it may be farfetched to suppose that all joint tortfeasors would agree to jury instructions that remove the language which supports the abolition argument, those suggestions hardly represent concrete legislative commitment to the abrogation of common law doctrine and trial rules.

[123]IND. CODE § 34-4-33-2(b).

[124]*Id.*

class would be that they are all other defendants. In parallel language, these "defendants" are those against whom recovery is sought based upon their own alleged act or omission and not based upon their relationship to another defendant.[125] Joint tortfeasors clearly do not fall into the second class because they are being sued upon their own acts or omissions, but it is not entirely clear that true joint tortfeasors fit within the first classification.

The meaning of "joint tortfeasors" and, consequently, the meaning of "joint and several liability" has slipped into obscurity by virtue of loose usage and the impact of modern rules of joinder.[126] Eliminating that obscurity is beyond the scope of this Article, but some background may be enlightening. The root of "joint tortfeasorship" is suggested quite strongly by the term "joint"; the relationship of joint action between the multiple actors subjects them to liability for the plaintiff's entire injury. That relationship of joint conduct, plus the operation of the general principle that a wrongdoer should not escape liability merely by pointing an accusing finger at another wrongdoer,[127] formed the basis for imposing entire liability upon each actor. Under the rule, if multiple actors join in concert or conspiracy to inflict tortious injury, a plaintiff can seek to hold them accountable individually or as the injury-inflicting group.[128] Modern rules of procedure, which abrogate the common law restrictions upon joinder, have eroded the boundaries of the original concepts of joint and several liability. That erosion undoubtedly was hastened by occasional cases involving indivisible injury caused by multiple actors. Concurrent, independent conduct consequently is treated in modern parlance as if fitting the traditional concepts.[129] Still, the older principles are inherent in the substance of the tort doctrine, and those principles illuminate the characteristics of actions that carry the onus of entire liability for multiple actors. Although the true nature of a joint tortfeasor action is that multiple acts were related, interconnected, and jointly aimed at plaintiff's interests, modern notions of expediency and efficiency, under which the trial of all issues between all parties is permitted, have obscured that characteristic.

In view of this historic background, the Act's definitions of defendants may not include the *true* joint tortfeasor. Pursuing this view, the plaintiff would argue that he is not seeking recovery against multiple actors simply upon the basis of each actors' *own* acts or omissions,[130]

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[125]The original Act defined "primary" defendant in this way. Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 2(a), 1983 Ind. Acts. 1930, 1931.

[126]*See generally* 2 F. HARPER & F. JAMES, *supra* note 74, at § 20.3; W. PROSSER, *supra* note 74, at 291-92.

[127]*See* Kingston v. Chicago & N.W. Ry. Co., 191 Wis. 610, 211 N.W. 913 (1927).

[128]*See* authorities cited *supra* note 126.

[129]*Id.*

[130]*See supra* note 124 and accompanying text.

but upon those acts or omissions as a whole concert or conspiracy of action. Plaintiff *is*, therefore, seeking to hold those actors responsible upon their relationship with each other. If this analysis is valid, then the Act has not addressed the true joint tortfeasor situation and should not be found to have incidentally and implicitly abolished the form of the remedy traditionally recognized in concert or conspiracy of action cases.

Furthermore, the same rationale may support a similar assertion in the context of concurrent tortfeasors. In this extension, the relationship element of the argument is probably a bit strained, but perhaps not to the breaking point in the case of an indivisible injury produced by technically-independent but factually-related injurious conduct such as the classic *Summers v. Tice* situation.[131]

In light of the dicta in *Summers v. Tice*[132] and later authorities which extended the concurrent tortfeasor analysis to cases in which the defendants were not acting in true concert,[133] the principles of joint and several liability would perhaps be strained if *not* applied to a plaintiff's claim. When, for example, three hunters knowing of each other's presence, but not hunting as a team, converged upon their quarry from three directions and two of them negligently fired in the third's direction to inflict an indivisible injury, the lack of true concert of action seems of little consequence. Even without the cause-in-fact problem dealt with by the *Summers v. Tice* court, the acts of the independent tortfeasors are, in their most crucial aspect, related in their joint and inseparable invasion of plaintiff's bodily integrity. Only the nicest of legal distinctions would justify treating the cases differently and denying joint and several liability in the latter.[134] However, if defendants are not to be permitted to escape liability by pointing the accusing finger at other wrongdoers, the logic of the argument compels a plaintiff who is also at fault to bear entire liability for an impecunious concurrent tortfeasor. Comparative fault might permit such plaintiffs to escape accountability, but only, and properly so, at the cost of abandoning the "constructive" joint tort argument.

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[131]33 Cal. 2d 80, 199 P.2d 1 (1948). In that case, two hunters had fired in the plaintiff's direction and the evidence could not establish which one had fired the injurious shot. The court, noting rather explicitly that the three parties were acting as a team, saw the case as an appropriate one to apply principles of joint and several liability. *Id.* at 84, 199 P.2d at 2-3. Moreover, the court expressed its belief that true concert of action was not an essential aspect of the case, and indicated that it would apply the principle even where the actors produced the injury independently. *Id.* at 88, 199 P.2d at 5.

[132]*Id.*

[133]*See* W. PROSSER, *supra* note 74, at 293-99 and authorities cited therein.

[134]A parade of horribles is possible. Consider the case of the slightly negligent shooter and the grossly negligent shooter whose pellets in combination cause plaintiff to lose a limb. If the grossly negligent defendant is impecunious, the plaintiff should not be denied full recovery on the simple ground that a suggested jury instruction results in a low

An extension of logic carries similar risks for the plaintiff using the argument in a true joint tortfeasor case. Since the proposed jury instructions are keyed specifically to the definitions of the two classes of defendants, if plaintiff persuades the court that his case involves a third class of tortious actors, he and the court face a statutory void. If the court fills that void with the common law and proceeds in a pre-Comparative Fault Act manner, the plaintiff who has contributed negligently to his own injury will be totally barred from recovery. On the other hand, although the statute's proposed jury instructions do not carry the substance of the Act, they surely provide a clear outline of the mechanical principles for the court's guidance. A court may be persuaded to fill the void of precise statutory language with a set of jury instructions tailoring the apportionment principle to the joint tort case.[135]

The plaintiff might also argue that the joint tortfeasors who are excluded by the two defined classes of defendants may be subject to a "pure comparison" of fault. This approach focuses on the language of section three, which merely sets out the general apportionment principle. That section does not refer to defendants, and thereby avoids the problem of an undefined "third" class of defendants. It could therefore be validly applied to joint tortfeasors. The plaintiff would assert that the "greater than 50% rule" of section four would not bar his action because it is keyed to the two classes of defendants. This interpretation, which brings two sections of the Act into conflict, must be viewed as contrary to the spirit of the Act. The argument may be advanced, however, as an "implication" of the Act no less technically "necessary" than the abolition argument.[136]

In view of the possible pitfalls of the "third class" of defendants arguments, the plaintiff may prefer to argue simply that, although it is not clearly stated, the set of instructions pertaining to multiple defendants who may be treated as a single party is the applicable set. In its most legally significant effect the rule of joint and several liability has always treated joint tortfeasors as a single party. In their concert of action they have combined into a single invasionary force to bring about a harm to the plaintiff. The culpable acts of each as independent and separable elements become inconsequential to the liability each may be made to bear. The plaintiff would argue that the basis of liability of each defendant is not "his own alleged act or omission" in the sense of distinct individual conduct. Instead, the plaintiff would assert that the interdependency of the acts, related in concert, requires the defendants

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percentage of "fault" for the other tortfeasor nor upon the ground that the slightly negligent defendant did not cause the entire injury.

[135]*See, e.g.*, the jury instructions at *supra* note 118.

[136]This is another reason the drafters should have stated the main principle of the Act in a unified affirmative manner. *See supra* notes 56-67 and accompanying text.

to be treated as a single party. If this argument prevails, the jury would assess the "fault" of the defendants in the aggregate, and adjust the plaintiff's damages proportionately.[137]

(*4*) *Legal and institutional validity of the required jury procedure.*— The plaintiff might assume arguendo the practical effect argument and shift his attack to concentrate upon the legal and institutional validity of the jury process required by the Act. This attack would focus upon the requirements of section six.[138] Because section six requires the recitation of special findings of fact (the percentages of fault and the calculations required by the instructions),[139] the Act effectively requires the jury to answer interrogatories. This requirement raises a troublesome issue of institutional conflict between the legislature and the courts concerning the respective powers of those two branches to determine rules of procedure. Rule 49 of the Indiana Rules of Trial Procedure declares simply: "Special verdicts and interrogatories to the jury are abolished."[140] If section six of the Act resurrects jury interrogatories for this class of legal proceedings, a trial judge will be placed in the quandary of whether to follow the Act's prescription or to heed Rule 49.

The Indiana Supreme Court has recognized the General Assembly's coordinate power in promulgating rules of procedure for the courts.[141] The court need not obtain legislative approval of its rules, and legislative rules enacted in an area of judicial silence are to be treated as valid, if only to protect rights that would be denied in the procedural vacuum.[142] The quandary, therefore, is not resolved by a simple proposition that one set of rules or the other always prevails.

Where the competing rules conflict, however, the court rules take precedence: "[A] procedural rule enacted by statute may not operate as an exception to one of [the court's] rules having general application. If such an exception is to be made, it lies within [the court's] exclusive province to make it."[143] Therefore, if section six and Rule 49 conflict,

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[137]For example, where the plaintiff's damages are $10,000 and the plaintiff's fault is assessed at 20% and joint tortfeasors *A* and *B* have 30% and 50% fault respectively, the jury would return an aggregate verdict of $8,000. Thus, *A* and *B* are treated as a single defendant under the first set of instructions. A modification of the suggested form at *supra* note 118 could be employed. The modification would include a finding that the defendants were, by virtue of their joint conduct, being treated as a single party.

[138]IND. CODE § 34-4-33-6.

[139]*Id.*

[140]IND. R. TR. P. 49.

[141]*E.g.,* Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585 (Ind. 1980); *In re* Pub. Law No. 305 and Pub. Law No. 309, 263 Ind. 506, 334 N.E.2d 659 (1975); Neeley v. State, 261 Ind. 434, 305 N.E.2d 434 (1974); State v. Bridenhager, 257 Ind. 699, 279 N.E.2d 794 (1972); Harris v. Young Women's Christian Ass'n, 250 Ind. 491, 237 N.E.2d 242 (1968); State *ex. rel.* Blood v. Gibson Circuit Court, 239 Ind. 394, 157 N.E.2d 475 (1959).

[142]State v. Bridenhager, 257 Ind. 699, 703, 279 N.E.2d 794, 796 (1972).

[143]*Id.* at 704, 279 N.E.2d 796-97. *See also* Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585 (Ind. 1980); Neeley v. State, 261 Ind. 434, 305 N.E.2d 434 (1974).

the trial judge must pay heed to Rule 49.[144]

However, both rules may be valid if they are not truly in conflict. If section six operates in an area of judicial silence, it is to be treated as valid until the Supreme Court abrogates it by promulgating its own rule.[145] If the legislature has merely filled a void left by Rule 49, the section should be able to withstand challenge. A direct positive-statement versus negative-statement conflict is not required, however, and the legislative rule must fall if it is "incompatible to the extent that both could not apply to a given situation."[146] In the situation at hand, this "incompatibility test" seems easily satisfied. First, Rule 49 is not simply a void to be filled by the legislative rule as might have been the case if the number of the Rule had simply been left vacant. The Rule affirmatively abolishes jury interrogatories, and a trial judge could not both allow and disallow the recitals required by section six. Second, the recitals required by the section are, in effect, legislatively enacted exceptions to Rule 49, exceptions which arise only in "actions based on fault." The suggested jury instructions must, therefore, fall as a legislative incursion upon the "exclusive province" of the court.[147]

Even if all of the arguments for retaining joint and several liability with the current Act's language are considered unpersuasive, the General Assembly should revise the Act. The attempted balance disproportionately benefits tortfeasors. If joint and several liability is abolished, multiple tortfeasors are assured that the evenhandedness of pure apportionment will prevent them from bearing more than their assessed proportion of "fault," while a plaintiff is denied pure apportionment by the 50% rule. A plaintiff who is 51% at "fault" must bear 100% of the cost of the injury, while a defendant who is 51% at "fault" bears only 51% of the liability. The defendant's 51% may have been instigating the jointly negligent (or willful, wanton, or reckless) concert of action with a judgment-proof cohort.

An even greater inequity exists where the plaintiff is "fault"-free and must bear the cost of the injury equal to the impecunious defendant's "fault." The "evenhandedness" of this system of apportionment works to the benefit of tortfeasors and to the detriment of injured plaintiffs.

Where possible, plaintiffs should be required to pursue judgment against each person fairly chargeable with accountability for the injury.

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[144]State v. Bridenhager, 257 Ind. 699, 279 N.E.2d 794 (1972).

[145]*Id.*

[146]*Id.* at 704, 279 N.E.2d at 796.

[147]*Id.* There is a similar conflict with Trial Rule 54(D) if the practical effect of the jury instructions is to require the entry of judgments that are only several and not joint. Even if section six were construed as void and severable from the Act to avoid invalidating conflict with Rule 49, section five's separate recitals of proportions of fault and related individual verdicts are still vulnerable to challenge by the foregoing arguments.

However, defendants who would otherwise be jointly liable for the injuries should not be able to cast the entire effect of the fortuitous presence of an impecunious tortfeasor upon the plaintiff, especially if the plaintiff is entirely free from fault.[148] Plaintiffs who are not at fault do not share the same interest in a comparative fault system as those who have contributed to their own injuries. Innocent injured claimants clearly are not elements of the "greater good for the greater number" legislative compromise formula, and should not be asked to give up the common law doctrine's protections.

Adoption of comparative fault signals the embrace of a policy of refining the compensation function of tort law in order that injured parties' needs may be more widely and accurately served. Abolition of joint and several liability operates against that policy. At the same time, the fairness element inherent in the comparative fault system powerfully favors the interests of tortfeasors who rightfully claim that liability apportioned to fault is meaningless if they are made to bear more than their assessed percentage of fault. The answer to these competing interests lies neither in a simplistic abandonment of joint and several liability nor in a simplistic retention of the old common law doctrine and its allied rules. Plaintiffs' and defendants' interests can both be addressed if joint and several liability is retained *in connection* with the adoption of two additional refinements of the compensation function. The first, equitable reapportionment, addresses the problem of the judgment-proof tortfeasor and requires all parties at fault to share the burden of the impaired compensation that such defendants impose.[149] The second, a rule permitting apportioned contribution among tortfeasors, addresses the problem of malapportionment in the event the plaintiff elects to pursue execution of the entire judgment against a single joint tortfeasor.[150]

(*5*) *Equitable reapportionment as a substitute for joint and several liability.*—In cases in which the plaintiff is at fault, he should bear part of the burden of the judgment-proof defendant's fault by an equitable reapportionment of accountability.[151] Equitable reapportionment allows

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[148]Care must be taken to maintain the distinction between actions which involve a valid case for joint and several liability, a true concert of action case, and actions in which joinder of multiple but independent concurrent or consecutive tortfeasors has been made for the sake of judicial efficiency. Absent a proper case for the application of joint and entire liability upon a set of tortfeasors, the injured plaintiff has no claim to be made better off by the application of the doctrine. It is simply because some courts and attorneys have blurred the distinction and have applied joint and several liability as a matter of convenience that the defense bar has a basis for arguing against the plaintiff's "empty chair" strategy. *See infra* notes 200-34 and accompanying text.

[149]*See infra* notes 151-53 and accompanying text.

[150]*See infra* notes 154-62 and accompanying text.

[151]This reapportionment is easily administered, although it may appear facially complex. For example, if Plaintiff *P*, and defendants *A* and *B* were cutting down a tree which fell on *P* because of all three's negligence, neither *A* nor *P* should be singled out to bear

the plaintiffs to receive an amount closer to full compensation, while the defendant's liability is not only apportioned to fault but also accounts for the relationship of the defendant to her impecunious partner in tort. The concert of action is addressed without requiring the solvent defendant to pay the full amount that the rule of joint and several liability would require.[152] Such reapportionment was recommended by the National Conference of Commissioners on Uniform State Laws,[153] and is an equitable approach. The Indiana Act is not equitable, and should be amended to include the Uniform Act's proposal.

F. Section 7: Contribution and Indemnity

1. Contribution.—Section seven of the Act bans contribution between tortfeasors.[154] Why the Indiana legislature considered it necessary to include the ban is open to question, given the Act's purported abolition of joint and several liability,[155] and the fact that contribution is presently unavailable at common law in Indiana.[156] Whatever the reason, the ban

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the entire cost of *B*'s acts if *B* is impecunious. Equitable reapportionment requires both *P* and *A* to bear a fair share of *B*'s fault. If *P*'s injuries were assessed at $10,000, and *P*'s, *A*'s and *B*'s "fault" at 33-1/3% each, 6/9 of the fault which produced the injury is attributable to *P* and *A*. *B*'s "fault," if equitably redistributed to *P* and *A*, would add 3/18 to each of their shares of accountability. *A*'s liability to *P* should, therefore, be for 50% (9/18) of $10,000.

[152]In the case of a nonculpable plaintiff, the principle produces the same result as the common law.

[153]UNIFORM ACT, *supra* note 7, § 2(c)(d) at 39.

[154]IND. CODE § 34-4-33-7 (Supp. 1984).

[155]*See supra* text accompanying notes 90-94.

[156]The proposition of no contribution among joint tortfeasors was enunciated by the Indiana Supreme Court at a very early date in the state's history. The first case appears to be Hunt v. Lane, 9 Ind. 248 (1857), in which the court cited to Chitty on Contracts, but to no earlier case. The proposition is so well-settled that the issue has rarely arisen in litigation since. *See* Jackson v. Record, 211 Ind. 141, 5 N.E.2d 897 (1937) (dictum); Silvers v. Nerdlinger, 30 Ind. 53, 60 (1868); Barker v. Cole, 396 N.E.2d 964 (Ind. Ct. App. 1979). The rule, plus the position of Indiana courts that a release of one joint tortfeasor is a release of all, has produced a practice of "loan receipt agreements," in which one defendant or her insurance carrier will advance the plaintiff a sum of money in return for a "covenant not to execute" by the plaintiff. The agreements essentially provide for full or partial discharge of the loan in the event the plaintiff is unsuccessful against the other tortfeasors, and for full or partial repayment of the loan from the funds obtained in satisfaction of any judgment obtained against other tortfeasors. Thus, the device serves both the function of providing an injured party with needed funds with which to meet the additional financial needs produced by the injury, and the function of limiting the lending defendant's exposure to liability for plaintiff's full damages. The Indiana Court of Appeals has even approved such agreements executed *after* judgment. Barker v. Cole, 396 N.E.2d 964 (Ind. Ct. App. 1979). However, that result was reached over a vigorous dissent by Judge Staton arguing that such approval sanctions "a vehicle whereby one economic inequity is cured by the creation of another," because the ability to avoid full liability is dependent upon the financial liquidity of the settling defendant and places the burden of the entire judgment upon the defendant lacking that liquidity. *Id.* at 973 (Staton, J., dissenting).

reflects the legislature's ambivalence toward the apportionment principle, and stands as an unfortunate foreclosure of judicial use of contribution to adjust and refine the comparative fault system in the state. If the equitable reapportionment system suggested in the previous discussion is adopted,[157] for example, it could not be fully effective without an amendment of the Act expressly permitting contribution.[158] Defendants made to bear a portion of the liability of insolvent or immune defendants should be afforded the opportunity to recoup their additional outlays, and should be enlisted in the effort to locate persons who might otherwise avoid accountability.

If the Act is ultimately construed to have no effect upon joint and several liability, the proscription of contribution presents a serious impediment to full utilization of the principles underpinning comparative

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If the Act is interpreted as having abolished joint and several liability, it will curtail the use of "loan receipt agreements" in their present form. Since separate verdicts for each defendant will be rendered, the plaintiff no longer will have the opportunity to execute against nonsettling parties for the full amount of damages from which repayment of the loan can be made. Plaintiffs will not be able to repay the loan from judgment proceeds without diminution of their ultimate compensation. For example, assume that the plaintiff's damages were agreed to be $100,000 and the settling defendant advanced the plaintiff $20,000 as a loan on the condition that the plaintiff repay the loan from proceeds of execution on the judgment against the other defendants. If the jury's assessments matched the parties' estimates and the settling defendant was found 20% at "fault," the plaintiff would be obligated to repay the $20,000 from the amount recovered from the other defendants. Assuming he was able to collect the remaining $80,000 from those defendants, the plaintiff's net recovery after repayment would be $60,000. Knowing that exposure to liability will be something less than the plaintiff's full damages, the settling defendant can exert the leverage of financial need to hold down the negotiated estimate of fault. If the jury's assessment of "fault" for the settling party exceeds the negotiated percentage, the plaintiff's net recovery will be reduced even more. Plaintiffs thus have little incentive to entertain "loan receipt" proposals except as a relatively quick source of funds. Whether that prospect would be sufficient to induce a plaintiff to enter such an agreement would depend upon individual financial circumstances, but the plaintiff's counsel should fully advise clients of the ultimate cost of the "up front" money.

Plaintiffs' counsel should explore the feasibility of including terms in the agreement which limit repayment solely to amounts recovered in excess of the agreed-upon estimate of total damages. For example, if the plaintiff and the settling defendant agreed that the plaintiff's total damages were $100,000 and that the settling defendant's share of "fault" was 20%, the plaintiff might agree to repay a portion of the "loan" in the amount equal to the excess recovered if the plaintiff receives verdicts aggregating more than $80,000 against nonsettling defendants.

[157] *See supra* notes 151-53 and accompanying text.

[158] Pro rata contribution, based upon proportionate shares of fault, is contemplated by equitable reapportionment. Per capita contribution, or equal shares, is the only rational method of division in a straight negligence system and has been outmoded by the development of comparative fault. The legislature may have contemplated per capita contribution in the ban and intended to foreclose the adoption of that method of contribution, since per capita contribution is incompatible with apportionment based upon percentages of "fault."

fault. If a plaintiff is able to obtain satisfaction of the entire judgment against a single defendant and that defendant is prevented from seeking contribution from other tortfeasors, apportionment of the defendants' fault will have been a meaningless exercise. Joint and several liability can be an important doctrinal tool in a system designed to expand the compensation function of tort law to afford relief to injured people previously denied protection.[159] Codification of the rule against contribution, however, has shackled the judicial hand to another outmoded principle. If the courts are persuaded that joint and several liability should survive under the Act's language, section seven prevents them from allowing those jointly liable defendants who have paid full satisfaction to plaintiffs to benefit from the fairness of the apportionment principle. If Indiana's Comparative Fault Act, a legislative reform based upon rejection of the gross one-sidedness of contributory negligence, prevents judicial attempts to avoid gross one-sided effects upon some tortfeasors by foreclosing implementation of the apportionment principle through contribution, the Act cannot seriously be termed a comprehensive reform of tort liability in this state.

Faced with the perplexity of trying to operate in a comparative fault system with an obsolete concept of contribution frozen in legislative language, a court might find persuasive the logic that as long as the ban on contribution stays, joint and several liability ought to go to maintain balance. That logic labors under the same problem as the "greater good for the greater number" argument for abolishing joint and several liability.[160] It may have superficial appeal, but close examination shows that the balance swings too far. When joint and several liability is abolished, the rule against contribution is redundant; no detriment is imposed against defendants' interests which needs to be counterbalanced. All of the detrimental effects are borne on the plaintiffs' side of the bar. A rule against contribution *is* antithetical to the apportionment principle.[161] To conclude that the compensation function of tort law should be contracted for some injured people by abolishing joint and several liability because an outmoded relic of the common law negligence system which managed to slip into the Act would be a detriment to some wrongdoers is not only bad logic, it is also bad policy. The legislature should repeal the ban on contribution and replace

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[159]*See supra* notes 146-48 and accompanying text. The Uniform Act, upon which the Indiana Act is so heavily based, retains joint and several liability. That fact alone, in view of the long and careful consideration that the Commissioners on Uniform State Laws have given to a system of comparative fault, is a powerful argument for the retention of the doctrine. *See* UNIFORM ACT, *supra* note 7, § 2(c), at 39.

[160]*See supra* text accompanying notes 90-91.

[161]*See* Leflar, *Contribution and Indemnity Between Tortfeasors,* 81 U. PA. L. REV. 130, 159 (1932).

it with an equitable system of contribution such as that proposed by the Uniform Act.[162]

In the interim, courts persuaded that the ban on contribution flaws the Act in principle and function may use a creative judicial approach

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[162]The Uniform Comparative Fault Act's provisions permit contribution limited by each tortfeasors's "equitable share of the obligation." UNIFORM ACT, *supra* note 7, § 4(a), at 42. A settling tortfeasor may seek contribution "only (1) if the liability by the person against whom contribution is sought has been extinguished and (2) to the extent that the amount paid in settlement was reasonable." *Id.* § 4(b). If a party has paid "more than his equitable share of the obligation, upon motion [he] may recover judgment for contribution." *Id.* § 5(a). The judge determines the equitable share of each party and states it in the judgment. *Id.* § 2(c). In addition, the judge reduces the claim of the releasing party by the amount of the equitable share of the released party. *Id.* § 6. "Equitable share" conforms to the percentage of fault assessed against the party by the trier of fact. *Id.* The Commissioners provide an illustration for the system:

> *Illustration No. 11.* (Effect of release).
>
> A was injured through the concurrent negligence of B, C and D. His damages are $20,000. A settles with B for $2,000.
>
> The trial produces the following results:
>
> A, 40% at fault (equitable share, $8,000)
>
> B, 30% at fault (equitable share, $6,000)
>
> C, 20% at fault (equitable share, $4,000)
>
> D, 10% at fault (equitable share, $2,000)
>
> A's claim is reduced by B's equitable share ($6,000). He is awarded a judgment against C and D, making them jointly and severally liable for $6,000. Their equitable shares of the obligation are $4,000 and $2,000 respectively.

Id. at 45. The Commissioners acknowledge that some discouragement of settlement is produced by this arrangement; they chose between alternative systems by giving primacy to the apportionment principle. *Id.* at 44.

In effect, the Indiana Act adopts part of the Uniform Act's position. Since the trier of fact will be required under most circumstances to assess a nonparty's "fault" and factor that assessment into "total fault" for the purposes of apportionment, the plaintiff's net recovery will be reduced by the percentage of "fault" attributable to the (settling) nonparty. The separate sums-certain verdicts against tortfeasors who are parties to the lawsuit arguably ensure that they do not pay more than their equitable share of liability. However, without a right of contribution, the settling tortfeasor has no way to recoup amounts paid in excess of the equitable share of liability and is immune from contribution from other tortfeasors if the settlement is for less than that share. Tortfeasors thereby have an incentive to keep negotiated percentages of fault low. On the other hand, if the plaintiff underestimates the settling defendant's fault, the amount of underestimation must be absorbed by the plaintiff in the form of a reduced verdict. The Indiana Act exceeds the Uniform Act's "tendency to discourage" settlements. If each party approaching settlement were to have some assurance that their settlement estimates would not ultimately penalize them, then the usual economic incentives to avoid litigation would be free to operate.

To accomplish that objective, one system would first reduce plaintiff's claim by the amount received in settlement. That might produce a slight disincentive on the plaintiff's part to settle, but since the plaintiff would be assured of receiving full damages, he would incur no penalty. This disincentive also might be overcome by the fact that the "up front" settlement funds would save trial expenses. Next, the defendants remaining in litigation would receive verdicts against them for the *remainder* in proportion to their

respective percentages of "fault." This would assure that the plaintiff received full compensation, but no more. Then, the party or parties who had paid more than their equitable share of damages would be entitled to contribution from those who had paid less. In the situation of a nonculpable plaintiff, the onus would fall upon the wrongdoers in the case to obtain the equitable adjustment and, contrary to the Uniform Act proposal, the innocent injured party would not be permitted to receive less than full compensation. Culpable plaintiffs would also benefit, but since the total damages would also have been reduced by the plaintiff's contribution of "fault," there would be no danger of overcompensation. The settling defendant would have an incentive to keep negotiation estimates of fault low in order to avoid the necessity of seeking contribution, but the incentive to avoid *under*-estimation and consequent contribution to other defendants would be at least as strong. In addition, settling defendants would have the assurance that errors in estimates of "fault" would not be final. Illustrations of the method follow:

Case A:

P injured by *D, E,* and *F.*
P's damages = $100,000
P settles with *D* for $20,000
Jury finds percentage of fault to be:

P,	0%
D,	10%
E,	30%
F,	60%

P's claim would be reduced by the amount received from *D* ($100,000 − $20,000 = $80,000).
E's verdict reflects her liability for the proportionate share of the $80,000 remainder (3/9 of $80,000 = $26,666.66).
F's verdict reflects her liability for the proportionate share of the $80,000 = $53,333.34). Since *D* paid twice her equitable share of liability, she would be entitled to contribution from *E* and *F* to the extent of their equitable shares. *D* would then be entitled to $3,333.33 from *E* and $6,666.67 friom *F.*

Case B:

If all the facts were the same except that *E* settled with *P* for $20,000. *D*'s verdict would be for $11,428.58 (1/7 of $80,000). *F*'s verdict would be for $68,571.42 (6/7 of $80,000). *D* would be entitled to $1,428.58 and *F* would be entitled to $8,571.42 contribution from *E.*

Compare American Motorcycle Ass'n v. Superior Court of Los Angeles County, 20 Cal. 3d 578, 605-08, 578 P.2d 899, 916-18, 146 Cal. Rptr. 182, 199-201 (1978) (permits a tortfeasor to obtain "partial indemnity" from other nonsettling tortfeasors on a "comparative fault basis" after plaintiff's claim is reduced by the amount of settlement), *with* Pierringer v. Hager, 21 Wis. 2d 182, 191-92, 124 N.W.2d 106, 111-12 (1963) (allows a released tortfeasor to avoid contribution to nonsettling tortfeasors and requires plaintiff's claim to be reduced by the amount of the nonsettling defendant's percentage of fault). *See also* Kennedy v. City of Sawyer, 228 Kan. 439, 461-62, 618 P.2d 788, 803-04 (1980) ("If the reasonable amount of the damages is determined to be more than the settlement figure, all tortfeasors will receive the benefit of the bargain struck by the settling tortfeasors"; a settling tortfeasor having paid plaintiff's full claim will be entitled to "seek apportionment from his cotortfeasors based on comparative degrees of responsibility." *Kennedy,* 228 Kan. at 461-62, 618 P.2d at 803, 804.

The Indiana Act is too roughly hewn on the issues of contribution and joint liability. Settlements may well occur because the economics of settlement will supply strong arguments in any case. However, those settlements will not have occurred because the Act promoted them. The Indiana General Assembly should amend these provisions soon to permit the

permitting partial indemnification among joint tortfeasors.[163] This approach is technically simple, but since it requires the modification of a common law rule, judicial approval may prove exceedingly difficult to obtain.

2. *Indemnity.*—Section seven of the Act, after banning contribution among tortfeasors, declares that rights of indemnity are not affected.[164] Indemnity, like contribution, operates in the tort system as a legal means of obtaining reimbursement for monies paid to an injured person. The traditional common law concept of indemnity is an "all or nothing" proposition. Either the indemnitee is entitled to be reimbursed for the whole of the judgment paid by the indemnitee, or no entitlement exists at all.[165] The parties do not share accountability as in contribution; the indemnitor is required to make the indemnitee whole on the basis of restitution.[166]

Rights of indemnity arise in a variety of situations. Full treatment of the doctrine and the circumstances to which it applies is beyond the scope of this discussion, but a general idea of the occasions which give rise to rights of indemnity can be obtained from descriptions contained in the Restatement (Second) of Torts, § 886B:

> (1) If two persons are liable in tort to a third person for the same harm and one of them discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of the liability.
>
> (2) Instances in which indemnity is granted under this principle include the following:
>
> (a) The indemnitee was liable only vicariously for the conduct of the indemnitor;
>
> (b) The indemnitee acted pursuant to directions of the indemnitor and reasonably believed the directions to be lawful;
>
> (c) The indemnitee was induced to act by a misrepresentation on the part of the indemnitor, upon which he justifiably relied;
>
> (d) The indemnitor supplied a defective chattel or performed defective work upon land or buildings as a result of which both were liable to the third person, and the indemnitee innocently or negligently failed to

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Act to operate more in keeping with the apportionment principle and to permit parties more flexibility in shaping nonlitigation alternatives to resolving their disputes.

[163]*See infra* notes 183-88 and accompanying text.

[164]IND. CODE § 34-4-33-7.

[165]1 F. HARPER & F. JAMES, *supra* note 74, § 10.2, at 723; W. PROSSER, *supra* note 74, § 51, at 310; RESTATEMENT (SECOND) OF TORTS § 886B (1979).

[166]RESTATEMENT (SECOND) OF TORTS, *supra* note 165, § 886B comment c.

discover the defect;

(e) The indemnitor created a dangerous condition of land or chattels as a result of which both were liable to the third person, and the indemnitee innocently or negligently failed to discover the defect;

(f) The indemnitor was under a duty to the indemnitee to protect him against the liability to the third person.[167]

The first three categories involve situations in which the indemnitee is not actually at fault but has been made accountable to a third person on the basis of some relationship with the indemnitor. The last three categories address circumstances in which the indemnitee may or may not have been at fault.

In contrast, Indiana case law recognizes the right of indemnification in only the first three categories. It has long been the view of Indiana courts that the right of indemnity does not arise if the person seeking indemnity may be considered a joint tortfeasor.[168] Only where the indemnitee has been held liable upon a theory of "derivative" or "constructive" fault does the right arise.[169] Absent a contractual obligation to indemnify, the only situation in which a right of indemnification exists in Indiana is when liability has been imposed against the indemnitee because of her vicarious liability for the acts of the indemnitor. The Indiana Act has contemplated defendants in the Restatement's first three categories. Section two of the Act refers to a "defendant [who] may be treated along with another defendant as a single party where recovery is sought against that defendant not based upon his own alleged act or omission but upon his relationship to the other defendant."[170] For example, if *A*, who was the employee of *B*, injured the plaintiff, *B* will be "treated along with . . . [*A*] as a single party."[171] The assessment of "fault" against *A* will apply to *B* pursuant to the jury instructions of section five of the Act.[172] Any payment made by *B* in satisfaction of the judgment may be the subject of an action for indemnity by *B*

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[167]*Id.* at 344-45.

[168]*See, e.g.,* Westfield Gas & Milling Co. v. Noblesville & Eagletown Gravel Road Co., 13 Ind. App. 481, 482, 41 N.E. 955, 956 (1895) (dictum).

[169]*See* Indiana State Highway Comm'n v. Thomas, 169 Ind. App. 13, 24, 346 N.E.2d 252, 259 (1976) (citing McLish v. Niagra Machine & Tool Works, 266 F. Supp. 987, 991 (S.D. Ind. 1967)). The *McLish* court cited Silvers v. Nerdlinger, 30 Ind. 53 (1868) and City of Gary v. Bontrager Construction Co., 113 Ind. App. 151, 47 N.E.2d 182 (1943). *See also* Bituminous Casualty Corp. v. Hedinger, 407 F.2d 655 (7th Cir. 1969); Augustine v. First Fed. Sav. & Loan Ass'n of Gary, 175 Ind. App. 597, 603, 373 N.E.2d 181, 184 (1978) (Garrard, J., concurring and dissenting in part); *cf.* Bash v. Young, 2 Ind. App. 297, 28 N.E. 344 (1891) (good faith purchaser allowed indemnity against seller for owner's judgment).

[170]IND. CODE § 34-4-33-2(b).

[171]*Id.*

[172]*Id.* § 34-4-33-5(a).

against *A* on the restitution principle.[173] The Indiana Act has no effect on *B*'s rights against *A*.

If *A* and *B* are multiple defendants instead of parties who may be treated as a single defendant, a different result occurs. Consider an example based upon the Restatement's category (2)(e):[174] assume that *A* was constructing a power line through *B*'s premises and the plaintiff, *B*'s invitee, was injured when he came in contact with the line as he entered *B*'s property. The plaintiff sued *A* and *B*, citing *A*'s negligent construction and *B*'s negligent failure to discover and correct the hazard. If the Restatement view is followed, *B*, who was "passively negligent," would have a right of indemnification against *A*, the "actively negligent" tortfeasor. Defendant *B* would be able to recover any payment she made to the plaintiff in satisfaction of the judgment against her.[175] Under the Indiana Act and applicable common law, the jury would be instructed to assess the proportionate fault of *A* and *B* and render a verdict against each based upon portions of "fault," and *B* would have no right of indemnification against *A* for any monies she paid to the plaintiff in satisfaction of the judgment against her.[176]

Thus, preservation of indemnification is consistent with the Act's two classes of defendants. Defendants' rights of indemnification are neither enlarged nor contracted by the Act. The common law of indemnity in Indiana therefore promises no assistance to joint tortfeasors who have paid more than their share of liability. If the doctrine of joint and several liability is found to have been unaffected by the Comparative Fault Act and if a plaintiff executed judgment against a single tortfeasor, comparative fault would be an empty phrase for that tortfeasor. In this class of cases, little actual refinement of the compensation function of tort law would have been accomplished. The new system of liability will simply allow some claims that plaintiffs' fault previously would have barred.

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[173]*See* Indiana Nitroglycerine & Torpedo Co. v. Lippincott Glass Co., 165 Ind. 361, 75 N.E. 649 (1905).

[174]RESTATEMENT (SECOND) OF TORTS, *supra* note 165, § 886B(2)(e).

[175]Circumstances like the hypothetical will more than likely produce an occasion for applying principles of joint and several liability. Even in situations where the defendants are not acting in concert, a single, indivisible injury will give occasion to treat the two tortfeasors as jointly and severally liable in many jurisdictions. The point being raised in this discussion is not dependent upon an assumption that one of the tortfeasors has been required to pay the entire judgment, although that will probably have been the result. So long as *B* satisfies the criteria for indemnification under the Restatement's category (2)(e), she would be entitled to reimbursement for the total amount she paid in satisfaction of the plaintiff's judgment *against her,* regardless of whether that amount represented the plaintiff's total injury or a portion attributable to *B*'s negligence.

[176]The conclusions stated here follow from the Act and the common law regardless of the ultimate position adopted by the courts on the issue of the Act's effect upon joint and several liability.

If Indiana courts believe that the balance struck should not simply be in plaintiffs' favor, but should also take into account defendants' interests, and if the courts reason that the law of indemnity can serve as a vehicle for fully implementing the comparative fault system, some features of the common law of indemnity will have to change. First, the right to be indemnified will have to be extended to joint tortfeasors. Second, since the Act's explicit ban upon contribution forecloses further common law development of that principle for the benefit of defendants in Indiana, the indemnity doctrine's "all-or-nothing" operation will have to be abandoned in favor of a rule permitting restitution which amounts to partial indemnification. Finally, measurement of the amount of restitution will have to be made on the basis of the apportionment of fault. These are significant changes, and a court would understandably be reluctant to depart from the simpler and more easily administered common law rule. Courts should overcome that reluctance and adopt a rule of partial equitable indemnification.

The proposition that joint tortfeasors are not entitled to indemnity amounts to a rule in search of a rationale in Indiana jurisprudence. The case most often cited for the proposition, *Silvers v. Nerdlinger,*[117] offers only the suggestion that wrongdoers *in pari delicto* are not entitled to the remedy. If that is indeed the rationale, it has been removed by the adoption of apportionment of fault. Under the prior negligence system, no occasion was presented for determining the respective quantities of fault of multiple tortfeasors. Having been found jointly negligent, each defendant was liable to the plaintiff for the entire amount on that basis alone. The plaintiff alone decided whether to seek satisfaction of the entire judgment or only a portion from a single defendant. In the eyes of the law, the defendants were equally at fault, and if one defendant claimed to have paid more than her fair share of the judgment, no basis existed for determining how much one defendant should reimburse the other.

Support for this view is found in the other leading case in the state, *City of Gary v. Bontrager Construction Co.*[178] In that case, the city argued that its right to recoup from a contractor who created a hazard, any damages it may have to pay to a person injured on city streets, should prevent the injured person from recovering from the city in the first instance. The court, while acknowledging the validity of the general proposition that a city could under certain circumstances recoup damages paid for the wrongdoing of a third party contractor, rejected the city's argument.[179] The basis for the rejection was that cities permitted indemnification in earlier cases had not been at fault. In the instant case,

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[177]30 Ind. 53 (1868).

[178]113 Ind. App. 151, 47 N.E.2d 182 (1943).

[179]*Id.* at 160, 47 N.E.2d at 186.

evidence of the city's independent negligence existed, and the city's claim for ultimate recoupment therefore had no foundation.[180] In light of the *Bontrager Construction* court's analysis, it is apparent that where a basis for comparing the fault of the tortfeasors is presented, that is, where negligence on the part of one tortfeasor and mere *vicarious* liability on the other's part is present, indemnification is available. Where both are at fault, the proposition of *in pari delicto* denies the remedy.

Comparative fault supplies the needed foundation for recognizing a right of indemnification of one tortfeasor by another. The old, rough-hewn determination of the mere presence or absence of negligence has been replaced by the apportionment principle. Even in joint tort situations, the jury's findings attribute specific proportions of fault to the actors. The presumptive *in pari delicto* concept is removed from the process, and in its place are concrete judgments about the relative culpability of defendants. A rational basis is supplied for deciding whether one tortfeasor should recover against another for payments made in excess of that culpability.[181]

Another rationale supporting the rule against joint tort indemnification is that the law will not stand in aid of a wrongdoer,[182] although that rationale has not been articulated in Indiana case law. If that proposition ever had any validity in the context of indemnity,[183] the very essence of the comparative fault system militates against its continued use. Wrongdoing on the part of both plaintiffs and defendants is acknowledged, evaluated, and apportioned so that interests on both sides of the case may be served. The Indiana courts have adequate reason under the Comparative Fault Act to depart from the obsolete *Nerdlinger* view of indemnification.

By the same token, adoption of comparative fault opens the way for abandonment of the "all-or-nothing" operation of indemnity. Partial indemnification made no sense in the old system of liability where joint tortfeasors had no basis for claiming reimbursement in any amount less than the total sum they paid in satisfaction of the judgment debt. The common law doctrine of contribution, if available at all, was the closest the courts could come, and the apportionment provided by that doctrine

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[180]*Id.* at 161-63, 47 N.E.2d at 186-87.

[181]Further support for this view can be found in those jurisdictions which permit indemnification of a "passively" negligent tortfeasor by an "actively" negligent one. That approach demonstrates that where courts are able to discern a difference in the character or quality of the actors' fault, a right to indemnification follows. The Indiana courts have rejected this approach however. Coca-Cola Bottling Co.-Goshen v. Vendo Co., 455 N.E.2d 370 (Ind. Ct. App. 1983); Indiana State Highway Comm'n v. Thomas, 169 Ind. App. 13, 346 N.E.2d 252 (1976). *See* McLish v. Niagra Machine & Tool Works, 266 F. Supp. 987, 991 (S.D. Ind. 1967) (citing Indiana Harbor Belt R. Co. v. Jones, 220 Ind. 139, 41 N.E.2d 361 (1942)).

[182]*See* W. PROSSER, *supra* note 74, § 51, at 311.

[183]*Id.*

was rational in a case of joint and several liability only upon an equal division, or *per capita* basis.[184] Apportionment of fault, a determination the Indiana Act requires in every case, supplies the needed logical support for restitution of a sum certain reflecting the indemnitor's portion of the damages paid to the injured plaintiff.

The sum certain can be determined by applying the percentages of "fault" assessed against the defendants in the trial of the case. For example, assume the plaintiff's damages are found to be $100,000, and the "fault" of the parties is assessed in the following percentages: plaintiff - 20%; defendant one (D^1) - 30%; defendant two (D^2) - 50%. The plaintiff's verdict would be for a total of $80,000 against D^1 and D^2 as joint tortfeasors. Supposing the plaintiff executed against D^1 for the entire judgment and D^1 satisfied it, D^1 would have an equitable claim for partial indemnity against D^2 in the amount of $50,000. Under this approach, the comparative fault system's aim of improving the compensation function of tort law will have been achieved without sacrificing the fundamental fairness of the apportionment principle.

Precedent for this approach exists in other jurisdictions.[185] One court has grounded the remedy solidly upon the principle of fairness in preventing unjust enrichment.[186] Another has relied heavily upon principles of restitution to create an equitable "contribution based upon relative fault."[187] The label is theoretically unimportant.[188] In this new era of tort law in Indiana, the principles driving the comparative fault system should be given full play for the benefit of all parties whose rights and obligations are to be adjudicated under that system. The old common law rules of contribution and indemnity served their purpose in a system of unrefined determinations of fault. Their simplicity and ease of administration suited them well in that system. Those qualities alone do not justify their perpetuation in the new system. Contributory negligence is, after all, a simple and easily administered principle in contrast to apportionment of fault. The Indiana legislature's ban on contribution has petrified that doctrine and preserved it as a relic of the past. The doctrine of indemnity is still a part of the living common law. The Indiana courts should not shrink from applying their equitable powers to fashion a

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[184]*See* Leflar, *supra* note 161, at 136; W. PROSSER, *supra* note 74, at 310.

[185]The leading case is Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). *See also* American Motorcycle Ass'n v. Superior Court of Los Angeles County, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362 (Minn. 1977); Missouri Pac. R. Co. v. Whitehead & Kales Co., 566 S.W.2d 466 (Mo. 1978).

[186]Missouri Pac R. Co. v. Whitehead & Kales Co., 566 S.W.2d 466, 469-70 (Mo. 1978).

[187]Tolbert v. Gerber Indus., Inc. 255 N.W.2d 362, 367 (Minn. 1977).

[188]What the remedy is called may induce a more receptive attitude, however. A given court may be more inclined to apply the principles of restitution to prevent a tortfeasor from being unjustly enriched than it would to create a new doctrine of "partial indemnity," even though the function is the same.

new remedy from the elementary principle of fairness, a common denominator of indemnity and comparative fault.

G. *Section 8: Government Entity and Public Employee Exceptions*

Section eight of the Act, which will be invoked in cases arising under the Indiana Tort Claims Act, proclaims that the Comparative Fault Act "does not apply in any manner to tort claims against governmental entities or public employees under I.C. 34-4-16.5."[189] Since the Act does not apply, any plaintiffs suing under the Tort Claims Act will be subject to common law defenses and principles of liability.[190] Those plaintiffs' claims will be completely barred for any contributory negligence,[191] and defendants will be foreclosed from invoking the apportionment principle. By this section, the Indiana General Assembly has again equivocated on its acceptance of the comparative fault system of liability. If governmental entities and their employees operated in a world insulated from general social intercourse, a dual system of liability would raise only policy considerations: the fairness of the duality, the economics of maintaining two systems, and the question of whether societal interests in protection from harm are adequately served by the two systems. Government workers are, however, actively involved in daily life. Many of the passersby at any busy intersection are likely to be carrying out some governmental function. The possibility of a claim involving the government worker as a joint or concurrent tortfeasor is not remote. In such a case, the problems of a dual system of liability become acute. Practical issues in the administration of a dual system are joined with and underscore the considerations of fairness, economics, and utility of preserving the otherwise abandoned common law negligence doctrine for the benefit of government.

If a plaintiff alleges that the negligence of a government worker, *A*,[192] and a private individual, *B*, combined to injure him, the Indiana Act's misplaced deference to government immediately presents the court with difficulties in managing the case. The court has two options: (1) to separate the governmental case from the non-governmental case and

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[189]IND. CODE § 34-4-33-8 (Supp. 1984).

[190]*See* City of Fort Wayne v. Cameron, 267 Ind. 329, 333-34, 370 N.E.2d 338, 340-41 (1977) and cases cited therein.

[191]Any contributory negligence that is overcome by the last clear chance doctrine will, of course, not bar the plaintiff's action. See the discussion of the last clear chance doctrine in the context of comparative fault, *infra* notes 465-501 and accompanying text.

[192]For the sake of simplicity, it is assumed that the government would also be sued. At any rate, the Tort Claims Act requires the governmental entity to pay the judgment against an employee "when the act or omission causing the loss is within the scope of his employment, regardless of whether the employee can or cannot be held personally liable for the loss and when the governor, in the case of a claim or suit against a state employee, or the governing body of the political subdivision, in the case of claim or suit against an employee of a political subdivision, determines that paying the judgment . . . is in the best interest of the governmental entity." IND. CODE § 34-4-16.5-5(b) (1982).

conduct two trials, or (2) to try the case as a normal multiple defendant case, instructing the jury differently with respect to the two defendants.

The first option requires a total duplication of effort and expense. It may present difficulties of proof, and the jury will have to be carefully instructed to prevent confusion about why it should not consider one of the actors involved in the case. For these reasons a court might decide to try the case at one time under both systems of liability.

The second option, to try the case as a normal multiple defendant case but with separate jury instructions for each defendant, has nothing to recommend it over the first. Approaching the case this way would require an explanation to the jury that *B*'s fault is to be apportioned, but *A*'s fault is not. Concerning *B*'s liability to the plaintiff, *B* could argue that *A* should be treated as a "nonparty," thereby reducing the ultimate damages award. The plaintiff would counter by saying *A* is not technically a "nonparty" under the Act's definition of that term,[193] and that *B*'s liability should not be reduced by bringing *A* into the case when the Act "does not apply in any manner" to *A*. If a court accepts *B*'s "nonparty" argument, it will be faced with explaining to the jury how a party *present* in the case is to be treated as a "nonparty" for the purposes of comparative fault for *B*, and then explaining how that same "nonparty," *A*, is liable to the plaintiff without apportionment. If the plaintiff's argument is accepted, however, apportionment of "fault" against either tortfeasor would be inappropriate.

The matter gets more complicated if the plaintiff is partly at fault. One problem arises if two trials are conducted and the jury finds the plaintiff at "fault" in the trial against *B*. In the subsequent trial against *A*, the defendant might assert that the finding of "fault" in the case against *B* ought to be binding in the plaintiff's case against *A*. The plaintiff should be able to successfully overcome *A*'s assertion by pointing out that the principles of collateral estoppel do not support *A*'s assertion; *A* would be seeking to benefit from collaterally estopping the plaintiff from relitigating the issue of "fault" without having risked liability in the trial against *B*.[194] If the jury in *A*'s trial finds the plaintiff free of "fault," *A* has no way of using the fact findings in *B*'s trial to impeach the second verdict. The plaintiff is under similar limitations if he decides to litigate the claim against *A* first: he may not use the findings in *A*'s

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[193]IND. CODE § 34-4-33-2(a) (Supp. 1984).

[194]Since defendant *A* was not actually a party to the plaintiff's action against *E*, sufficient identity of parties would be lacking for *A* to attempt to estop the plaintiff from claiming that the issue of "fault" was open in his claim against *A*. *See* Indiana State Highway Comm'n v. Speidel, 181 Ind. App. 448, 392 N.E.2d 1172 (1979). *Compare* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), *with* Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) (cited by the *Speidel* court for the proposition that the identity of parties requirement of collateral estoppel has been abandoned in federal courts.).

trial (such as a finding that he was not contributorily negligent) to his benefit in the trial against *B*.[195]

Regardless of whether two trials are conducted, issues concerning the plaintiff's ultimate right of recovery arise in cases involving governmental and nongovernmental defendants. Since the Act does not apply in the case against *A*, for example, a judgment against *A* would entitle the plaintiff to seek satisfaction for the entire amount of his damages against *A*. Normal principles of joint and several liability would prevent *A* from resisting the plaintiff's attempts to recover the entire judgment.

If the plaintiff obtains a favorable verdict in the case against *B* and executes on that judgment first, other problems arise. For example, assume the jury found the plaintiff's unadjusted damages to be $100,000, *A*'s "fault" to be 40%, and *B*'s "fault" to be 60%.[196] If the plaintiff obtains satisfaction of the $60,000 judgment against *B*, should the court entertain *A*'s claim that she should benefit from the apportionment, even though the Act does not apply, and limit the plaintiff's execution against *A* to $40,000?[197] The argument by *A*, that the plaintiff would enjoy a windfall if permitted to recover the full $100,000 from *A* in addition to the $60,000 from *B*, might seem fairly persuasive. It is not entirely clear, however, that *A* should be heard to make that argument under the collateral source rule.[198] Given the Act's inapplicability, *A* is vulnerable to the counterassertion that a limitation of recovery would amount to a windfall for her.

The amount of legislative detail necessary to address all of these

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[195]Principles of due process prevent fact findings in the trial against *B* from being used to *A*'s detriment in the trial against her. The nonmutuality of parties (the plaintiff was not proceeding against *A* in the trial against *B*) prevents findings of fact from being used by *A* to the plaintiff's detriment. These principles are not dependent upon a judgment having been rendered in the first trial. They should therefore be applicable in a situation where the court conducts the proceedings pursuant to Indiana Trial Rule 42. Compare the federal court's allowance of collateral estoppel in Barron v. United States, 654 F.2d 644, 649 (9th Cir. 1981).

[196]This example assumes that *A* is treated as a "nonparty." *See infra* text accompanying notes 200-34.

[197]The plaintiff need not seek satisfaction first from *B* for this type of problem to arise. If he first obtained satisfaction of the entire judgment from *A*, it is unclear whether *B* would have a claim that the judgment against her should be discarded. If the Act is construed to have abolished joint and several liability with respect to the claim against *B*, upon what basis would *B* assert that the judgment against her had been discharged? *See supra* text at notes 90-94. Furthermore, payment of tort claims against governmental agencies is subject to approval by that entity as being "in the best interest of the governmental entity." IND. CODE § 34-4-16.5-5(b) (1982). If the decision of the governmental entity is that payment should be limited by the apportionment of "fault" to the government employee, has not the entity in essence applied the Act for its own benefit?

[198]*See* Evans v. Breeden, 164 Ind. App. 558, 561, 330 N.E.2d 116, 118 (1975) (quoting 9 I.L.E. *Damages* § 86: "Compensation for the loss received by plaintiff from a collateral source, independent of the wrongdoer, as from insurance, cannot be set up by the wrongdoer in mitigation of damages.")

issues probably means they will have to await judicial treatment. If such a case is ever brought to litigation, uncertainty and confusion from the Act's preservation of the old system for Tort Claims Act cases seems unavoidable.

Section eight is alleged to have been another fruit of the political compromise necessary to obtain passage of the Act.[199] No legal reasons have been publicly offered in support of that compromise, and none are apparent. Indiana's exclusion of governmental entities is unique among statutory enactments of comparative fault. Maintenance of the dual systems of liability which the exclusion requires should have more to recommend it. The exclusion should be repealed.

H. Section 10: The "Empty Chair Defense"

One of the main points of contention between proponents and opponents of the bill proposing comparative fault in Indiana was whether the fact finder should be able to take into account the culpable conduct of persons not party to the lawsuit in its apportionment of fault.[200] From the defendant's point of view, any culpability attributable to another person ought to reduce the defendant's share of liability in a system based upon apportionment of fault. If the jury must find that the combined fault of the named parties totals 100%, some distortion of apportionment must inevitably result in cases where more than one tortfeasor contributed to the injury, but not all tortfeasors were named in the action. If, for example, one tortfeasor was impecunious or could present circumstances which might evoke the sympathies of the fact finder, the plaintiff might deliberately refrain from naming that tortfeasor as a defendant in the hopes of enhancing the chances or extent of recovery. The named defendant would then likely bear full responsibility, having committed only part of the fault which contributed to the injury, since the "total fault" of the *named* parties would have to equal 100%.[201] In effect, the plaintiff could enjoy the advantage of injecting the nonpresent actor's fault into the case without the disadvantages presented by that actor's peculiar circumstances. The nonpresent actor would be figuratively represented by an "empty chair" in the courtroom. A faceless, nameless entity whose only meaningful quality was fault would occupy that chair, and the only way such fault could be accounted for would be to attach it to the other parties to the action. If the plaintiff were found to be free of fault, the entire burden of this phantom

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[199]Remarks of Mr. Bayliff, *supra* note 87.

[200]*Id.*

[201]To illustrate, assume two actors equally at fault in producing the plaintiff's injury. If one actor was insolvent and the fact finder found each of the actors 50% at fault, the plaintiff's actual recovery would be limited by 50%. If the insolvent actor was not named in the suit and the fact finder could not take her fault into account, the plaintiff could impose 100% of the liability upon the solvent actor by refusing to name the insolvent.

defendant's fault would be borne by the named defendant. Facing the possibility of such a distortion of the apportionment principle, a defendant would want the system to be capable of factoring all culpable acts into the apportionment formula. Two methods for attaining that objective are (1) requiring the plaintiff to name all actors thought to be at fault as defendants, or (2) permitting the finder of fact to consider nonpresent persons' fault in the apportionment decision and allowing the "fault" of the named parties to total less than 100%.

From the plaintiff's point of view, neither of the two alternatives is inherently attractive. The first requires the plaintiff to name all potentially liable actors, regardless of the magnitude of that potential liability or the other disadvantages of having those actors as parties to the action. Multiple actor cases might become unwieldy, expensive, or time-consuming in ways not commensurate to the fragments of compensation recoverable from some actors. Some tortfeasors may be people whom the plaintiff would prefer not to sue if given the choice, such as relatives. Other tortfeasors may be immune, and to name such persons might be a dry exercise. The second alternative requires the plaintiff to bear the burden of the nonpresent person's culpability, since any "fault" attributed to that person means a proportionate reduction of the verdict obtained in the cause of action.

On a relative scale, the second alternative permits some discretion by plaintiffs, and would be generally preferable over the first. If the plaintiff saw no disadvantage in naming all potentially liable actors to the lawsuit, he would be permitted to do so under the second alternative while retaining the flexibility to leave some persons out of the case if he believes the reduction in the ultimate verdict to be an acceptable cost. The Indiana Comparative Fault Act adopts the second alternative in the form of an affirmative defense. Section ten, added by the 1984 amendments, permits a defendant who pleads the defense to "assert . . . that the damages of the claimant were caused in full or in part by a nonparty."[202] The plaintiff in such a case still bears the burden of proof with respect to the causal connection between the tortfeasors' fault and the injury,[203] but if a defendant pleads a "nonparty defense"[204] she must prove the causal connection between the nonparty's actions and the plaintiff's damages.[205]

The section imposes specific time limits for raising the defense, but confers some discretion upon the trial court to provide some flexibility.

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[202]Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 5, § 10(a), 1984 Ind. Acts 1468, 1471 (codified at IND. CODE § 34-4-33-10(a)).

[203]IND. CODE § 34-4-33-10(b).

[204]*Id.* § 34-4-33-10(a).

[205]*Id.* § 34-4-33-10(b).

Generally, the defense must be pleaded when the defendant knows of it, except that when the plaintiff has served the complaint more than 150 days before the expiration of the statute of limitations for the action against the nonparty, the defendant has until 45 days before the expiration of the period of limitations to plead it.[206] The court is empowered to adjust the time limits so long as the defendant has a "reasonable opportunity to discover the existence of a nonparty defense"[207] and the plaintiff has time to name the nonparty as a defendant before the statute of limitations expires.[208]

If the defendant is a "qualified health care provider" under the Medical Malpractice Act,[209] section ten applies to claims brought pursuant to that Act.[210] However, the "nonparty defense" must be pleaded within 90 days from the date the plaintiff's claim was filed with the insurance commissioners.[211] The court is given similar power to modify the time limit in malpractice proceedings under restrictions similar to those in ordinary lawsuits.[212] This subdivision ensures that the medical review panel, required by the Medical Malpractice Act, will be timely apprised of any assertion that the plaintiff's injury was wholly or partially caused by anyone other than the defendant named in the original claim before it begins its determination of the issues of causation and breach of the standard of care.[213]

Recognition of the nonparty defense by section ten thus forecloses plaintiffs' use of the "empty chair" strategy and places it in the hands of defendants. If the plaintiff is unwilling or unable to name the person the defendant asserts as another source of the plaintiff's injuries, the defendant will attempt to attribute as much "fault" as possible to the phantom occupant of the "empty chair" in order to reduce her own share of liability. Where the plaintiff chooses not to name the other person as a defendant, this defense is consistent with principles of fairness and apportionment of fault since it will ensure that the defendant bears no more than her proportionate share of liability, and any resultant reduction of the plaintiff's compensation will stem from the plaintiff's own choice.

When the plaintiff is *unable* to name the nonparty, however, the defense may strain both the fairness and apportionment principles. In such a case, the nonparty is not a party to the suit for reasons beyond the plaintiff's control. The identity of the nonparty may be unknown

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[206] *Id.* § 34-4-33-10(c).
[207] *Id.* § 34-4-33-10(d)(1).
[208] *Id.* § 34-4-33-10(d)(2).
[209] IND. CODE tit. 16, art. 9.5 (1982).
[210] IND. CODE § 34-4-33-10(d). *See also infra* notes 235-41.
[211] IND. CODE § 34-4-33-10(d).
[212] *Id.* § 34-4-38-10(d)(1), (2).
[213] *See generally* IND. CODE §§ 16-9.5-9-1, -10 (1982).

to the parties, or the person may be beyond the jurisdiction of the court or immune from liability. In the usual two-party situation outside the Act's application, these conditions would prevent the plaintiff's recovery. These conditions, however, affect the legal relation of the plaintiff and the would-be defendant. In the multiple actor case, the legal relations between the plaintiff and the defendant on the one hand, and the plaintiff and the nonparty on the other, do not seem so inherently connected that the former should be affected by flaws in the latter. The concept of joint and several liability might supply a connection in logic, policy, fairness, or precedent in some cases, but that concept and its elements would argue in favor of the plaintiff and full liability, not in favor of the defendant and reduced compensation.

The defense permits an over-emphasis of notions of causation to encroach upon the apportionment decisions of the fact finder. Faced with multiple actor cases, even where it is clear that the named defendants' acts satisfy all legal requirements of a cause of action founded upon fault, juries will be asked to segment the cause of action as if it were a series of actions against several individuals rather than a single action against a group of actors. In cases of indivisible injuries, juries will be asked to pretend that those injuries are capable of division, and that this divisibility logically follows from an apportionment of fault. The comparative fault system in general is founded upon the important fiction that the fact finder is capable of ascertaining portions of fault from the facts of the case with precision. The "empty chair" defense presses that fiction into service beyond what it can comfortably bear in cases of this sort.

One potential problem if an "empty chair" defense is available is the situation where a worker is injured at the workplace as a result of the combined fault of his employer and a third party, and the worker sues the third party. The employer, being immune from tort liability, could not be named as a party to the tort action. If the third party tortfeasor were to be able to raise the employer's fault as a "nonparty defense" under section ten, serious difficulties would arise in connection with the plaintiff's ultimate recovery and the employer's right to obtain reimbursement for payments made pursuant to the workers' compensation statutes.[214] The potential difficulty presented is that the plaintiff would suffer a double reduction of compensation if his verdict were reduced by the amount of the employer's "fault" and then he had to reimburse that employer from the proceeds of the already reduced verdict. Section ten does not specifically address this problem, but it has been solved by the 1984 amendments' definition of "nonparty," which specifically

[214]The problem is discussed in greater detail in conjunction with the examination of section twelve. *See infra* text accompanying notes 242-305.

excludes employers.[215] Third party tort actions brought by workers will, therefore, be treated as if the conduct of the employer is not involved. That is not to say that the employer's conduct is capable of being ignored in the presentation of the case and the assignment of accountability. Plaintiffs' counsel would accordingly be well-advised to make sure that the jury is fully and clearly instructed on the law in this regard, so that it understands that it is not to attribute to the employer any responsibility for the plaintiff's injury, either in the percentages of fault it computes or in the determination of damages before adjustment. The Act's suggested jury instructions, even with removal of the "nonparty" language, are clearly inadequate for such purposes.

Allegiance to the apportionment principle argues strongly in favor of the defense. If the named defendant is made to bear the consequences of the absent actor's fault, apportionment of fault would seem to have been scrapped for the sake of compensating plaintiffs. At this level of simplicity, and from a defense orientation, the objection appears to be well-taken. It should be remembered, however, that the policy of expanding the compensation function is at least as important as the policy of applying the apportionment principle in the adoption of comparative fault. Considerations of fairness support the defense where plaintiffs' choice of strategy is the primary reason for imposing the burden of someone else's fault on the defendant. Where no one has *chosen* to leave that other person out of the lawsuit, fairness principles strongly suggest that *both* the defendant and the plaintiff should bear the burden; resolution of the matter should not be dependent upon a simplistic notion of apportionment oriented either toward plaintiffs' *or* defendants' interests. If the plaintiff and the defendant hurt *each other* in combination with a third person, they would each participate in the benefits and burdens of the nonpresence of that third party.[216] The same should be true where the plaintiff is the only person to have been injured. Section ten casts the entire burden upon the plaintiff regardless of the reason for the nonparty's absence from the suit, and thereby tilts the balance of fairness in defendants' favor. The noninjured defendant has no more

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[215]Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2(a), 1984 Ind. Acts 1468, 1468-69 (codified at IND. CODE § 34-4-33-2(a)).

[216]For example, if the plaintiff were found to be 30% at "fault," the defendant 40%, and the third party 30% at "fault," plaintiff would recover 40% of his damages and defendant 30% of her damages under the defense; each shares proportionately the burden of the defense. However, if the fact finder was not permitted to take the third party's "fault" into account, the plaintiff's proportion of "fault" becomes 42.9%, and the defendant's becomes 57.1%. Pursuant to the Act's "greater than 50%" rule, the defendant's recovery would be totally barred. The defense permits the defendant to avoid this harsh result. Furthermore, this benefit of the defense is not dependent upon the status of the parties as plaintiff or defendant; the same result is produced where plaintiff's and defendant's percentages of fault are reversed.

of a claim for strict adherence to the apportionment principle than does the injured plaintiff. When the plaintiff must absorb the fault of the phantom defendant, as much distortion of the apportionment principle occurs as when the defendant must, and forcing the plaintiff to accommodate also impairs the compensation principle.

The problem of malapportionment demonstrates that the issues raised by a nonpresent tortfeasor are not simple. Simplistic, one-way rules to supply answers to those issues are not satisfactory. The "empty chair" defense has received far less than unanimous acceptance by other authorities. The Indiana Act goes well beyond the position taken by the National Commissioners in the Uniform Act, for example. That body believed it better to keep the fault of third persons out of the lawsuit unless those persons could be named as parties.[217] The commissioners recited the lack of "certainty whether that person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued, or whether the statute of limitations will run on him," plus the fact that the determination of none of those issues could be binding upon the nonparty, in support of its position.[218] Courts of California,[219] Kansas,[220] Oklahoma,[221] West Virginia,[222] and Wisconsin[223] have required the acts of all persons to be taken into account in apportionment decisions, regardless of whether they have been named as parties to the lawsuit. However, under various circumstances, courts in Arkansas,[224] Florida,[225] Hawaii,[226] Oregon,[227] and South Dakota[228] have excluded the fault of persons not named as parties from consideration by the fact finder.

Even the treatise writers disagree. Mr. Schwartz believes "[a] result more compatible with the goals of comparative negligence is reached by determining the negligence of all concurrent tortfeasors irrespective of

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[217]UNIFORM ACT, *supra* note 7, commissioners' comment at 39.

[218]*Id.*

[219]American Motorcycle Ass'n v. Superior Court of Los Angeles County, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

[220]Geier v. Wikel, 4 Kan. App. 2d 188, 603 P.2d 1028 (1979).

[221]Paul v. N.L. Indus., Inc., 624 P.2d 68 (Okla. 1980).

[222]Bowman v. Barnes, 282 S.E.2d 613 (W. Va. 1981).

[223]Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934).

[224]*See* H. WOODS, *supra* note 27, § 13.3, at 224-25.

[225]Kapchuk v. Orlan, 332 So. 2d 671 (Fla. Dist. Ct. App. 1976) (other parties' collisions with plaintiff's automobile subsequent to defendant's collision treated as plaintiff's contributory negligence).

[226]Sugue v. F.L. Smithe Machine Co., Inc., 56 Hawaii 598, 546 P.2d 527 (1976). *But see* Barron v. United States, 473 F. Supp. 1077 (D. Hawaii 1979), *rev'd in part*, 654 F.2d 644 (9th Cir. 1981) (apportioning fault of employer immune to direct suit by injured worker).

[227]Conner v. Mertz, 274 Ore. 657, 548 P.2d 975 (1976).

[228]Beck v. Wessel, 90 S.D. 107, 237 N.W.2d 905 (1976) (applying guest statute: host's negligence not used to reduce plaintiff passenger's recovery).

whether they are parties to the suit."[229] Judge Woods, having compared cases from jurisdictions with opposing views, concludes that

> [i]t is unrealistic to ask jurors to determine percentage of fault of tortfeasors who are not before the court. A reading of the case reports demonstrates that the Wisconsin practice has proved vexatious to its courts. On the other hand, by only apportioning fault among parties actually before the court, Arkansas has had no demonstrable problems.[230]

With respect to both writers, as this brief discussion has attempted to demonstrate, the issue is not as simple as either of them would have it. The focus of the system should not be so narrow as to exclude accommodation of either the apportionment principle or the need for judicial efficiency. At this late date of development, comparative fault systems should be refined enough to offer a flexible approach based upon equitable principles to avoid or resolve practical problems without departing from the elemental concepts of the system of liability. Rather than imposing a rigid one-way rule which requires one party or the other to bear the burden of the nonpresent actor's fault, a comparative fault system ought to be able to take the peculiar circumstances of a given case into account. Some circumstances may well exist under which it is both realistic and reasonable to expect the fact finder to apportion fault to a nonparty. That may especially be true where the plaintiff chooses not to name that person. Where the absence of a tortfeasor is not attributable to the decision of any of the parties to the action or where it is not reasonable to expect a jury to assess the fault of the nonpresent actor, the courts should have the ability to equitably distribute the burden among all of the named parties. A workable system might be one similar to the Uniform Act's treatment of released, insolvent, or immune tortfeasors, where the plaintiff's claim is reduced in proportion to a released tortfeasor's equitable share of fault, and all present parties equitably share the burden of an insolvent or immune defendant's liability.[231] The system assuredly is not as simple as a one-way rule, and requires coordination of the apportionment function with rules of joint and several liability, rights of contribution and indemnity, motions practice, and the courts' exercise of equitable jurisdiction. In the tort system's adjustment of rights between people, in which compensation for injuries is determined by close evaluation and assignment of quantums of culpability, however, simplicity is not necessarily a virtue.

When the 1984 amendments added the "empty chair" defense to the Act, the suggested jury instructions in section five were only cosmetically amended; they do not truly reflect the substance of section

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[229]V. SCHWARTZ, COMPARATIVE NEGLIGENCE 122 (Supp. 1981).

[230]H. WOODS, *supra* note 27, § 13.3, at 224-25.

[231]UNIFORM ACT, *supra* note 7, §§ 2, 6 and commentary.

ten. Section ten makes the defense an affirmative defense, and places the burden upon the defendant. Where the defendant does not raise the defense, it clearly would be improper to instruct the jury to "determine the percentage of fault . . . of any person who is a nonparty,"[232] since even when the defense is raised the fact finder may not automatically consider "*any* person who is a nonparty," as these instructions suggest. Together, the Act's definition of a "nonparty" as "a person who is, or may be, liable to the claimant in part or in whole for the damages claimed,"[233] the requirement that the jury name the "nonparty"[234] in the verdict, and the specificity with which section ten treats the defense, indicate quite strongly that the fact finder is not to assign accountability for the plaintiff's injuries to just any person whose actions the fact finder believes to be faulty. The incentives to name all potential defendants are strong enough that a case involving a valid nonparty defense will be relatively infrequent, placing the general applicability of the suggested instructions in further doubt, and enhancing the responsibility of the bench and bar to ensure that usage of the instructions do not become routine and automatic.

I. Section 11: Coordination Between the Comparative Fault and Medical Malpractice Acts

When an injured person has been harmed by several people, some of whom are "qualified health care providers" under the Medical Malpractice Act and some of whom are not, the injured person would face possible problems of coordinating the actions against the various parties unless one or the other of the two Acts made allowance for the medical review panel process of the Medical Malpractice Act. That Act does not permit a tort action against certain qualified defendants until a review panel has rendered its opinion on issues of causation and breach of the applicable standard of care.[235] If a nonqualified defendant's conduct had combined with the qualified defendant's, the action against the nonqualified defendant might reach the trial stage before the preliminaries under the Medical Malpractice Act had been completed.[236]

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[232]IND. CODE § 34-4-33-5(a)(1), (b)(1).

[233]*Id.* § 34-4-33-2(a).

[234]*Id.* § 34-4-33-6. The requirement of section six, that the party be named, probably does not mean that the defense will fail unless the person can be named with specificity. Under proper circumstances, a "John or Jane Doe" identification should suffice. However, the requirement clearly indicates that the defendant cannot raise a complete phantom from the realm of conjecture and require the jury to surmise that someone else "must or may have" contributed to the plaintiff's injury.

[235]IND. CODE § 16-9.5-9-2 (1982).

[236]Delays in the process have been acknowledged by the Indiana Supreme Court in Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585 (Ind. 1980). A recent trial level decision, citing Department of Insurance statistics showing that the average case filed with the insurance commissioners takes nearly two years from the filing date to receive a

Section eleven solves the problem by permitting the trial court to "grant reasonable delays"[237] in the action against the nonqualified defendant "until the medical review panel procedure can be completed."[238] If the review panel procedure produces an opinion allowing the malpractice action to proceed, the court must permit the plaintiff to join the qualified defendant as party to the tort action begun against the nonqualified defendant.[239]

This compulsory continuance and joinder provision of section eleven relieves a plaintiff from the problems of conducting simultaneous proceedings dealing with the same set of facts. More importantly, it permits the plaintiff to file an action against the nonqualified defendant within the period of limitations without fear that the delays in the medical malpractice proceedings would set up a "nonparty defense" for the nonqualified defendant.[240] Had the Comparative Fault Act not provided for this coordination, the nonqualified defendant might well have been successful in convincing the fact finder to attribute some "fault" to the qualified defendant, even though it turned out later that the medical review panel's opinion foreclosed suit against the qualified defendant. In such a case, the plaintiff would have had a reduced recovery against the nonqualified defendant, but no recovery against the qualified defendant. Section eleven's language could fairly be interpreted as indicating that the Comparative Fault Act gives the nonqualified defendant no "empty chair" defense respecting the qualified defendant's conduct. "Nonparty" is defined by section two as a "person who is, or may be, liable to the claimant."[241] Since section eleven permits continuance of the action against the nonqualified defendant until the medical review panel decision has been reached, an opinion by that panel in favor of the health care provider would not only foreclose further proceedings against the provider, it would sweep the provider out of the definition of "nonparty," and thereby prevent the nonqualified defendant from asserting that the medical provider was at fault.

J. Section 12: The Diminution of Subrogation Claims, Liens, and Claims

1. Introduction.—The named parties in a tort action are not always the only entities interested in the outcome of the litigation. Often the

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medical review panel opinion, held the Medical Malpractice Act unconstitutional. Warnick v. Cha, S.D., 83-169, at 10 (Jasper Cty. Sup. 1983) (violating both the Indiana and the United States Constitutions in depriving claimants of the "right to free access of the courts.")

[237] IND. CODE § 34-4-33-11.

[238] *Id.*

[239] *Id.*

[240] *See supra* notes 200-34.

[241] IND. CODE § 34-4-33-2.

injured party has received some assistance in dealing with the injury from some other person or organization, and that provider looks to the judgment obtained from the tort action as a source of reimbursement for the assistance. Usually the provider is an insurer who has paid all or some portion of the medical expenses of its insured. In the absence of insurance protection, the assistance may have come from a hospital or other medical care provider. In each case, the provider has legal remedies to secure reimbursement for expenditures made on the injured party's behalf. Section twelve of Indiana's Comparative Fault Act modifies the extent to which such providers may obtain reimbursement, by diminishing the legal devices of "subrogation claims or other liens or claims"[242] under certain conditions. Liens and subrogation rights pursuant to the Indiana Workmens' Compensation Act and Occupational Disease Act, however, are specifically excluded from the section's operation, and require separate consideration.

2. Subrogation Claims.—To obtain reimbursement for designated expenses, an insurer employs a clause in the insurance contract conferring upon it the right of subrogation.[243] The insurer may exercise the right by an action against the tortfeasor whose acts occasioned the need for the expenditures, or by a claim against the insured.[244] The insurer has standing to sue the tortfeasor on the theory that the insurer is substituted for the injured party as the real party in interest, or, "standing in the shoes" of the insured it brings an action in the name of the insured.[245] Where the insurer seeks to recover from its insured, the action is grounded in the theory of restitution; presumably, since the insured has recovered for the expenses related to the injury, it would be unjust to permit him to retain items of damages for which he has already been compensated.[246] If the collateral source rule prevents the tortfeasor from reducing damages

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[242]IND. CODE § 34-4-33-12 (Supp. 1984).

[243]The right probably is not dependent upon a subrogation clause. Rights in the nature of subrogation have been recognized in the common law at least since the seventeenth century, even when no subrogation clause was part of the contract. However, because the common law would not aid a volunteer in obtaining reimbursement for such expenditures, the conduct of the subrogee must be of sufficient character to have been more than that of a mere volunteer to invoke principles of equity based upon the concept of constructive trust. *See* Marasinghe, *An Historical Introduction to the Doctrine of Subrogation: The Early History of the Doctrine*, 10 VAL. U.L. REV. 45, 275 (1975). *See also* Aetna Casualty & Sur. Co. v. Katz, 177 Ind. App. 44, 377 N.E.2d 678 (1978) (subrogation allowed when insured paid claim despite later discovery that the actual cause of damage was not one covered by the provisions of the policy).

[244]16 COUCH ON INSURANCE 2D §§ 61:4, 61:26, 61:29 (rev. ed. 1983). *See* Aetna Casualty & Sur. Co. v. Katz, 177 Ind. App. 44, 377 N.E.2d 678 (1978) (action against tortfeasor). *See generally* 4 G. PALMER, THE LAW OF RESTITUTION § 23.16, at 447 (1978).

[245]16 COUCH ON INSURANCE 2D, *supra* note 244, §§ 61:26, 61:27, 61:36. *See* Marasinghe, *supra* note 243, at 295.

[246]In his treatise on Restitution, Professor Palmer argues that since proceeds from insurance do not always compensate fully for actual loss, a mechanistic presumption of

by the amount of benefits previously paid to the plaintiff, the possibility of overcompensation is removed by permitting the subrogated provider to recover the funds advanced.[247]

Section twelve of the Act applies to certain providers of "medical expenses or other benefits" for injured persons whose tort recovery has been reduced by apportionment of fault or uncollectibility of the judgment.[248] Where the latter conditions exist, the "subrogation claim or other lien or claim . . . shall be diminished in the same proportion as the claimant's recovery is diminished."[249] Thus, in a case where the plaintiff had been found 20% at "fault," the subrogated provider of medical benefits will be entitled to restitution of 80% of the amount advanced to the plaintiff.

On the face of it, this statutory reduction of the provider's rights may seem arbitrary and unfair. The connection between the plaintiff's "fault" in contributing to his own injuries and the obligation arising between the plaintiff and the provider does not seem close enough to warrant a reduction of the provider's rights. Consideration of the basis of accountability in the context of subrogation rights, however, places the provision in a broader perspective, and its fairness and consistency with the compensation function of comparative fault becomes apparent.

The subrogated injured party's obligation usually springs from a clause in the contract of insurance similar to the following:

> In the event of any payment under the medical expense coverage of this policy, the company shall be subrogated to all the rights of recovery therefor which the injured person or anyone receiving such payment may have against any person or organization and such person shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. Such person shall do nothing after loss to prejudice such rights.[250]

The obligation *need not* arise from such a subrogation clause, and may actually be based upon operation of law,[251] but in either case the nature

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overcompensation in every case where the plaintiff recovers medical expenses in the tort judgment and from insurance proceeds is unwise, a departure from principles of unjust enrichment, and a failure to maintain a proper perspective upon the interests of the injured person. 4 G. PALMER, *supra* note 244, §§ 23.15-23.17.

[247]16 COUCH ON INSURANCE 2D, *supra* note 244, § 61:18, at 93-94; 4 G. PALMER, *supra* note 244, § 23.15.

[248]IND. CODE § 34-4-33-12.

[249]*Id.*

[250]4 G. PALMER, *supra* note 244, § 23.18, at 457 (quoting Peller v. Liberty Mut. Fire Ins. Co., 220 Cal. App. 2d 610, 34 Cal. Rptr. 41 (1963); Shelby Mut. Ins. Co. v. Birch, 196 So. 2d 482 (Fla. Dist. Ct. App. 1967); Demmery v. National Union Fire Ins. Co., 210 Pa. Super. 193, 232 A.2d 21 (1967)).

[251]16 COUCH ON INSURANCE 2D, *supra* note 244, § 61:2, at 75-76, § 61:19.

of the subrogated provider's right is the same: the provider is entitled to be placed in the position of the injured party with respect to recovery for the expenses paid.[252] Since the right is thereby tied to the underlying right of the injured party to recover against the tortfeasor,[253] and is in that sense derivative, it is subject to the defenses which the tortfeasor might raise against the injured party.[254] Thus, in a contributory negligence system, if the plaintiff's action is barred by his own fault, the provider's right of recovery under subrogation is also extinguished.[255] No money judgment in the underlying action can exist to provide a source of funds from which subrogation reimbursement may come. Given that restitution is the underlying theory of recovery, the equitable principle is not invoked in such a case because the plaintiff has not been unjustly enriched.[256]

The function of restitution theory in preventing unjust enrichment similarly operates where the provider seeks reimbursement from the injured recipient rather than from the tortfeasor. If the subrogated plaintiff recovers some damages in the tort judgment, but less than full compensation for the injury, the provider is not entitled to full reimbursement.[257] The burden is upon the party asserting the right to restitution to prove that the recipient of the benefits would be unjustly enriched if permitted to retain both the judgment recovery and the payments advanced by the provider.[258] Some courts have used "equitable distribution" in cases where the recovery has not been sufficient to cover all of the plaintiff's losses plus the amount claimed for reimbursement. The principle gives priority to the injured party's interests and the subrogee obtains reimbursement only after the injured party has received full compensation.[259]

In a comparative fault system, the plaintiff's partial fault will not necessarily bar his tort action, of course, and cases will arise in which recovery will represent less than full compensation for the injured party. Juries operating under the Indiana Comparative Fault Act and the Indiana Rules of Trial Procedure will render general verdicts which contain no itemization of the elements of damages awarded or the extent to which those elements are valued.[260] It would be impossible for an insurer to establish any certain amount of restitution to which it was entitled in such cases because it could not show how much, if any, of the recovery

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[252]*Id.* § 61:36, at 118.

[253]*Id.* § 61:212 at 274.

[254]*Id.*

[255]*Id.*

[256]*See* 4 G. PALMER, *supra* note 244, § 23.15, at 440.

[257]*See id.* at 438-39, § 23.18 at, 468-476; 16 COUCH ON INSURANCE 2D, *supra* note 244, § 61:43.

[258]4 G. PALMER, *supra* note 244, § 23.18, at 470-71.

[259]16 COUCH ON INSURANCE 2D, *supra* note 244, § 61:44.

[260]Indiana Trial Procedure Rule 49 abolishes special verdicts and interrogatories to the jury. *See supra* text accompanying notes 138-47.

pertained to medical expenses. Generally, where the plaintiff's medical expenses were established at a fixed amount and the verdict in the tort action was sufficient to cover all of the plaintiff's alleged losses, the difference between the verdict amount and the amount established for medical expenses could fairly be said to cover all items of damages *except* medical expenses. In a comparative fault case, the inference cannot so easily be drawn. For example, if the plaintiff's unadjusted damages were assessed at $100,000, and the plaintiff had offered proof of $10,000 in medical expenses, at this stage $90,000 would represent recovery for nonmedical losses. That conclusion would not hold up if the plaintiff had been found to be 10% at "fault." The resulting verdict would be $90,000, the plaintiff might assert that full compensation had not been received, and that he therefore had not been unjustly enriched. To the extent that subrogation rights against the injured party are dependant upon unjust enrichment, which must be proved by the provider, the subrogated provider's claim of unjust enrichment could be wholly undermined by reduction of damages according to apportioned fault.

Section twelve of the Act purports to save such subrogees from losing their subrogation claims. Had the Act been silent on the question of its effect upon subrogation claims, the theory outlined above may have been employed to block attempts for reimbursement of medical payments "or other benefits."[261] Since the section addresses claims which assert rights of subrogation and requires that the claims shall be merely "diminished,"[262] the argument may be maintained that the legislature did not intend subrogees' rights to be defeated. To justify the mere reduction of the right, the argument presumes that the overall percentage reduction of the plaintiff's recovery represents a rate of reduction pertaining to all items of damages asserted in the action. That is, in the hypothetical case presented above, the presumption is that the item of medical expenses (asserted by the plaintiff to total $10,000) has been reduced by 10%. Extending the presumption would mean that $9,000 of the $90,000 verdict represents damages for medical expenses, and the plaintiff holds the $9,000 for the provider.

The provision is arguably consistent with the compensation function of comparative fault since plaintiffs who are not found at "fault" will be treated as before and the effect of section twelve applies only to that class of plaintiffs which would have enjoyed no tort recovery at all under the contributory negligence system. Given the continued applicability of the collateral source rule, if plaintiffs who had received medical payments subject to contractual subrogation clauses were able to defeat subrogation claims by asserting less than full compensation recovery, the principle of *apportionment* of fault would be undermined.

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[261] IND. CODE § 34-4-33-12.

[262] *Id.*

Comparing the result under section twelve with the result if plaintiffs were able to rebuff subrogees on the above theory demonstrates the point. Assume the same facts as presented in the above hypothetical case: the plaintiff has suffered a $100,000 loss which has been recognized by the jury. Medical payments in the amount of $10,000 have been received subject to subrogation of the plaintiff's insurance carrier. The plaintiff has been found to be 10% at "fault." The verdict in favor of the plaintiff would then be $90,000, and the plaintiff is able to collect the entire judgment. To this point, the plaintiff has received $100,000 for his $100,000 loss. If the carrier's subrogation right is defeated on the theory that the plaintiff's *tort recovery* is less than full compensation, the plaintiff will have obtained a net recovery of 100% of his alleged loss. No apportionment of compensation resources in relation to his "fault" will result; he will be in as good a position as the plaintiff who was free from fault. Applying section twelve to the facts would mean that the plaintiff would be required to honor the subrogation claim in the amount of $9,000, less the insurer's share of litigation expenses.[263] The plaintiff under those circumstances would receive a net $91,000 in total compensation resources, a 9% reduction for his 10% of "fault." He will actually fare better than a plaintiff under similar circumstances who had no insurance. The resulting incentive to obtain protection for accidental injuries providing for advanced payments to ease the financial impact of such injuries may well be worth the partial contraction of subrogation rights under the provision.

A feature of the language of section twelve that may give pause in efforts to interpret and apply it is that it addresses subrogation *claims*, not the obligations secured by subrogation rights. A claim has two conceptual parts: the assertion that the subrogor is obligated to the subrogee, and the demand for restitution. The claim is not the obligation itself.[264] The amount demanded may be diminished by certain factors extraneous to the obligation, but it does not necessarily follow that the underlying obligation is diminished. As a practical matter, however, unless an alternative remedy is available for discharging the remainder of the obligation after the diminished subrogation claim is satisfied, reduction of the claim is tantamount to reduction of the underlying

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[263] *See* 16 COUCH ON INSURANCE 2D, *supra* note 244, § 61:47; 4 G. PALMER, *supra* note 244, § 23.18.

[264] *See* BLACK'S LAW DICTIONARY 224 (rev. 5th ed. 1979). Black's defines "claim" to include "right to payment" in the sense employed in the Bankruptcy Act § 101(4). That inclusion consolidates and reflects numerous references to statutory causes of action contained in the Revised Fourth Edition, but the former edition did not use the phrase. *See also* BALLANTINE'S LAW DICTIONARY 205 (3rd ed. 1969), which does not employ the phrase, emphasizes the *demand* aspect of the term "claim," and states that the term means "a cause of action for *some purposes*." *Id.* (emphasis added). The distinction being maintained here has to do with the substantive aspect of the obligation as contrasted with the procedural aspect of the right to seek satisfaction of that obligation.

obligation. The obligation may not have been fully discharged, but it remains uncollectible. Since rights of subrogation are so closely tied to the injured party's right of recovery against the tortfeasor, as the sample subrogation clause quoted above illustrates,[265] the subrogee is limited to asserting a claim against the "fund" produced by the tort judgment.[266] In this light, section twelve may accomplish indirectly what it does not do by direct language.

3. Liens.—A lien in its most general sense "is a charge against property that makes the property stand as security for a debt owed."[267] Distinctions may be drawn between equitable, common law, and statutory liens in terms of the differing factual elements giving rise to them, the various classes of providers protected, the character and extent of property serving as the security, enforcement procedures, and the like, but the shared element between them is that the lien is a remedy for enforcement of an underlying obligation.[268] The obligation may be in the nature of a debt created by contract, express or implied, or simply one that arises by the law of restitution to prevent unjust enrichment.[269]

If the provider of benefits is a hospital, the obligation arising from the express or implied contract between the injured party and the hospital is secured by a statutory lien.[270] The lien attaches to the judgment obtained in the personal injury action against the tortfeasor.[271] The theory of restitution to prevent unjust enrichment is again the foundation for the remedy.[272] The lien, as distinct from the obligation, is a remedial right conferred by the law to "detain" the assets of the obligor for the purpose of permitting the obligee to obtain satisfaction.[273] Destruction of the property thus encumbered means that the lien, if it has any independent existence at all, has nothing to which to attach; the underlying obligation, however, is not extinguished and the obligee may still pursue other remedial courses to obtain satisfaction.[274] The same

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[265]*See supra* text accompanying note 250.

[266]16 COUCH ON INSURANCE 2D, *supra* note 244, § 61:165.

[267]D. DOBBS, LAW OF REMEDIES § 4.3, at 248 (1973). *See* Hubble v. Berry, 180 Ind. 513, 103 N.E. 328 (1913).

[268]*See* D. DOBBS, *supra* note 267, § 4.3, at 248-50; G. DOUTHWAITE, ATTORNEY'S GUIDE TO RESTITUTION § 8.3, at 331 (1977); 1 L. JONES, A TREATISE ON THE LAW OF LIENS §§ 1-4 (1888); D. OVERTON, A TREATISE ON THE LAW OF LIENS: AT COMMON LAW, EQUITY, STATUTORY AND MARITIME § 8 (1883).

[269]D. DOBBS, *supra* note 267, § 4.3, at 249; G. DOUTHEWAITE, *supra* note 268, § 8.3, at 332-33. *See* RESTATEMENT (SECOND) OF RESTITUTION ch. 3 (Tent. Draft No. 2, 1984).

[270]IND. CODE §§ 32-8-26-1, -2 (1982).

[271]*Id. See generally* Annot., 25 A.L.R.3D 858 (1969).

[272]D. DOBBS, *supra* note 267, § 4.3, at 249.

[273]1 L. JONES, *supra* note 268, § 2, at 2 n.1 (Mr. Jones used the term "retain"); D. OVERTON, *supra* note 268, §§ 1-5 (Mr. Overton used both "detain" and "retain").

[274]D. DOBBS, *supra* note 267, § 4.3, at 250; *cf.* D. OVERTON, *supra* note 268, § 9 (where the author professes that "there can be no lien where the property is annihilated").

principle permits the lienholder whose lien attaches to a chattel that has suffered a reduction of value in the hands of the defendant to seek satisfaction for the full amount of the obligation by combining the action for discharge of the lien with an action at law for the difference in value.[275]

This aspect of the legal concept of liens becomes important in the context of section twelve because unless the section operates to diminish the obligation underlying the lien as well as the lien, no diminution of the lienholder's ultimate right of recovery will have been accomplished. If, for example, the lien is for $10,000 worth of medical benefits conferred,[276] and the recipient of those benefits is found to be 10% at "fault" in his tort action, the provider's lien is diminished by $1,000, but unless section twelve is also construed to have diminished the obligation secured by the lien, the lienholder may seek a supplemental money judgment for that $1,000.[277]

The different footing upon which lienholders' rights rest, in contrast to the rights of subrogated insurers, sets up a theoretical possibility that lienholders would ultimately be able to thwart the effect of section twelve and receive full reimbursement for the advances they have made to the injured party. In general terms, equitable liens are based upon and are intended to secure express or implied contractual rights between the parties. If the express terms of the contract or the implied understanding of the parties do not relate to the "fund" which is to be generated from the personal injury judgment of the recipient but to some other "fund," it would seem that neither the lien nor the underlying obligation "exists in respect to a claim for personal injuries or death"[278] as required by section twelve. If such a case were to arise, and the lienholder asserted the secured rights independently from the recipient's tort action, the lienholder might argue that the case falls outside the contemplation of the provision.

Beyond this theoretical possibility, such a case does not appear likely under present Indiana law. No Indiana case has been found which has recognized an equitable lien under circumstances like those under discussion. Indiana does, however, confer a statutory lien in favor of hospitals providing medical services to injured parties, but since the lien attaches to "any judgment for personal injuries rendered in favor of any person [with some exceptions] . . . receiving treatment, care, and maintenance therein on account of said personal injuries received as a result of the negligence of any person or corporation,"[279] the lien and

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[275]D. Dobbs, *supra* note 267, § 4.3, at 250.

[276]Indiana Code section 32-8-26-1 for example, confers a lien upon hospitals having furnished the injured party with medical services.

[277]D. Dobbs, *supra* note 267, § 4.3, at 250.

[278]Ind. Code § 34-4-33-12.

[279]Ind. Code § 32-8-26-1 (1982).

underlying obligation would appear to satisfy the elements of section twelve.[280]

4. Claims.—If the word "claim" has independent significance in

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[280]Section twelve limits a "lien or claim" that otherwise satisfies the elements of the provision. Logically, the lienholder could concede that the lien and the obligation asserted in a related contractual claim were subject to diminution and still contend that since the two remedies are not a unitary element, they should be serially diminished. To illustrate, assume advances of $10,000 for which the statutory lien arises and that the plaintiff's "fault" is assessed at 20%. This line of argument would assert that the lien would be diminished by 20%, leaving $2,000 in the contract claim, which would then be reduced by 20% or $400, allowing a total reimbursement of $9,600. Surely the legislature did not intend lienholders and holders of subrogated rights to be treated differently. If that is true, the logic of the lienholder's argument above compels a conclusion at odds with the enactment. The logic is enabled by the failure of the language in section twelve to actively and directly address what the section only apparently was designed to do—to treat the rights of lienholders and subrogated providers equally by reducing the injured party's *obligation* to the holder of the right.

The design is apparent because the drafter equated subrogation rights and liens on the one hand and treated liens and claims as equivalencies on the other. The phrase "subrogation claim or other liens" is evidence of the equation of liens and subrogation claims, and the pregnant word is "other." In ordinary usage, "other" sometimes denotes the noun following it as a more general class of things of which the noun preceding it is a member, as in the phrase, "apples or other fruit." *See* Kirk, *Legal Drafting: Curing Unexpressive Language*, 3 TEX. TECH. L. REV. 23, 36 (1971) (*quoted in* R. DICKERSON, MATERIALS ON LEGAL DRAFTING 129-30 (1981)). Used as an adjective it may also mean one of a class that is left, as in "the only other apple you may have is on the tree," or one that is different, as in "I don't want that apple, I want the other one." Only the drafter knows the precise semantic meaning of the term "other" in section twelve, but the first usage here seems closest to the syntactic arrangement of the phrase in the section. If that is true, the drafter must have thought of liens as a more general term sharing characteristics with subrogation rights. Professor Kirk explains that in statutory interpretation if "other" is used in a series it is actually construed as *limiting* the modified term to the characteristics of the preceding items even though the drafter's intent may have been entirely the opposite. *See id.* While the two devices do have several aspects in common, liens are not just a more general class of legal devices, and the significance for the applicability of section twelve lies in their differences. Since nothing serves as security for the obligation which is the object of a subrogation right, and since liens may under some circumstances be combined with other remedies, a suggestion that the phrase "subrogation claims or other liens" means that subrogation rights are a member of the more general class of remedies called liens is clearly incorrect in the law. An analogous phrase in the same syntax as the one under discussion would be "apples and other oranges." While this ascribed intent may be vulnerable to criticism from the standpoint of legal accuracy, it would nevertheless support the argument that liens and subrogation claims are intended alternative subjects to be similarly affected by the predicate clause of section twelve. Simply because the drafter thought of liens and subrogation claims as alike does not make them so, but it would indicate that the sense of the enactment is to treat the two devices, and, by implication, their underlying rights, equally.

The phrase "lien or claim," simple as it may be, is even more troublesome. The phrase appears in the predicate clause of the section ("the lien or claim shall be diminished") as well as the subject clause. Many semantic difficulties reside in the use of the term "or," since it has an exclusive sense, as in the phrase "apples or oranges may be picked" (meaning apples may be picked or oranges may be picked, but not both) and an inclusive sense (when the same phrase means apples or oranges or both may be picked). R.

the subject and predicate clauses of section twelve,[281] the section may fairly be said to diminish appropriate claims against the injured party, regardless of whether the claim arises from or is associated with subrogation rights or rights secured by liens. While the intended operation of section twelve may be taken to be the same with respect to general claims as subrogation claims and liens, the same deficiency of indirect language is also present.

A comparison of section twelve language with the language of the general substantive sections of the Comparative Fault Act brings the indirectness of section twelve into high relief. The first substantive section of the Act provides: "In an action based on fault, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the

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DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING, § 6.2, at 76-78 (1964) [hereinafter cited as FUNDAMENTALS OF LEGAL DRAFTING]. Drafting convention has it that the inclusive sense is the meaning to be attached to the word in legislative interpretation, so it may be said that the phrase "lien or claim" means lien or claim or both. *Id.* at 77; R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 233 (1975). The term may also denote an interchangeability of the linked terms as equivalents, such as in the phrase "a cabin or cottage sits on the hill." FUNDAMENTALS OF LEGAL DRAFTING, *supra* § 6.2, at 76 n.6. Evidence that the drafters may have used the term in this third sense is illustrated by looking at the whole subject clause of section twelve: "a subrogation claim or other lien or claim." If the latter use of "claim" is not linked to "lien" as an equivalent term, the clause is rendered redundant since the general word "claim" could have made the subject clause complete without enumerating "subrogation claim." Removing the words "lien or" demonstrates this; the phrase would then be "subrogation claim or other claim"—the whole class of "claims" could be captured simply by using the unmodified term. The drafter has done just that in the predicate clause of the section, and no good reason for assuming an intended redundancy is apparent. If redundancy is to be avoided, then what appears to have been a three-item enumeration of (1) subrogation claim, (2) lien, and (3) claim, may be taken as a simple two item enumeration: (1) subrogation claim, and (2) the unitary concept of lien or claim.

The trouble with attempting to make sense of the clause in this line of analysis is that it sets up to a triple dilemma. In order to conclude that "lien or claim" is to be treated as a unitary concept so that a $10,000 lien/claim will be reduced in the same amount as a $10,000 subrogation right/claim, the statute must be taken to be in violation of sound drafting and interpretation principles. At the same time, if the unitary concept of lien/claim is taken to be intended by the phrase "lien or claim" in the subject clause, the same phrase in the predicate clause can be construed in a like manner and the first item in the two-item enumeration would disappear from the predicate clause. To reject this construction and assume that drafting convention has been followed and "or" means either lien or claim or both exposes the subject and predicate clause of section twelve to the logical argument that even if both the lien and the contractual claim are to be diminished, the statute does not say that they shall be diminished as if a single amount. By failing to directly state that the obligations secured by liens and asserted in claims against the injured party shall be diminished, section twelve may have struck wide of its intended mark.

[281] *See supra* note 280 for discussion of the possibility that "claim" and "lien" may not be so independent.

claimant's contributory fault, but does not bar recovery except as provided in section 4 of this chapter.[282] The substantive section which states the "greater than 50%" rule provides in part that "the claimant is barred from recovery if his contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages."[283] Throughout the Act, the injured party is referred to as "the claimant." In this context, the assertion that someone has caused an injury through fault together with the consequent demand for money damages for those tortious injuries constitutes a "claim." Consistent with the approach of section twelve, the apportionment effect of the Act might have been stated as a diminution or bar of a claim. The legislature chose, however, to express directly both the operation of the statute and the subject of that operation; the *amount awarded as compensatory damages* is reduced or the *recovery* is barred, leaving no doubt of the effect of those provisions and the subjects to be affected. It is unfortunate that similar specificity was not employed in section twelve.

In the case of claims, practicalities may again work to prevent serious problems from arising. So long as a claim satisfies the contemplated case of the statute,[284] absent some vehicle besides a "claim" with which to assert the underlying obligation and demand payment, the provider seems compelled to accept the diminished value of the claim as final satisfaction. One definition of "claim" is "right of recovery."[285] If section twelve is read to say that rights of recovery are diminished, all avenues of escape from the operation of the section would appear to be closed for claims.

However, the significance of another phrase in section twelve becomes important in connection with a claim. The claim must also "[exist] in respect to a claim for personal injuries or death."[286] Absent that circumstance, the claim would be outside the subject of section twelve's diminution effect, even if the holder of the claim asserted it only after the injured party had received sufficient funds from a tort judgment to satisfy the claim. No case on point has been found in Indiana, but it is entirely plausible that an express or implied contractual claim for medical services and supplies conferred upon an injured party could

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[282]IND. CODE § 34-4-33-3.

[283]*Id.* § 34-4-33-4(a), (b).

[284]The terms "case of the statute" refer to the generalized set of facts which occasion the operation of the statute, as contrasted with the common law attorney's notion of a "case" as a specific set of allegations comprising a dispute. *See* F. HORACK, CASES AND MATERIALS ON LEGISLATION 571 (2nd ed. 1954); Kennedy, *Legislative Bill Drafting,* 31 MINN. L. REV. 103, 111 (1946).

[285]BLACK'S LAW DICTIONARY 224 (rev. 5th ed. 1979). *See supra* note 264.

[286]IND. CODE § 34-4-33-12.

arise which could fairly be said to exist wholly independently of the injured party's tort action.[287]

Little legal difference lies between a physician who renders services to an injured party, a hospital that does so, or an insurer that pays for those services, in terms of the obligation of the injured party to reimburse the provider for the value of the services. Yet, nothing inherent in the implied agreement between the injured party and the physician suggests a necessary connection to or dependence upon some inchoate tort action that may or may not arise in the future between the injured party and the person who caused the injury. In contrast to the nature of liens and subrogation rights, which are in large part closely related if not dependent upon the personal injury action and the "fund" which is generated by judgment in that action, a claim *and* its underlying obligation in this context are independent of the adjustment of rights between the injured party and tortfeasor. Once again, the indirectness of section twelve's language may have failed to reach the true subject of the legal predicate of the enactment.

5. Workers' Compensation Liens.—Section twelve specifically excepts workers' compensation[288] and occupational disease[289] liens and subrogation rights from its operation.[290] Liens and subrogation rights arising from workplace injuries and diseases[291] present special issues not present in other settings because the worker's employer may have been partially at fault in producing the disability.

As originally enacted, the Comparative Fault Act addressed neither the matter of how the employer's fault was to be treated in apportionment decisions, if at all, nor how the employer's lien and subrogation rights were to be affected by that apportionment.[292] As a result, difficult issues lurked in the Act concerning the worker's ability to obtain adequate compensation. Two features of tort litigation for workplace injuries under comparative fault combined to produce potential problems: (1) the exclusivity of workers' compensation as a remedy against the employer, and (2) the Act's requirement that jurors assess the "fault" of

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[287]*See, e.g.,* Cotnam v. Wisdom, 83 Ark. 601, 104 S.W. 164 (1907) (the court held that a physician was entitled to recover for the reasonable value of his services when conferred upon the victim of an accident). *Cf. In re* Davis, 132 Misc. 811, 231 N.Y.S. 4 (1928) (disagreeing with the *Cotnam* court on the issue of whether the jury could consider the obligor's ability to pay as a factor in determining reasonableness of the obligation).

[288]The statute conferring the lien and subrogation rights for benefits paid for accidental injuries is Indiana Code section 22-3-2-13 (1982).

[289]Liens and subrogation rights in the case of payments for occupational disease are created by Indiana Code section 22-3-7-36 (1982).

[290]IND. CODE § 34-4-33-12.

[291]For the sake of brevity, both the workers' compensation and occupational disease provisions will be referred to solely as workers' compensation in the remainder of this discussion.

[292]*See* Act of Apr. 21, 1983, Pub. L. No. 317-1983, 1983 Ind. Acts 1930.

persons not named in the tort action. The exclusive remedy of the workers' compensation statutes prevents an injured worker from naming even a culpable employer as a defendant in a tort action against a third party for an injury suffered in the workplace.[293] Under the original Comparative Fault Act, this did not foreclose the jury from assessing the "fault" of the nonpresent employer as a part of the "total fault" contributing to the injury.[294] Consequently, a worker injured by the combined fault of the employer and a third party would have had to bear the economic burden of the employer's culpability since his recovery would be reduced in proportion to the nonparty employer's "fault." For example, if the worker's total damages before adjustment were $100,000, the employer's "fault" was assessed at 15%, and the third party's "fault" was assessed at 85%, the worker's verdict would be for $85,000 against the third party.

Furthermore, the statutory rights to reimbursement permit the employer to recover "the amount of compensation paid to the employee or dependents, plus the medical, surgical, hospital and nurses' services and supplies and burial expenses"[295] paid to the employee, less the employer's share of litigation expenses. Under the Act's original language, if the employer had paid $10,000 in such benefits and expenses, the worker's recovery would be reduced by that $10,000 (less expenses) to discharge the employee's obligation to the employer and the right to future worker's compensation benefits would be extinguished.[296] For his $100,000 injury, the worker's net compensation resources would fall short of full recovery by approximately $15,000.

The amended Act solves the problem by excluding employers from the "nonparty" classification,[297] and by permitting the employer to obtain reimbursement undiminished by the worker's assessed "fault."[298] Thus, in the hypothetical situation above, even though the worker's employer was at fault, the defendant named in the tort action is prohibited from asserting that fault as a partial defense. The defendant's "fault" would be assessed at 100% and the plaintiff's verdict would be for the full $100,000. The employer would then be entitled to reimbursement of the $10,000 workers' compensation benefits and medical expenses paid. Having received a total of $110,000 in compensation resources but being required to disburse $10,000 back to the employer, the worker's net compensation would equal full damages.

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[293]IND. CODE §§ 22-3-2-6, 22-3-7-6.

[294]*See* Act of Apr. 21, 1983, Pub. L. No. 317-1983 Sec. 1, § 5, 1983 Ind. Acts 1930, 1931-32. (codified at IND. CODE § 34-4-33-5 (Supp. 1984)).

[295]IND. CODE §§ 22-3-2-13, 22-3-7-36.

[296]*Id.*

[297]Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2(a), 1984 Ind. Acts 1468, 1468-69 (amending IND. CODE § 34-4-33-2(a)).

[298]Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 7, § 12, 1984 Ind. Acts 1468, 1472-73 (adding IND. CODE § 34-4-33-12).

In the case of a worker partially at fault, the system works to prevent overcompensation. If, for example, a worker sustaining a $100,000 injury had been found 15% at "fault," his verdict against the defendant in the tort action would be for $85,000. If the employer had paid $10,000 in workers' compensation benefits and his right to reimbursement was treated in the same way as other liens and claims under section twelve, the employer would be entitled to recover only $8,500 (less expenses) and the worker's net compensation would be $1,500 greater than he would be entitled to recover under the apportionment of fault principle.

From one perspective, this system seems overly protective of the interest of employers who have been partially at fault in bringing about the worker's injury. In a case where all three actors contribute some fault to the incident, for example, the only party who is not made to bear its ultimate share of economic responsibility for faulty conduct is the employer. From the perspective of the workers' compensation system, however, the effect may be justified as a matter of policy.

One policy justification is to avoid the difficult matter of meshing the nonfault system governing compensation for workplace injuries with the comparative fault system. If employers were to be made subject to suit in situations where third party defendants also contributed to the harm, for example, much of the delicate balance of interests obtained in the workers' compensation system would be lost, and employers' incentive to participate in the system would be reduced.[299] Employers have been required to bear the direct economic burden of the workers' compensation system partially in return for immunity from tort liability to injured workers. If they were required to appear and defend in actions where third party defendants were allegedly responsible, employers could argue that, at least with respect to this class of cases, some of the efficiencies of the workers' compensation system would be lost at their expense. An incentive to bring third party actions naming employers as defendants might arise because workers' compensation benefits do not even pretend to be full compensation for the worker's injuries. These conflicting incentives would create a tension between the fault and nonfault systems which would not be healthy for either system.

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[299]This is not to suggest that the workers' compensation system is dependent upon employer incentive. Participation is compulsory for qualified employers. IND. CODE §§ 22-3-2-2, 22-3-7-2 (1982). However, compulsory compliance does not produce full compliance. Workers' compensation statutes were recently amended to bolster enforcement powers and sanctions in response to increasing incidences of employers flaunting the statute's requirements for coverage. Act of Feb. 24, 1982, Pub. L. No. 135-1982, 1982 Ind. Acts 1034 (amending IND. CODE §§ 22-3-4-13, 22-3-7-34). Those measures may have solved some of the problems of nonparticipation; they are not at work in some employers' decisions about participation. Nor would those provisions relieve tensions that might build up which would produce pressure for comprehensive modification of the system should employers be made vulnerable to fault liability in some settings.

If the employer is excluded from the tort action but the employer's fault is nevertheless taken into account, the potential for either overcompensating or undercompensating the injured worker looms large. The benefits payable under the workers' compensation system are not determined by reference to fault, and the employer's proportion of "fault" in the tort action may not precisely match the amount of compensation paid under the workers' compensation benefit formulas and schedules. One illustration of overcompensation has already been given. On the other hand, if a worker suffering a $100,000 injury received workers' compensation benefits and medical expenses totalling $10,000 and the employer's "fault" was later assessed at 20%, *under*compensation by approximately $10,000 would result.

Another policy consideration favoring section twelve's exceptions relates to the principle of fairness in allocating the benefits and burdens of the system. Since the economic vitality of the workers' compensation system is dependent upon employers' contributions[300] to the compensation pool, either through payment of insurance premiums or self-insurance, a policy based upon fairness might well justify excluding the employer from accountability for some incidents of faulty conduct. The probability that most employers will eventually be required to finance payment of compensation benefits and medical expenses in more instances where they are not at fault than where they are at fault might be viewed as an adequate quid pro quo for permitting the occasional faulty employer to escape accountability. The third party defendant does not have the same claim for equitable balancing of the financial impact of a workplace injury. The third party has not contributed at all to the compensation resources.[301] The worker, not having contributed to the compensation resource pool up to the point of injury, is in a weaker position than the employer for disavowing accountability in the ultimate allocation of

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[300]Employees indirectly contribute to the economic balance of the system by foregoing full compensation for their injuries in return for the surer and more efficient payment of benefits. Since the issues addressed here arise only in the context of situations where the injured worker also has a third party defendant to look for compensation, the economic burden upon such workers is not implicated.

[301]If fairness is of prime concern, the interests of the third party defendant who must ultimately bear the cost of the employer's fault must be carefully considered. Where the third party's fault is significantly less than the employer's but that defendant is made to bear 100% of the worker's damages, the issue is acute. Unfortunately, if such defendants are permitted to reduce their liability by forcing the worker to accept a verdict apportioned to the "fault" of the employer, the compensation function of the comparative fault system would be undermined. If they are permitted to reduce their liability by obtaining reimbursement from the employer in proportion to the employer's "fault," the nonfault basis of the workers' compensation system would be undermined. Given the worker's injury and the employer's contributions to the workers' compensation system, the equities favor the worker, the employer, and the third party defendant, in that order. If fairness follows equity, the Act has struck the correct balance.

compensation. He also has a choice whether to substitute tort compensation for workers' compensation,[302] and it is consistent with the fairness principle to require that a choice of the former releases the employer from financial burden. As between the worker and the third party defendant, even where both are at fault, the issue of which of them more fairly bears the financial burden of the employer's fault is easily answered in favor of the party who has been injured. If the third party has also been injured, the matter is much more complicated, but the injured third party's interest in compensation is not jeopardized by the operation of section twelve.[303]

When the injured worker chooses workers' compensation over suing the third party, the workers' compensation statutes confer upon employers the right to pursue reimbursement for benefits and expenses against the tortfeasor.[304] In such a case, section twelve is not invoked and the

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[302]IND. CODE §§ 22-3-2-13, 22-3-7-13.

[303]In such a case, the court should consider bifurcating the trial, treating the injured worker's action against the third party separately from the third party's action against the worker and the employer because while the employer may not be treated as a "nonparty" in the worker's suit against the third party, no such restriction is imposed in the third party's suit against the worker. Since keeping the employer out of the case in the third party's action while allowing the assessment of the employer's "fault" would put the burden of reduced recovery upon the injured third party, the third party should be permitted to name the employer as defendant. On the other hand, since bringing the employer into the worker's case would be contrary to and would thwart the objectives of section twelve's design, the worker should be permitted to keep the employer out of his case. Having the employer in the case for one party and out of the case for the other might prove to be overwhelming for the jury. Bifurcating the trial with careful guidance supplied to the jury would ease the difficulty. As an example of what might result, consider worker (*W*) with a $100,000 injury and a third party (3*P*) with a similar injury. The employer (*E*) has paid *W* $10,000 in benefits and expenses. Starting with trial one, *W*'s action, and assuming that *W*'s "fault" is assessed at 40%, *W*'s verdict would be for $60,000 against 3*P*. Assuming further that *W* reimburses *E* for the $10,000, his net recovery is $60,000. In trial two, *E* appears and defends, and 3*P* is entitled to have *E*'s "fault" apportioned. Assuming an assessment is returned by the jury that *E* is 20% and 3*P* is 40% at "fault," verdicts in favor of 3*P* would then be entered against *W* for $40,000 and against *E* for $20,000, for a net recovery of $60,000. It is much easier to describe such an outcome in the abstract than actually to try to bring it about, of course, but it is entirely plausible that both injured parties can recover fully, commensurate with comparative fault principles. A court may want to consider conducting the trial in the order illustrated above, with the jury first considering the worker's "fault," because having the jury assess the employer's and the third party's shares of "fault" first may inject an element of prejudice into the worker's segment of the case which sections one and twelve try to avoid. Because each case will present different requirements for avoiding such prejudicial carryover from one determination to the other, the court should consider with care which segment to try first. It should be noted that set-off between the parties is assumed to be no problem in this illustration. It would be an issue, however, and the issue in a more general context is considered in a separate section of this article. *See infra* notes 449-64.

[304]IND. CODE §§ 22-3-2-13, 22-3-7-36.

subrogated employer should be subject to any defense which could be raised by the tortfeasor against the worker's action.[305] That would mean that the *worker's* fault could be asserted as a "nonparty" defense, but it is not clear that the *employer's* fault could be asserted. If the employer "stands in the shoes" of the worker and the action is viewed as no more than a derivative action, logic would compel the conclusion that since the third party could not assert the employer's fault against the worker, that defense should be excluded in the employer's action. On the other hand, viewing the employer as a substituted real party in interest where the interests of the worker are not actually at stake in the action, because of the limited nature of the reimbursement remedy sought, would compel a different conclusion. Since the worker's action is not being asserted, this point of view demands that the third party should be able to raise the employer's own fault as a defense.

Should the courts diminish the employer's reimbursement remedy against the tortfeasor, they should carefully consider whether it is good policy to have a system which treats employers' rights to reimbursement differently depending on whether the worker or the employer asserts the claim. If an employer is entitled to full reimbursement when the worker asserts his tort action against the third party, but is entitled only to diminished reimbursement when he presses his subrogation claims independently, economic forces which have not figured in the system before come into play and should be given close scrutiny. The courts considering the issue should take into account whether the economics of full versus partial reimbursement would be of sufficient magnitude to induce employers in cases of this nature to encourage their workers to foresake certain workers' compensation benefits for the less certain tort recovery. It would seem that the greater the fault contributed by the employer in producing the injury, the greater the inducement to avoid asserting a reimbursement claim subject to a fault defense.

III. Comparative Fault and Assumed/Incurred Risk

A. Introduction and Background

The Indiana Act's definition of "fault" includes an "unreasonable assumption of risk not constituting an enforceable express consent" and "incurred risk." As will be seen in this discussion, it is not entirely clear what the General Assembly intended by its choice of language, but it is at least certain that in some circumstances where the common law would have barred recovery, assumption of risk and incurred risk are to be treated as comparative "fault" and the damages are to be apportioned. Dean Prosser has said that the doctrine of assumption of risk

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[305] *See* 16 Couch on Insurance 2d, *supra* note 244, § 61:212.

> has been a subject of much controversy, and has been surrounded by much confusion because "assumption of risk" has been used by the courts in several different senses, which have been lumped together under the one name, usually without realizing that any differences exist, and certainly with no effort to make them clear.[306]

Within the limited scope of this Article no attempt will be made to unravel the confusion, even assuming that it would be possible to do so. But some excursion into the murky depths of this area of the law must be made in order to appreciate how the Comparative Fault Act might operate in appropriate cases, and to raise some of the issues which the legislature's choice of language presents.

As a starting point, some description of the several senses of assumed and incurred risk may be helpful. Part of the confusion about assumption of risk resides in the facts that the defense applies to a wide spectrum of plaintiffs' conduct and, depending upon the kind of conduct involved, operates to relieve the defendant of liability in significantly different ways. The complexity inherent in the several theoretical and practical aspects of the defense has made it necessary to employ a sort of shorthand terminology for easy reference to these different aspects. A brief description of the concepts behind the shorthand terms, such as "primary" and "secondary" assumption of risk, will be set out here to facilitate later discussion. "Assumption of risk," as a general proposition, pertains to the defensive theory that a plaintiff who knew and appreciated a risk of injury to himself, and who voluntarily encountered that risk, should not be heard to complain that the defendant should be answerable for any injuries resulting from the forces which created that risk.[307] When successfully employed, the defense totally bars a plaintiff's recovery. In some jurisdictions, like Indiana, the phrase "assumption of risk" pertains only to cases in which there has been some contractual relationship between the parties. The defense is called "incurred risk" when no contractual relationship is present. Indiana case law is not clear on the point, but it appears that the defenses are identical in all other respects[308] and the discussion here will frequently refer to them collectively as "assumption of risk defenses." In a case where a plaintiff affirmatively states his intention to take on the risk as part of his responsibility, the

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[306]W. Prosser, Handbook on the Law of Torts § 68, at 439 (4th ed. 1971) (footnotes omitted).

[307]*See generally,* 2 F. Harper & F. James, The Law of Torts § 21.1, at 1162 *passim* (1956); W. Prosser, *supra* note 306, § 68 *passim*.

[308]The Indiana Court of Appeals has presumed, without deciding, that the two defenses are essentially identical. Kroger Co. v. Haun, 177 Ind. App. 403, 408 n.2, 379 N.E.2d 1004, 1008 n.2 (1978).

defense is spoken of as an "express" assumption of risk.[309] Where no affirmative conduct can be taken as an expression of an agreement to assume the risk, a plaintiff nevertheless may have exhibited conduct from which the courts may infer that agreement. In such a case, a plaintiff will be said to have "impliedly" assumed the risk.[310]

The defenses have also been employed in other senses. Professors Harper and James have developed a classification of assumption of risk focusing upon the relationship between the plaintiff's and the defendant's conduct. If, in advance of the defendant's conduct, the plaintiff did something to relieve the defendant of a duty to protect the plaintiff from the risk and took on the responsibility for possible injury from that risk, courts adhering to Harper and James' classification would say that the plaintiff assumed the risk in the "primary" sense.[311] In its "secondary" sense, assumption of risk means that the defendant has already negligently set an injurious force in motion, and the plaintiff accepts the risks attendant upon that force. Harper and James assert that the assumption of risk bar operates in "secondary" assumed risk cases only where the plaintiff's acceptance of the risk was unreasonable as tested by the circumstances. They consider this segment of the defense to be a "form of contributory negligence."[312]

This idea of an "overlap" between the assumption of risk defenses and contributory negligence has been another source of confusion and discontent in the case law, as Dean Prosser's comment has pointed out. In the abstract, it may be presumed that there are some risks of harm that the reasonably prudent person would not voluntarily take. In every risk-encountering act the theoretical *possibility* therefore exists that the actor could be found to have acted contrary to the reasonably prudent person standard. If that act culminated in injury to the actor, the claim against the person who created or maintained the risk is subject to a defensive plea that the actor negligently contributed to his own injury by unreasonably assuming the risk. In such a case, it makes no difference in a negligence system whether the action is barred for the assumption of the risk or contributory negligence. The matter of a *reasonably* assumed risk presents much more difficult pragmatic and theoretical issues. If the Harper and James analysis is adhered to, and the reasonable assumption of risk is of the "secondary" type, the plaintiff's action will not be barred.[313] The logic supporting this conclusion is that since

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[309]2 F. HARPER & F. JAMES, *supra* note 307, § 21.6, at 1184-89; W. PROSSER, *supra* note 306, § 68, at 442-45.

[310]2 F. HARPER & F. JAMES, *supra* note 307, § 21.6, at 1184-85; W. PROSSER, *supra* note 306, § 68, at 445-47.

[311]2 F. HARPER & F. JAMES, *supra* note 307, § 21.1, at 1162-68.

[312]*Id.* at 1162.

[313]Meistrich v. Casino Arena Attractions, 31 N.J. 44, 155 A.2d 90 (1959) is a leading case. *See also* Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977); Parker v. Redden, 421 S.W.2d 586 (Ky. 1967); Felger v. Anderson, 375 Mich. 23, 133 N.W.2d 136 (1965);

"secondary" assumption of risk is a form of contributory negligence, to reasonably assume a risk is to act in accordance with the standard of care. If, however, the risk had been reasonably assumed in the "primary" sense, the plaintiff's action would nevertheless be barred on the logic that the only relevant inquiry is whether the plaintiff's act had relieved the defendant of the duty of care toward the plaintiff. Since the plaintiff's fault in assuming the risk is not the basis for his accountability, the reasonableness of that assumption has no bearing upon the applicability of the defense. Furthermore, it is theoretically possible to acknowledge an "overlap" and pragmatic similarity between the assumed risk and contributory negligence defenses without accepting Harper and James' idea of an interdependent mixture of the two. If the assumed risk defense in all of its various senses is considered to be a defense not based upon fault, the reasonableness of the plaintiff's encounter with and acceptance of the risk is irrelevant. Under this nonfault view, a plaintiff would be barred for having taken the risk upon himself regardless of whether he had acted in accordance with the standard of ordinary care.

When the traditional negligence system is abandoned in favor of a comparative fault system and the latter system purports to incorporate the assumed risk defenses, some important issues about how those defenses are to operate in the new system are immediately suggested:

(1) Since fault is the watchword in the comparative system, how are the nonfault aspects of the assumption of risk defenses to be treated?
   (a) Is the adoption of comparative fault to be considered a total merger of the assumption of risk defenses with fault defenses by either:
      (i) somehow translating the nonfault aspects of the defenses into "fault" for comparative purposes, or
      (ii) abolishing all nonfault senses of the defenses?
   (b) Or, are the nonfault aspects of the defenses to remain intact and outside the comparative system as complete bars to plaintiffs' action?
(2) How much can and should the common law concepts of the assumption of risk defenses affect the answer to the first issue and its subissues?

These issues are the focus of this part of the Article.

As will be seen, obtaining answers to these issues is not simply a

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Armstrong v. Mailand, 284 N.W.2d 343 (Minn. 1979); Bolduc v. Crain, 104 N.H. 163, 181 A.2d 641 (1962); Sandford v. Chevrolet Div. of General Motors, 292 Or. 590, 642 P.2d 624 (1982) (excellent general discussion where comparative negligence statute abolished "implied" assumption of risk.).

matter of reading the words of the Comparative Fault Act. Two background elements figure importantly in the interpretation of that language: (1) the General Assembly's heavy reliance upon the Uniform Comparative Fault Act's definition of "fault," and (2) the Indiana case law development of the assumption of risk defenses. Both of those background elements will be examined in detail. That examination will reveal some conceptual gaps between comparative fault and the assumption of risk defenses which were not closed by the General Assembly.

The language chosen by the General Assembly is susceptible of conflicting interpretations because of its conceptual gaps. This discussion will explore those interpretations and the possible theoretical, functional, and policy-oriented issues they raise, to show that the legislature has failed to speak with sufficient precision to ensure trouble-free application of the apportionment principle in tort litigation involving assumption of risk defenses.

B. "Reasonable" and "Unreasonable" Assumption of Risk Under the Uniform Act

To fully appreciate the effect the Indiana Act imposes upon assumption of risk defenses, it is helpful to consider the approach of the Commissioners on Uniform State Laws. Because the Uniform Act is simpler and is accompanied by explanatory commentary, it can provide an anchoring point for the consideration of the more complex issues the Indiana Act poses.

The Uniform Act, like the Indiana Act, includes in its definition of "fault" the acts of a claimant amounting to an "unreasonable assumption of risk not constituting an enforceable express consent." Risk-assuming conduct becomes "faulty" conduct by virtue of the modifier "unreasonable." By implication, a plaintiff would not be subject to apportionment of fault so long as his assumption of risk was not "unreasonable." The definition fails to address, and thereby fails to incorporate into comparative fault, conduct in which the plaintiff encountered and accepted a known and appreciated risk, and did so under circumstances a trier of fact would find reasonable. Only that part of assumption of risk that "overlaps" with contributory negligence triggers apportionment, and the commissioners' commentary accompanying the section clearly shows that the definition was intended to operate that way.[314]

The Uniform Act's "unreasonable assumption of risk" in essence incorporates into comparative fault the "secondary" sense of that defense as articulated by Professors Harper and James. That is, the plaintiff

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[314]UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 35, 37-38 (Supp. 1984) [hereinafter cited as UNIFORM ACT].

will be subject to a reduction of damages where he has encountered a risk associated with the defendant's activity, and ran that risk in a manner which, in the view of the circumstances, a trier of fact would deem below the standard of reasonableness. In the ordinary case, the assumption of risk elements of knowledge, appreciation, and voluntary encounter of the risk are usually so inextricably mixed with and part of the plaintiff's substandard conduct that practical separation of the plaintiff's assumption of risk and contributory negligence is impossible. In order to attach legal significance to the risk-assuming character of the plaintiff's conduct, it is meaningful in such circumstances to speak of the defense only by shifting from an evaluation of the subjective presence of the essential elements to an evaluation which objectively attaches those elements to the circumstances. The case is likely to present a plaintiff who has not subjectively known or appreciated the risk. If that is true, naturally he will not have expressed an intention to take responsibility for the risk. The legal evaluation of his conduct necessarily concentrates upon the deed which brings him into injurious involvement with the risk. It may be that only by acutely distorting the meaning of the term "responsibility" can such a plaintiff's behavior be said to have evidenced an intent to be responsible for anything, much less a risk of injury. In such a case, the basis of accountability in assumption of risk can be satisfied only by evaluating the plaintiff's behavior against the standard of reasonableness. The conclusions of such an evaluation might be that the plaintiff's conduct was so unreasonable that even though he did not subjectively know or appreciate the risk, he should have; that even though he did not subjectively agree to accept the consequences he should not, as a matter of objective policy, be heard to say that he did not.

This objective theory of "unreasonable" ("secondary") assumption of risk[315] is so dependent upon the reasonable person standard for establishing the general elements of the defense that the defendant pragmatically cannot satisfy the predicates of the defense without referring to the faultiness of the plaintiff's acts. The close, dependent relationship between "unreasonable" assumption of risk and fault is demonstrated in the commissioners' official commentary to the Uniform Act, where the commissioners state that "unreasonable assumption of risk . . . does not include . . . reasonable assumption of risk (which is not fault and should not have the effect of barring recovery)."[316] Experience with

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[315]It is also "implied" assumption of risk, but for the sake of clarity, that sense of the defense is ignored here. It is addressed in the discussion accompanying notes 330-38, *infra*.

[316]Uniform Act, *supra* note 314, at 38. The specific significance of this portion of the commissioners' comments is discussed in more detail later in this discussion in the text accompanying note 338, *infra*.

cases of this sort has led some courts to blend "secondary" assumption of risk into a unitary contributory negligence defense.[317]

If this unitary concept of the two defenses is what the drafters of the Uniform and Indiana Acts contemplated, then it is not only sensible to permit a defendant to invoke the apportionment principle when a plaintiff "unreasonably" assumes the risk, it is sensible to deny apportionment when a plaintiff is reasonable. Since, in circumstances calling for the objective theory, the elements of assumed risk are so closely tied to the evaluation of the social acceptability of a plaintiff's actions, then when those actions are deemed reasonable by the trier of fact it can be said that the defendant has failed to satisfy the threshold of "fault" necessary to trigger the apportionment principle. Professors Harper and James might say that to be accurate, it should not be said that the plaintiff has "reasonably assumed the risk," but rather that because the plaintiff has acted reasonably, he has *not assumed* the risk.[318]

However, cases where the plaintiff has acted reasonably in the face of a known danger and in which the courts have nevertheless held that the plaintiff may not recover for having assumed the risk present some difficulty in reconciling practice with theory.[319] If these cases represent a segment of "reasonable" assumption of risk not affected by the definition of comparative "fault" here being examined, they pose the possible dilemma of some plaintiffs being totally barred for reasonable conduct while others are able to benefit from apportionment if their acts were "unreasonable." This proposition may cause some to recoil if it is thought to mean that a wrongdoer may escape liability altogether if her victim was acting in a socially acceptable manner regarding the risks posed by the defendant's socially unacceptable behavior.

The dilemma is escaped by employing the "primary" sense of assumption of risk. Professors Harper and James explain the meaning of this sense of the defense as "only the counterpart of the defendant's lack of duty to protect the plaintiff from that risk. In such a case plaintiff may not recover for his injury even though he was quite reasonable in encountering the risk that caused it."[320] If this concept is permitted to control and the defendant successfully shows that the plaintiff's knowing, voluntary acceptance of the risk has the effect of relieving the defendant of a duty, the fundamental principle of the defense will have been discharged. The plaintiff will have taken the responsibility for the potential injury and none remains with the defendant. Here, the legal significance of the distinctions residing in the

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[317]*See* authorities cited *supra* note 313.

[318]*See* 2 F. HARPER & F. JAMES, *supra* note 307, § 21.1, at 1162, and § 21.8, at 1191.

[319]See 2 F. HARPER & F. JAMES, *supra* note 307, § 21.1 at 1163-64 for cases of this sort, and the authorities cited at 1162 n.2. W. PROSSER, *supra* note 306, at 440 n.18 cites several others.

[320]2 F. HARPER & F. JAMES, *supra* note 307, § 21.1, at 1162 (footnote omitted).

terms "secondary" and "primary" become extremely important for ascertaining the ultimate place the assumption of risk defenses will occupy in a comparative fault system. In "secondary" assumption of risk, the plaintiff's conduct, like the defendant's, is socially unacceptable, and all of the same considerations which arise in a contributory negligence setting concerning the propriety of putting the entire burden of the injury upon the plaintiff are implicated. In a "primary" assumption of risk case, however, the fault basis for imposing liability disappears from the case altogether. Prosser explains that the plaintiff's cause of action fails under such circumstances "because as to him the defendant's conduct is not a legal wrong."[321] In such a case, the reasonableness of the risk and the reasonableness of the plaintiff's conduct in relation to it have no bearing upon the issue of accountability for the injury. The plaintiff may well have acted in a socially acceptable manner, but if, in so doing, he has removed responsibility from the realm of the defendant's duty and placed it entirely within his own control, he no longer has a claim against the defendant. It does not, as might appear from superficial analysis, involve a guilty defendant escaping liability to a "reasonable" plaintiff. Unless the statute or decision adopting comparative fault specifically transforms the assumption of risk defenses into something different from the concepts just developed, "primary" assumption of risk should have the same effect under a comparative fault system as under the traditional contributory negligence system.

The comments accompanying the Uniform Act's definition indicate that the commissioners did not intend to modify "primary" assumption of risk to permit that defense to invoke the apportionment principle. In attempting to explain what was meant by "unreasonable assumption of risk," the commissioners spelled out some ideas about what the defense did *not* include, one of which was "a lack of violation of duty by the defendant (as in the failure of a landowner to warn a licensee of a patent danger on the premises)."[322] The parenthetical illustration is one employed by Harper and James in their explication of the theory.[323] The trouble with the illustration is that it relates the simplest possible circumstance: where at the outset the risk is not within the scope of defendant's duty to plaintiff. A case which more significantly involves the operation of the principle is where the defendant owes a duty of care toward the plaintiff and the risk is initially within the scope of that duty, but the plaintiff's actions remove it from that scope. Prosser cites *Hunn v. Windsor Hotel Co.*,[324] a good example in which the plaintiff,

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[321]W. PROSSER, *supra* note 306, § 68, at 440.

[322]UNIFORM ACT, *supra* note 314, at 38.

[323]2 F. HARPER & F. JAMES, *supra* note 307, § 21.1, at 1164, and § 21.2, at 1168.

[324]119 W. Va. 215, 193 S.E. 57 (1937). *See* W. PROSSER, *supra* note 306, § 68, at 446 n.71.

an invitee of the defendant, was injured when she stepped on a plank the defendant had placed on the stairs to hold down a tread that was being glued to the stairs. Plaintiff said she knew the plank was dangerous because she had climbed the stairs earlier and thought the plank might move. Coming down, she stepped on it anyway, it moved, and she fell. The court denied recovery, despite its recognition that the facts suggested no negligence on her part, because she had assumed the risk.[325] The court did not employ the term "primary assumption of risk," nor did it express the view that the defendant was relieved of his duty. Yet, the principle behind the assumption of risk defense clearly explains the result. The defendant owed a duty of care to keep the premises safe and to warn of known or discoverable dangerous conditions. However, that duty is relieved if the plaintiff otherwise knows of the danger, or if it is obvious.[326] Here, the obviousness of the danger was in doubt, but the plaintiff testified that she knew about it. Having run the risk of injury resulting from that danger, responsibility for the injury shifted from the defendant to the plaintiff. The commissioners' commentary clearly indicates that "unreasonable" assumption of risk does not include "primary" assumption of risk, and that facts similar to *Hunn* would result in a total bar of the plaintiff's action.

The remainder of the definition and the commentary, however, demonstrate that the intent of the commissioners is not at all clear concerning the effect of comparative fault upon assumed risk defenses. According to the definition, and a comment which essentially repeats the phrase, the apportionment principle is not triggered by "a valid and enforceable express consent."[327] Although it may appear at first to be a concept misplaced in negligence law, the principle of consent can be useful in appreciating the operation of assumption of risk defenses.[328] A look at consent properly shifts the focus of analysis of the defense away from fault by permitting evaluation of the plaintiff's actions without reference to whether those actions were "reasonable" or not. This fundamental operation of consent can easily be seen in the more customary setting of liability for intentional conduct. When a plaintiff consents to an intentional invasion of his interests, tort law is not concerned with whether his consent is fault-ridden. The law of consent has to do only with whether the plaintiff has knowingly permitted the invasion and has agreed to bear the consequences. If he has, the defendant's conduct is not faulty because she was privileged to act in the

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[325] 119 W. Va. at 219, 193 S.E. at 58.

[326] *See generally* 2 F. HARPER & F. JAMES, *supra* note 307, § 21.2, at 1168-69; W. PROSSER, *supra* note 306, § 68, at 446; RESTATEMENT (SECOND) OF TORTS §§ 343, 343A, 496C (1965).

[327] UNIFORM ACT, *supra* note 314, § 1(b), at 36; *id.* comments at 37-38.

[328] *See generally* W. PROSSER, *supra* note 306, § 68, at 439-40; H. STREET, THE LAW OF TORTS 170-72 (1955).

invasionary manner by virtue of the plaintiff's consent. The operation of the assumed risk version of consent is similar to consent in an intentional tort setting.[329] The important difference is that in assumption of risk cases, the object of the consent is the risk, not the invasion.

Because the object of the consent in the negligence setting is the risk, and because the defense may be applied when the plaintiff's actions show that he has only impliedly taken on the risk, the potential exists for a great deal of confusion in the law dealing with situations where plaintiffs have given no affirmative consent. In his treatise, Prosser attributes the confusion to a failure to distinguish between voluntary acts constituting consent to the risk and other voluntary encounters with perceived dangers which do not amount to the requisite consent.[330] However, since it is more than apparent that this distinction is the ultimate question to be decided, the confusion must stem from the application of the consent principle to a given set of facts rather than residing in the result.[331] Prosser's favorite example illustrates the difficulty well: the person who jaywalks into a busy street. Asserting that such a person "certainly does not manifest consent that they [the drivers] shall use no care and run him down,"[332] Prosser concluded that the person's actions were "certainly contributory negligence . . . not assumption of risk."[333] The difficulty lies in the necessity of satisfying the consent principle only, if at all, by applying the "implied" sense of assumption of risk, coupled with Prosser's own confusion regarding the object of the consent. As Prosser observed,[334] to say that the jaywalker

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[329]*See* W. PROSSER, *supra* note 306, § 68, at 440.

[330]W. PROSSER, *supra* note 306, § 68, at 445.

[331]Prosser himself was a victim of the very confusion he lamented. He recognized that the object of consent in assumed risk is different from that of consent to intentional torts in an introductory statement: "The situation is . . . the same as where the plaintiff consents to what would otherwise be an intentional tort, except that the consent is to run the risk of unintended injury, to take a chance, rather than a matter of the greater certainty of intended harm." *Id.* at 440. But deeper in his treatment of the topic it becomes apparent that he failed to consistently adhere to that distinction as his discussion progressed. The statement quoted here appears in connection with his attempt to lay out his own classification of assumed risk defenses, which conforms roughly to Harper and James' "primary-secondary" classification. Unfortunately, in the course of describing his concept of the classes, he speaks of the consent as referring at different times to the risk, to the defendant's negligence, and "to relieve defendant of the duty," without acknowledging the changes. *Id.* As the discussion in the text demonstrates, it is a very difficult proposition to accept at a common sense level that people accept and consent to others being negligent toward them. Assumption of risk operates to relieve defendant of a duty only if plaintiff knows, appreciates, and accepts the risk within the scope of that duty. Prosser's treatment illustrates the limited usefulness of the consent concept as an analytical tool. For the most part, "consent to the risk" is ultimately just another way of saying "assumption of the risk."

[332]*Id.* at 445, 450.

[333]*Id.* at 450.

[334]*Id.* at 445.

consented to the negligent invasion of his person does not conform to common sense. The observation is likely to be valid in the bulk of "implied" assumed risk cases. The plaintiff's attitudes and intentions concerning the drivers' actions in the jaywalking case are likely to be the same as they would be if he were crossing with the light in the crosswalk. He still expects those drivers to exercise care respecting pedestrians, but if it is remembered that the object of consent in assumed risk is the *risk* rather than the invasion, it does not distort common sense to conclude that the plaintiff has taken the risk upon himself. Applying that common sense to the facts does require the evaluator to shun the subjective elements of the assumed risk defense in favor of an objective test of the plaintiff's conduct. In the crosswalk example the plaintiff leaves the risk where he found it, within the scope of the drivers' duty. His attitude and intentions about the drivers' duty are likely to be the same as the jaywalker's—neither actually consents to an invasion of his bodily integrity by the faulty conduct of the drivers. But common sense, including notions of personal responsibility, engenders a strong impulse to hold the jaywalking plaintiff accountable. It may be possible to hold him accountable only by focusing upon his objective behavior rather than his subjective intention, concluding that he took the risk of injury upon himself and manifested his intention to be responsible for that injury if it should occur.

The key is the necessity to apply the objective theory of "implied" assumption of risk. The plaintiff probably has not, in a truly voluntary exercise of intellect, decided to accept the consequences of the risk, but he has acted in a way which society demands be undertaken only by those who have accepted that responsibility. The plaintiff may not have agreed to accept the risk, but society will not hear his complaint that he did not. As with nearly all impositions of objective standards to a person's frame of mind, a certain uneasiness about the conclusions reached accompanies the application of those standards. Prosser indirectly expressed that uneasiness through his efforts to characterize the example as "contributory negligence, pure and simple."[335] That it is not, and never will be. The plaintiff may well have been unreasonable in stepping into the street. If he was, our negligence-dominated system of tort law may more comfortably apply its objective standards to the plaintiff's actions to impose accountability. Yet he may not have been unreasonable. If the benefit he sought by crossing the street outweighed the risk, the more comfortable contributory negligence basis of accountability disappears. What is left is assumption of risk, not so pure, not so simple, reasonably assumed, but assumed nevertheless.

In such a circumstance, considerations of fairness strain to pose the questions: Why should a wrongdoer escape liability to one who reasonably and only impliedly assumed the risk? In this "secondary" sense, the

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[335] *Id.*

defense is in the nature of the ancient pleading of excuse.[336] The defendant is in effect arguing, "I confess I breached my duty to the plaintiff, but the plaintiff acted as if he chose to accept responsibility for the injury, and my actions or omissions should be excused." Nevertheless, there are excuses and there are excuses. When the plaintiff has been engaged in no wrongdoing himself, the excuse of "implied, secondary" assumption of risk seems weak in our fault-dominated system of liability. The Uniform Comparative Fault Act attempts to relieve the tensions produced by mixing the nonfault basis of assumption of risk with the fault basis of negligence by permitting the fact finder to conclude that such a plaintiff is not at "fault."

Yet the Uniform Act's definition is confined to "implied" assumption of risk cases. If the plaintiff's assumption of the risk "constitut[es] an enforceable express consent," the apportionment feature of the Act is not invoked. In effect, the definitional phrase addresses the problem of attaching the relatively drastic legal effect of a complete bar to the plaintiff's actions on a purely objective foundation. By excluding from the Act situations where the plaintiff has clearly and affirmatively taken the responsibility for the risk of injury, the commissioners have permitted the total bar to operate only where the plaintiff's exercise of choice is a matter of concrete fact provable by evidence which expresses the plaintiff's state of mind. Where elements of knowledge, appreciation, and voluntariness are dependent upon inferences to be drawn from circumstances, the commissioners have permitted the fact finder to adjust the right of recovery by applying the apportionment principle, and even then only when those circumstances portray unreasonable conduct.

Problems in applying the Act's definition might arise in certain cases. Consider the earlier fact situation of the invitee who stepped on the plank on the stairs knowing the plank was dangerous. The plaintiff's actions might well have been objectively unreasonable, and consent to the risk, as is usually the case, was not expressed. Yet, even though it seems that the definition of "fault" would apply, it should not. The plaintiff's actions in a "primary" assumption of risk case have the effect of relieving the defendant of a duty. The giving of the consent may have been above or below the standard of reasonableness, but that quality of the consent is irrelevant. The roots of assumption of risk in the maxim *volenti non fit injuria* are strongest in the "primary" sense of the defense. The defense is here in the nature of justification, and if proved defeats the plaintiff's prima facie case.[337] The apportionment

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[336]*See* Fletcher, *Fairness and Utility in Tort Law*, 85 HARV. L. REV. 537, 558-60 (1972). *See generally* 2 F. HARPER & F. JAMES, *supra*, note 307, § 21.1, at 1162 and authorities cited therein.

[337]Here defendant argues in effect, "I am not liable to plaintiff because plaintiff relieved me of responsibility for managing or eliminating the risk. My acts (or omissions) were thereby justified and plaintiff has failed to show that I was at fault." *See generally* authorities cited *supra* note 336.

principle should not be applicable because the plaintiff has not established a foundation of liability upon which to rest a right to adjustment of damages. There is, literally, no fault to be compared.

The commissioners attempted to address the "primary" assumption of risk situation in the commentary by stating that "unreasonable assumption of risk" does not include "a lack of a violation of a duty by the defendant." This commentary, if permitted to guide the courts in the application of the Indiana Act, will help avoid the potential for error in requiring apportionment in a "primary" assumption of risk case.

Even so, the possibility for confusion still lurks in the third commissioners' comment to the assumption of risk phrase. That comment says that "unreasonable assumption of risk . . . does not include . . . reasonable assumption of risk (which is not fault and should not have the effect of barring recovery)."[338] Removed from the context of the other comments and given broad applicability, the comment might be taken to mean that all but "implied, secondary, unreasonable" assumption of risk is abolished as a defense. As the foregoing discussion has demonstrated, there is no neat separation of the various senses of the assumption of risk defense. Both "primary" and "secondary" assumption of risk may be "express" or "implied." In any setting, the consent to the risk may be "reasonable" or "unreasonable." The Uniform Act's definition of "fault" is operable only in the "implied, secondary, unreasonable" segment of cases, and the full set of commissioners' comments so demonstrate. The third comment just quoted should be taken to apply only to the "implied, secondary, reasonable" situation, and to mean only that the defendant should not be entitled to a reduction of damages in that context.

One difficulty attorneys and judges seeking to apply the Indiana Act are certain to experience is that there is no official commentary accompanying that Act. Since the Indiana Act borrows so heavily from the Uniform Act in many respects, it may be argued that the Uniform Act's commentary guided the General Assembly, and an adoption of the substantive part of the Uniform Act is tantamount to adopting the commentary. On the other hand, it can be forcefully argued that the comments limiting the general language of the definition of "fault" do not control the Indiana Act's definition. That argument finds support in the fact that the legislature did not adopt the Uniform Act verbatim. Since the Uniform Act's commentary presumes a "pure" comparative fault system, any presumption that the General Assembly adopted the commentary along with the substantive language must be tested with care, especially when we cannot truly know whether the legislature was even aware of the commentary. It is abundantly clear from a complete

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[338]UNIFORM ACT, *supra* note 314, at 38.

reading of the commentary, however, that no modification of the definition of "fault" for those jurisdictions wishing to adopt something less than a "pure" system was considered necessary, or even advisable, by the commissioners.[339] To construe the Indiana Act to have gone beyond the Uniform Act to abolish an important common law defense on the basis of the simple phrase "unreasonable assumption of risk not constituting an enforceable express consent"[340] is not compelled by the phrase itself. To bolster that construction with an argument that the *absence* of official clarifying commentary compels it puts a weak presumption upon a foundation that is weaker still.

C. The Indiana Act's Definition

1. General Issues.—Not only does the Indiana Act contain the Uniform Act's "unreasonable assumption of risk" language and the difficulties associated with that phrase, it has added the words "incurred risk" to the definition of fault.[341] Dean Prosser has asserted that the words "incurred risk" represent simply another "invented name" for assumed risk in those jurisdictions, such as Indiana, where assumed risk is the term which applies when the parties stand in some relation of contract, and incurred risk applies to all other cases.[342] He has said further that "[t]his appears to be a distinction without a difference."[343] If he was correct in respect to Indiana law, the ramifications for comparative fault in Indiana can be quite significant, since the words "incurred risk" are bare of the modifying phrases accompanying "assumption of risk." The Act will require that plaintiffs who incur a risk be treated differently than those who have assumed the risk, and unless some differences between the defenses exists in the common law which would justify the difference in treatment under comparative fault, the Act may need to be amended to correct the disparity. Some exploration of Indiana case law is therefore necessary in order to discover what the inclusion of "incurred risk" without the qualifying words means.

2. The Background of Indiana Case Law.—The presence or absence of a contractual relationship between the parties is of significance in Indiana on the question of whether a plaintiff "assumed" the risk or "incurred" it. If the relationship between the parties at the time of the injury is one of master and servant,[344] or of some other contractual

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[339]See the commissioners' suggestions for modifying the substantive language of the apportionment section, UNIFORM ACT, *supra* note 314, at 38. No other changes in the Act for a "modified" system were considered necessary.

[340]IND. CODE § 34-4-33-2(a) (Supp. 1984).

[341]*Id.*

[342]W. PROSSER, *supra* note 306, § 68, at 439-40.

[343]*Id.* at 440.

[344]The defense is no longer applicable to master and servant relationships that invoke the coverage of the Indiana Workmens' Compensation Act, since the remedy for workers

nature, the defense is referred to as assumption of risk. If no contractual relation exists, the defense is said to be incurred risk.[345] The court that first used the incurred risk terminology gave no particular reason for its adoption,[346] nor is any apparent from the later Indiana cases. On several previous occasions the Indiana Supreme Court had addressed the defense simply as "assumption of the risk," and had denied plaintiffs' recovery using that language.[347] Some of these early cases considered facts which also presented issues of contributory negligence, however, and in those cases the court seemed to be of the view that assumption of risk and contributory negligence were at least intermingled if not interchangeable.[348] As a result, no clear statement of the conceptual grounds of the assumption of risk defense emerged from the opinions and a rather muddled statement of doctrine characterized many of the decisions.

It is clear, however, that near the turn of the century the court began to think of assumption of risk as a principle dependent upon contractual relations between the parties, and contributory negligence as a principle applicable only upon an evaluation of the actions of the parties apart from contract.[349] Since the doctrine of assumption of risk as applied in the master and servant cases meant not only that the servant took upon himself those risks which the contract of employment

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provided by that statute is exclusive. *See* IND. CODE § 22-3-2-6 (1982); B. SMALL, WORKMAN'S COMPENSATION LAW OF INDIANA 315 (1950).

[345]Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Hoffman, 57 Ind. App. 431, 107 N.E. 315 (1914); Indiana Natural Gas Co. v. O'Brien, 160 Ind. 266, 65 N.E. 918 (1903).

[346]The Indiana Supreme Court employed the concept in the case of Indiana Natural Gas & Oil Co. v. O'Brien, 160 Ind. 266, 65 N.E. 918 (1903). It cited to no earlier Indiana case which had made the distinction, but rather to other jurisdictions and authorities.

[347]Morrison v. Board of Comm'rs of Shelby County, 116 Ind. 431 (1888); Town of Gosport v. Evans, 112 Ind. 133 (1887); Morford v. Woodworth, 7 Ind. 83 (1855); President and Trustees of the Town of Mt. Vernon v. Dusouchett, 2 Ind. 586 (1851).

[348]Bruker v. Town of Covington, 69 Ind. 33 (1879), citing to the *Dusouchett* case, 2 Ind. 586 (1851), said that the plaintiff "has no reason to complain of the injury he may sustain" and must be treated as having taken "the risk upon himself," and added the following phrase as an afterthought: "In other words, that a disregard of the knowledge of the existence of such an obstruction, by which an injury results, amounts to contributory negligence." 69 Ind. at 36. In Evansville & Terre Haute R. Co. v. Griffin, 100 Ind. 221, 225 (1884), the court said "It was negligence to take the risk." In a later case the supreme court said: "The law accounts it negligence for one, unless under compulsion, to cast himself upon a known peril, from which a prudent person might reasonably anticipate injury." Morrison v. The Board of Comm'rs of Shelby County, 116 Ind. 431, 433 (1888). The *Morrison* court cited authority for this proposition which had relied upon a similar proposition from Lord Ellenborough's opinion in *Butterfield v. Forrester*, 183 Eng. Rep. 926 (1809), the case most often cited as the source of the contributory negligence doctrine. *See* Town of Gosport v. Evans, 112 Ind. 133, 137 (1887).

[349]*See* Davis Coal Co. v. Polland, 158 Ind. 607, 619, 62 N.E. 492, 497 (1902).

expressly covered, but also those that the worker knew about or were necessarily incident to the work activity, the notion that the worker could be deemed to have impliedly assumed the risk of injury merely by entering into the work activities was an important feature of the doctrine.[350]

The resemblance between these "implied" assumption of risk cases coming out of the workplace and the implied acceptance of risks inherent in ordinary social intercourse was noted by the Indiana Supreme Court. In the first case to use the words "incurred risk," *Indiana Natural Gas & Oil Co. v. O'Brien*,[351] in response to the defendant's claim that the plaintiff had assumed the risk, the plaintiff argued that the defense could not be raised in a noncontractual setting. Finding that the maxim *volenti non fit injuria* was "not confined alone to cases where the relation of the parties is of a contractual nature,"[352] the court held that the plaintiff's cause of action would be barred if the defendant could show that the plaintiff knew of and appreciated the danger and "voluntarily, or of his own choice, exposed himself to or encountered such a danger, thereby *incurring*, or taking upon himself, the risk incident thereto."[353] This passage makes clear that the court considered the elements of incurred risk to be identical to those of assumed risk. It is possible, however, that the court was simply using the words "incurred risk" to express what has been referred to here as *"implied"* assumption of risk, since the court did not actually define "incurred risk." Subsequent cases, however, have focused upon the contractual relationship as the dividing line between the two defenses, rather than the line between "express" and "implied" acceptance. Indeed, the courts have held that a plaintiff may "impliedly" assume the risk in situations arising from a contractual relationship.[354]

The *O'Brien* case is also important in establishing a line of demarcation between incurred risk and contributory negligence. The court very carefully set out its view that incurred risk was not simply a matter of contributory negligence, and that contributory negligence was not to

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[350]*E.g.*, Louisville, New Albany & C. Ry. Co. v. Sandford, 117 Ind. 265 (1888); Indianapolis & St. L. Ry. Co. v. Watson, 114 Ind. 20 (1887); Lakeshore & Mich. So. Ry. Co. v. Stupak, 108 Ind. 1 (1886), and other cases cited by the *O'Brien* court, Indiana Natural Gas Co. v. O'Brien, 160 Ind. 266, 65 N.E. 918 (1903).

[351]160 Ind. 266, 65 N.E. 918 (1903).

[352]*Id.* at 272, 65 N.E. at 920.

[353]*Id.* at 273, 65 N.E. at 920 (emphasis added).

[354]Meadowlark Farms, Inc. v. Warken, 176 Ind. App. 437, 450, 376 N.E.2d 122, 132 (1978) (citing Brazil Block Coal Co. v. Hoodlet, 129 Ind. 327, 27 N.E. 741 (1891)). *See also* Kroger Co. v. Haun, 177 Ind. App. 403, 415, 379 N.E.2d 1004, 1011-12 (1978) (where the court, without deciding the matter, speaks as if a plaintiff may *incur* the risk by expressly consenting to it) (citing RESTATEMENT (SECOND) OF TORTS §§ 496B, 496C (1965); James, *Assumption of Risk,* 61 YALE L.J. 141 (1957); W. PROSSER, *supra* note 306, at 440)).

be considered an element of the newly articulated doctrine. Focusing upon the elements of the plaintiff's knowledge, appreciation, and voluntary encounter of the risk, the court contrasted those elements with the "carelessness" and "imprudence" constituting negligence. It observed that "carelessness in regard to a matter is not the same as the exercise of a deliberate choice in respect thereto."[355] The court concluded: "It is evident that contributory negligence and incurring the risk of a known and appreciated danger are two independent and separate defenses which should not be confused with each other."[356] The *O'Brien* case has never been repudiated, but, despite its explicit treatment of the distinction between contributory negligence and incurred risk, some confusion has persisted in the Indiana courts.[357]

Definitive treatment of the doctrine of incurred risk and its relationship with contributory negligence was given by the Indiana Court of Appeals in the case of *Kroger Co. v. Haun*.[358] Haun was injured when a forklift jacking machine he was operating backed into a stack of boxed groceries, crushing his foot. Defendant Kroger Company contended at trial and on appeal that Haun was contributorily negligent and had incurred the risk of injury in the operation of the forklift. In affirming the judgment for the plaintiff, the court of appeals discussed the doctrines of incurred risk and contributory negligence in great detail,

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[355]160 Ind. at 273, 65 N.E. at 920. In this portion of the opinion, the court was responding to defendant's main argument that plaintiff must allege and prove freedom from assumption of risk. An 1899 statute had shifted the burden of proof from plaintiff to defendant on issues of contributory negligence, and defense counsel argued that the statute had not affected the burden with respect to assumed risk which, they asserted, remained with plaintiff. The court observed that although earlier cases had failed to distinguish between incurred risk and contributory negligence, the precise issue of whether plaintiff was required to negative incurred risk had never been decided. Treating the issue as one of first impression, the court declared that defendant, rather than plaintiff, would bear the burden on the issue. Importantly, however, it also said that its ruling did not affect the previous rule that in *assumption* of the risk cases (master and servant and other contractual relations cases) plaintiff bore the burden. Alternatively, it said that the legislature may have intended the 1899 statute to operate on incurred risk in the same way as contributory negligence since so many court decisions had treated the doctrine as a "species" of contributory negligence, and so defendant's argument would fail under that view as well. The latter part of the opinion was the source of some confusion by a later court in the case of Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Lynn, 177 Ind. 311, 95 N.E. 577 (1911). In spite of the clear statements by the *O'Brien* court concerning the nature of the defense, the *Lynn* court read the case to say that incurred risk *is* a "species" of contributory negligence. Only two of the justices that were on the supreme court bench at the time of *O'Brien* were still on the court when *Lynn* was decided. The confusion has persisted. *See infra* text accompanying note 360.

[356]160 Ind. at 273-74, 65 N.E. at 920.

[357]*See* cases cited in Kroger Co. v. Haun, 177 Ind. App. 403, 408-10, 379 N.E.2d 1004, 1008-09 (1978); *see also infra* notes 359 and 360.

[358]177 Ind. App. 403, 379 N.E.2d 1004 (1978).

and concluded that the judgment should not be overturned upon application of either of the two doctrines. Citing the persistent tendency of the courts to confuse the two defenses,[359] the court declared its purpose to "attempt to reconcile the incongruity of these decisions and to hopefully clarify and develop a consistency in the use and application of the defenses."[360]

First the court outlined the "dissimilarities" between incurred risk and contributory negligence advanced by other courts. The court's treatment is simplified and rendered graphically below:

Incurred Risk	Contributory Negligence
1. "demands a subjective analysis with inquiry into the . . . actor's knowledge and voluntary acceptance of the risk."[361]	1. "contemplates an objective standard for the determination whether a reasonable man would have so acted under similar circumstances."[362]
2. "is concerned with the perception and voluntariness of a risk and is blind as to the reasonableness of risk acceptance."[363]	2. "is concerned with whether the acceptance of the risk was reasonable and justified in light of the possible benefit versus the degree of danger."[364]
3. "involves a mental state of 'venturousness. . .' "[365]	3. "under some definitions, describes conduct which is 'careless.' "[366]

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[359]The court cited Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Lynn, 177 Ind. 311, 95 N.E. 577 (1911); Rouch v. Bisig, 147 Ind. App. 142, 258 N.E.2d 883 (1970); Emhardt v. Perry Stadium, Inc. 113 Ind. App. 197, 46 N.E.2d 704 (1943). *See Kroger Co.*, 177 Ind. App. at 408-09, 379 N.E.2d at 1008.

[360]177 Ind. App. at 409, 379 N.E.2d at 1008.

[361]*Id.*

[362]*Id.* (citing Freuhauf Trailer Division v. Thornton, 174 Ind. App. 1, 11, 366 N.E.2d 21, 29 (1977); Morris v. Cleveland Hockey Club, Inc., 157 Ohio St. 225, 105 N.E.2d 419 (1952)).

[363]177 Ind. App. at 409, 379 N.E.2d at 1008.

[364]*Id.* (citing Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368 (Tex. 1963)).

[365]177 Ind. App. at 409, 379 N.E.2d at 1008.

[366]*Id.* (citing Weber v. Eaton, 160 F.2d 577 (D.C. Cir. 1947); Pittsburgh, C.C. & St. L. Ry. Co. v. Hoffman, 57 Ind. App. 431, 107 N.E. 315 (1914)).

4. "in one sense of the concept, has been described as negating a duty and therefore precluding negligence . . . ."[367]	4. "always presupposes a duty and breach thereof, but serves as an affirmative defense to prevent recovery by plaintiff."[368]

Second, the court discussed the basis of the confusion of the two doctrines in Indiana case law. It observed that in some cases the incurred risk elements of knowledge and appreciation of the risk had been considered satisfied by the application of the objective test of the "reasonable man," and that in some contributory negligence cases the courts had mistakenly required a showing that plaintiff knew and appreciated the peril.[369] Noting the split of authority on the question of whether "constructive" knowledge and appreciation of danger should be permitted to satisfy the pertinent elements of incurred risk, the court rejected the "constructive" theory.[370] In comparison, contributory negligence, the court concluded, might be established either by proof of plaintiff's actual knowledge of the danger *or* by applying the objective standard of reasonableness. Under the latter method, the plaintiff will be found contributorily negligent despite the lack of actual knowledge if he should have "appreciated or anticipated the danger."[371] Yet, the requirement of actual knowledge and voluntary acceptance necessary for incurred risk, in the court's view, should never be satisfied by the application of a standard of what plaintiff was required to know in the exercise of ordinary care.[372]

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[367]177 Ind. App. at 409, 379 N.E.2d at 1008.

[368]*Id.* (citing Gordon v. Maryland State Fair, Inc., 174 Md. 466, 199 A. 519 (1938)).

[369]177 Ind. App. at 409-10, 379 N.E.2d at 1008. As examples of the importation of the reasonableness standard of contributory negligence into incurred risk, the court cited Meadowlark Farms, Inc. v. Warken, 176 Ind. App. 437, 376 N.E.2d 122 (1978); Sullivan v. Baylor, 163 Ind. App. 600, 325 N.E.2d 475 (1975); Stallings v. Dick, 139 Ind. App. 118, 210 N.E.2d 82 (1965). 177 Ind. App. at 410, 379 N.E.2d at 1008-09. It discussed Rouch v. Bisig, 147 Ind. App. 142, 258 N.E.2d 883 (1970), and Hi-Speed Auto Wash, Inc. v. Simeri, 169 Ind. App. 116, 346 N.E.2d 607 (1976) as troublesome cases where the knowledge and appreciation of peril elements were apparently misapplied. 177 Ind. App. at 412-13, 379 N.E.2d at 1010.

[370]The court said: "It is our conclusion, however, that the integrity of each doctrine is better preserved when such situations are treated as unreasonable conduct in failing to recognize an obvious risk or danger, therefore constituting contributory negligence." 177 Ind. App. at 411, 379 N.E.2d at 1009.

[371]*Id.* at 413, 379 N.E.2d at 1011.

[372]*Id.* at 410, 379 N.E.2d at 1009. It should be noted that the court was *not* attempting to establish a concept of incurred risk tantamount to abolishing the "implied" sense of the defense. The court quoted from authorities taking the position that the plaintiff's subjective state of mind could be inferred from factors such as his own statements, " 'age,

The court then set out an analytical framework for applying the two defenses to avoid the misunderstanding and misapplications of the past. The court believed that the key to clarification lay in an examination of the "various possibilities concerning the conduct of a plaintiff suing in a negligence action."[373] The analysis first identified the "components" present in "every conceivable circumstance in which the conduct of [the] plaintiff is in question":[374]

(1) The existence or non-existence of a duty owed by the defendant to plaintiff for the prevention of the danger in question;
(2) The voluntariness of plaintiff's conduct and his knowledge and appreciation of its possible consequences, or lack thereof; and
(3) The reasonableness of the risk entailed or conduct engaged in by the plaintiff.[375]

On its face, the first "component" may appear to be misplaced in an analysis which purports to be directed at an evaluation of the *plaintiff's* conduct, since the relevance of the defendant's duty to the legal significance of the plaintiff's conduct is not immediately apparent. The relevance lies in the court's explanation of the use of the components. The court said the first "component" must be examined to determine "whether the risk or danger in question falls within the ambit of a duty owed by the defendant to plaintiff."[376] This first stage of evaluation may conclude the inquiry if the "defendant's duty does not include protection from the risk, either because of express or implied consent."[377] It is readily apparent that the court's first concern is whether the plaintiff

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experience, knowledge and understanding as well as the obviousness of the defect and danger it poses.' " *Id.* (quoting Williams v. Brown Mfg. Co., 451 Ill. 2d 418, 216 N.E.2d 305, 312 (1970)). The authorities discuss the matter in the context of assumed risk of dangerously defective products, but it is clear that the court was relying upon them for the more general proposition that the knowledge and voluntary acceptance elements of the defense might be inferred from the evidence in the case without applying the normative standard of what plaintiff *should* have known. 177 Ind. App. at 410, 379 N.E.2d at 1009. Furthermore, in discussing the "primary" sense of incurred risk, the court specifically referred to plaintiff's "express or implied consent." *Id.* at 415, 379 N.E.2d at 1011.

[373]177 Ind App. at 414, 379 N.E.2d at 1011.

[374]*Id.*

[375]*Id.* at 414-15, 379 N.E.2d at 1011.

[376]*Id.* at 415, 379 N.E.2d at 1011.

[377]*Id.* This is perhaps a slight overstatement by the court stemming from its abbreviated treatment of the "primary" sense of the general concept of assumption of risk. An examination of the authorities the court cited will show that "primary" assumption of risk includes situations where the defendant owed no duty to the plaintiff at the outset as well as those where, because of the plaintiff's conduct, the risk resulting in actual harm is removed from the scope of the defendant's preexisting duty and the defendant's act is thereby deemed to be no breach. RESTATEMENT (SECOND) OF TORTS §§ 496B, 496C; James, *supra* note 354, at 141; W. PROSSER, *supra* note 306, § 68, at 440; Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368 (Tex. 1963), *cited at* 177 Ind. App. at 415, 379

has taken on the risk in the "primary" sense. The key elements at this stage of the court's analysis are duty and consent. The court was not explicit about what the object of the plaintiff's consent must be, but it is certain that if the plaintiff has consented, that consent removes protection from the risk of harm from the defendant's set of duties. This effect pertains to the court's attempt to analytically separate the incurred risk and contributory negligence defenses because unless the defendant is *primarily* negligent, the plaintiff cannot be *contributorily* negligent.[378] If the plaintiff's consent to the risk relieves the defendant of a duty or a breach of that duty, no negligence to which the plaintiff can contribute exists.

This segment of the court's opinion is also important for establishing a perspective upon the place the reasonableness standard occupies in the court's larger analytical framework. Earlier the court had stated the proposition that the reasonableness standard pertains only to issues of negligence. If the court is wrong about this and reasonableness necessarily figures in determinations of plaintiffs' accountability for assuming/incurring the risk, then the "overlap" between the assumption of risk and contributory negligence defenses is complete and the two are interchangeable. The court's discussion of the specific application of the first "component" of its analytical framework attempts to demonstrate the validity of its proposition in the context of "primary" assumed/incurred risk. Although somewhat obscured by the brevity of treatment (the court

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N.E.2d at 1011-12. *See also* Armstrong v. Mailand, 284 N.W.2d 343, 348-50 (Minn. 1979). The point seems to have escaped observation by Dean Prosser in his categorization of assumption of risk even though he cites cases where the principle was employed. See cases cited in W. PROSSER, *supra* note 306, § 68, at 446 n.71 and the same cases cited in the Appendix to the RESTATEMENT (SECOND) OF TORTS, § 496C, at 414 (1966), as the basis for Illustration 3 to comment *g*. The *Haun* court apparently relied more upon Prosser's generalizations than upon the authorities. In fairness to the court, the overstatement seems to stem more from its attempt to briefly comment upon an aspect of incurred risk not directly pertinent to the case at hand rather than from misunderstanding, and its later illustrations of "primary" incurred risk redeem the slight inaccuracy. *See* 177 Ind. App. at 415-416, 379 N.E.2d at 1012. If this concept of the "primary" sense of the assumption of risk defenses is not kept in mind, the court's statement of the significance of the analysis of the first "component" is susceptible to misunderstanding. Following its outline of "components," the court made the statement that "contributory negligence presupposes the existence of a duty by defendant and breach thereof." *Id.* at 415, 379 N.E.2d at 1012. The court probably did not mean by its brief statement that if the defendant is under a preexisting duty then the reasonableness of the plaintiff's consent to the risk becomes relevant. The court reasoned that absent either one of the elements of duty or breach, no occasion to consider the plaintiff's contributory negligence would arise. *Id.* Since the plaintiff's assumption to risk could defeat either of those elements, the case could be resolved in favor of the defendant simply by ascertaining whether the plaintiff consented to the risk and without inquiring into the reasonableness of that consent.

[378]The court said, simply: "Where the defendant owes no duty or has not breached an existent duty, the question of contributory negligence is extraneous and not reached." 177 Ind. App. at 415, 379 N.E.2d at 1012.

was, after all, not confronted with a case of "primary" assumed/incurred risk), the logic seems to be this: (1) If accountability for assumed/incurred risk can be decided without reference to the reasonableness of the plaintiff's conduct, then the defense is not dependent upon that objective standard; (2) if the plaintiff's consent to the risk relieves the defendant of a duty, then the plaintiff's prima facie case of negligence against a defendant is defeated; (3) absent a prima facie case of negligence against the defendant, the "question of [the plaintiff's] contributory negligence is extraneous and not reached";[379] (4) the accountability having been established in assumed/incurred risk without reference to the reasonableness of the plaintiff's conduct, the independence of "primary" assumed/incurred risk from negligence theory is established.[380]

The court's discussion then turned to the "secondary" sense of incurred risk, where the defendant has breached a duty to protect the plaintiff from the risk of injury, but the plaintiff, knowing of the potential for harm and appreciating that potential, has engaged in conduct that relieves the defendant of responsibility for the resulting harm. Noting that the plaintiff's conduct under such circumstances may either constitute a voluntary acceptance of the risk or a failure to act reasonably under the circumstances, or both, the court acknowledged the area of "overlap" between incurred risk and contributory negligence.[381] The court admitted that there is no significant practical effect in a failure to distinguish the two defenses in the usual case where both are available.[382] The court quoted extensively from the *O'Brien* case and, without really saying so, seemed to disfavor its voluntary act-careless act dichotomy for distinguishing the two doctrines, characterizing that decision as "narrow" and concerned only with "simple negligence."[383]

In this portion of the opinion, without really saying so, the court seems to have favored the "modern" expansive view of contributory negligence. That view, expressed by Dean Prosser and in the Restatement,[384] maintains that the defense of contributory negligence is primarily based in the reasonableness of the plaintiff's conduct, including voluntary acts exposing the plaintiff to known peril. In contrast to the sharp distinctions between incurred risk and contributory negligence maintained by the *O'Brien* court with its voluntary act/careless act dichotomy, the "modern" view, since it permits any act of the plaintiff to be evaluated against the reasonableness standard, including voluntary risk-incurring acts, permits contributory negligence to swallow up the incurred risk

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[379] *Id.*

[380] *Id.*

[381] *Id.* at 416, 379 N.E.2d at 1012.

[382] *Id.* at 418, 379 N.E.2d at 1013.

[383] *Id.* at 417-18, 379 N.E.2d at 1013.

[384] W. PROSSER, *supra* note 306, § 65, at 424; RESTATEMENT (SECOND) OF TORTS § 466 (1965), both quoted by the *Haun* court. 177 Ind. App. at 417, 379 N.E.2d at 1013.

defense. The *Haun* court attributed judicial disagreement about whether "secondary" assumed risk defenses are merely species of contributory negligence or are independent defenses to the competing definitions of contributory negligence: the "narrow" definition tied to "carelessness," as in the *O'Brien* case, and the "broad" definition embracing the all-encompassing view of reasonableness.[385]

The court did not, however, explicitly adopt either of the competing views. The court preferred to leave them as it found them, being content to say that pragmatically the distinction is "without substantive significance" where both are applicable.[386] The court seems to have been content to allow either defense to operate interchangeably within the area of their functional overlap, but it offered no thoughts about its view of the extent of the overlap.

The court asserted the importance of distinguishing the defenses, however, in cases where the nature of the claim makes contributory negligence unavailable but where incurred risk is still a proper defense. The court raised guest statute and strict tort liability cases as examples, but it follows that any case where the theory of the defendant's culpability is something other than negligence could be similarly treated. The court pointed out the perplexity faced in those jurisdictions governed by the "expansive" definition of contributory negligence when cases presenting a necessity for distinguishing the two defenses arise: "If incurred risk is a 'type' of contributory negligence, then either: (1) incurred risk cannot be a defense to such actions since contributory negligence is not, or (2) contributory negligence is a defense since incurred risk is."[387] The *Haun* court rejected the merger of the two defenses, establishing that the analytical separation of the defenses should be maintained where it makes a pragmatic difference to do so. This separation is based on the determination of whether the plaintiff freely and intelligently chose to accept the consequences of the risk, a determination similar to that made in "primary" incurred risk situations. The court stated its conclusion in the following terms:

> While contributory negligence (unreasonable conduct) is *not* a defense in such cases, it may nevertheless be present in the form of conduct which includes the additional elements of voluntary and knowing incurrence. This is, in effect, the "overlap." In such situations, the mere presence of unreasonable conduct, and therefore contributory negligence, does not preclude plaintiff from recovery, but neither does it prevent the defendant from asserting the incurred risk elements of the conduct. The "un-

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[385]177 Ind. App. at 417-18, 379 N.E.2d at 1013.

[386]*Id.*, at 418, 379 N.E.2d at 1013.

[387]*Id.*, 379 N.E.2d at 1014.

> reasonableness'' of the conduct is not determinative in such actions.[388]

The court was not merely saying, however, that analytical separation should be maintained between incurred risk and contributory negligence principles only where the latter defense is unavailable. The discussion of the guest statute and strict liability cases was intended as reinforcement for its assertion that analytical separation is necessary in any case in order to avoid confusion. The court then proceeded to apply its analysis to the facts of the case, first to determine whether the plaintiff could, as a matter of law, be said to have incurred the risk (without reference to the reasonableness of the plaintiff's lack of knowledge) and then, independently, to determine whether he could be said to have acted unreasonably in failing to discover the risks or in other conduct. It found for the plaintiff in both branches of this application, but the clear import of its treatment is that it would have reached a different result had it been able to conclude from the evidence that the plaintiff knew, appreciated, and voluntarily encountered the risk without regard to the reasonableness of those factors.[389]

By refusing to treat ''implied secondary'' incurred risk and contributory negligence as a homogenized mixture, the *Haun* court's analysis, application, and conclusions means that the court discerned the nonfault basis of accountability of incurred risk, and intended to give it currency. It required a factual determination of the elements of incurred risk without reliance upon a normative judgment call about whether the plaintiff *should* have known or appreciated the risk. It required and applied an analysis of the plaintiff's voluntariness in encountering the risk without reliance upon an objective determination that he acted so unreasonably that he must be treated as a volunteer. If the analytical separation required by the court is maintained in the face of the transformation of contributory negligence into comparative fault, the plaintiff would still be totally barred if the incurred risk elements were satisfied, regardless of whether his conduct was totally reasonable or was unreasonable enough to invoke the apportionment principle. The refusal of the court to rely upon fault to satisfy incurred risk elements, as well as the significant difference between the Uniform Act's approach to assumed risk and the court's approach to incurred risk call into question the propriety of the legislature's unqualified inclusion of ''incurred risk'' in the Comparative Fault Act's definition of ''fault.''

D. Problems of Interpretation Raised by the Indiana Act's Language

1. Introduction.—Variations in the interpretation and application of the Comparative Fault Act concerning the assumption of risk defenses

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[388] *Id.* at 419, 379 N.E.2d at 1014.

[389] *Id.* at 419-21, 379 N.E.2d at 1014-15.

are imminent by virtue of the use of "unreasonable" as a qualifier of "assumed risk" and no qualification of "incurred risk." The thrust of the interpretations will depend upon the extent to which the views of the *Haun* court about incurred risk are considered to have been incorporated into the Act, the extent to which the views propounded in the Uniform Act's commentary are taken to have been adopted by the Act, and the support in logic, policy, and function each interpretation can muster.

If one were to assume that the words of the statute alone controlled its interpretation, then the conclusion easily follows that only "unreasonable" implied assumptions of risk are incorporated into comparative "fault" while all of incurred risk is included. When it comes to applying the Act to actual cases, however, interpretation may not prove to be such a simple matter. Behind the simple language of the Uniform Act are its potentially complicating comments. Litigants will certainly attempt to use the Uniform Act commentary on both sides of the bar. The words "incurred risk" are surely included, but the *Kroger v. Haun* formulation of that defense will just as surely be argued as a limitation upon the meaning of those words. If less than the full assumed risk doctrine and all of the incurred risk doctrine are taken to be included by the statute, then questions of consistency between the defenses arise which may not be sustainable under the new principles of comparative fault. Two conflicting interpretations are possible once the task of interpretation is carried beyond the mere language of the definition, one of which would incorporate the *Haun* court's formulation of incurred risk, and the other which would abandon the definition of incurred risk articulated by *Haun*, in effect reading the statute as legislatively overruling the court's holding.

2. A "Modified" Assumed Risk - "Limited" Incurred Risk Interpretation.—The Uniform Act, by its terminology and as expanded by the commentary accompanying it, is intended to apply to "implied secondary" assumption of risk situations; in addition, it has adopted the expansive merger theory of assumption of risk and contributory negligence discussed in *Haun*.[390] The Uniform Act's commentary particularly illustrates the commissioners' view that in cases where the definition applies, unless the plaintiff's deliberate conduct can be deemed faulty, the apportionment principle is not triggered.[391] All of this means that in "implied secondary" assumption of risk cases where the defendant fails to prove that the plaintiff's actions were unreasonable, the plaintiff recovers fully for his injuries. Yet, the commissioners did not simply

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[390] *See supra* text accompanying notes 384-86.

[391] UNIFORM ACT, *supra* note 314, at 38. The commentary also includes the statement: "this [definition of "fault"] is the case of unreasonable assumption of risk, which might be likened to *deliberate* contributory negligence and means that the conduct must have been voluntary and with knowledge of the danger." *Id.* (emphasis added).

incorporate all of assumed risk into the Uniform Act. While they adopted the expansive view of the "overlap" area, some of assumed risk remains outside the Uniform Act's comparative fault scheme. Implied and express "primary" assumption of risk and express "secondary" assumption of risk remain outside the coverage of the definition of "fault." Where the defendant successfully establishes one of these three segments of the defense, the common law features of the doctrine are operable and the plaintiff's action will fail completely. Thus, even though the Uniform Act adopts the expansive contributory negligence view and incorporates it into comparative fault, the use of the modifier "unreasonable" and the commentary explaining the meaning of the phrase demonstrate the intent to include only the segment of assumption of risk cases in which the plaintiff's encounter with a risk created by the defendant's negligence would fail to satisfy an objective standard of reasonableness. The phrase "not constituting an enforceable express consent" demonstrates the intent that, within the preceding class of cases, only those in which the plaintiff impliedly knew, appreciated, and encountered the risk are to be considered as "fault." This discussion will refer to the defense subsumed in the Uniform Act's definition as "modified" assumption of risk.

If the Indiana General Assembly is presumed to have been aware of the coverage of assumption of risk intended by the commissioners, then it may be said that the adoption of the very same language as the Uniform Act brought with it the same intent. If the General Assembly is presumed to have been aware of the *Kroger v. Haun* decision, it may be said that its inclusion of the words "incurred risk" in the statute brought with those words the court's pronouncements upon them. The *Haun* court's view of "implied secondary" incurred risk, however, is not the same as the Uniform Act's view of "implied secondary" assumption of risk. The Uniform Act's concept of the defense permits the plaintiff to recover if the fact finder is unable to conclude that the plaintiff's risk-assuming conduct was unreasonable. A similar case subject to the *Haun* analysis would still result in a total bar under incurred risk because the reasonableness of plaintiff's conduct would be irrelevant. Furthermore, since the *Haun* court equated "primary" incurred risk with "primary" assumed risk, it follows that if a defendant proves that a plaintiff's incurral of the risk had the effect of negating a duty or breach, the plaintiff's action will fail and no occasion for apportionment will arise. Since this view maintains that some aspects of incurred risk should remain outside of the apportionment, this discussion will refer to the segment of incurred risk which the *Haun* court's analysis would permit to be treated as comparative "fault" as "limited" incurred risk. A summary of the conclusions reached under this interpretation are:

(1) If the segment of "implied secondary" assumption of risk is the appropriate defense, the defendant may invoke the apportionment principle by proving that the plaintiff's conduct was unreasonable.

(2) If the plaintiff's conduct constituting "implied secondary" assumption of risk was reasonable, the defendant's comparative fault defense fails and the plaintiff's recovery is not apportioned.
(3) If the circumstances present a "valid and enforceable express consent" or "a lack of violation of duty," the segment of "implied secondary" assumption of risk is not applicable and the common law principles of assumption of risk remain as a complete bar.
(4) If "secondary" incurred risk is the appropriate defense whether "express" or "implied," the defendant may invoke the apportionment principle by satisfying the subjective elements of incurred risk (knowledge, appreciation of peril, and a voluntary encounter), but may *not* satisfy those elements by proving the unreasonableness of plaintiff's conduct.
(5) If "primary" incurred risk is the appropriate defense, the apportionment principle is not invoked and the common law principles of incurred risk remain as a complete bar.
(6) Defendant may in any case be able to compel apportionment by proving contributory fault in some other respect.

3. A "Modified" Assumed Risk - "Total" Incurred Risk Interpretation.—Arguments that the legislature intended not to incorporate the *Kroger v. Haun* formulation of incurred risk into the statute at all, but rather to legislatively overrule that case should be expected. The main premise of these arguments will be that by including the general, unqualified term of "incurred risk" in the definition of "fault" the legislature evidenced its intent that all issues of incurred risk, whether "primary" or "secondary," "express" or "implied," be subject to comparative fault principles.

The incentive for pressing such an argument lies with defendants in some contexts and with plaintiffs in others. By breaking the incurred risk defense out of the definitional boundaries established for it by the *Haun* court, a defendant might be able to invoke the apportionment principle under circumstances which would not have satisfied the *Haun* concept of incurred risk. For example, Indiana courts have permitted the trier of fact to overlook the plaintiff's contributory negligence in cases where the defendant's conduct is shown to be willful, wanton, or reckless.[392] In such a case, the ability to prove the presence of subjective

[392]Indiana courts have, on several occasions, in different settings, firmly stated the proposition that the plaintiff's contributory negligence is not a defense to liability for the defendant's willful, wanton, or reckless conduct. *E.g.*, Hoesel v. Cain, 222 Ind. 330, 53 N.E.2d 165 (1944); Kizer v. Hazelett, 221 Ind. 575, 49 N.E.2d 543 (1943); Parker v. Pennsylvania Co., 134 Ind. 673, 34 N.E. 504 (1893); Brannen v. Kokomo Greentown & Jerome Gravel Road Co., 115 Ind. 115, 17 N.E. 202 (1888); Palmer v. Chicago, St. Louis

knowledge, appreciation of the risk, and a voluntary encounter with it, as required by the *Haun* court, may be impossible. Proving that the plaintiff *should* have known and appreciated the risk and that the plaintiff should be *taken* to have voluntarily encountered it may be a relatively simple matter. Once the *Haun* shackles are removed, the defendant at least can argue the matter before the jury. Plaintiffs' incentive arises in the context of "primary" incurred risk. If a plaintiff subject to that defense were able to invoke the apportionment principle to avoid the total bar which the limited inclusion argument maintains, he would at least be able to cut his losses. He too could present the argument to the jury as to how reasonable he was in consenting to the risk.

The interesting aspect of this argument is that, as demonstrated by its appeal to both sides of the bar depending upon the circumstances, it really is not founded upon a particular theory of incurred risk or an attempt to keep some principle inherent in that defense internally consistent with comparative fault. It is rather based upon the broad appeal that the objective standard holds for lawyers in its flexibility. The ability of advocates to argue the reasonableness of their clients' conduct produces and maintains the flexibility. Once reasonableness becomes the focus, the nonfault aspects of the defense drop from view. Proponents of this interpretation might assert that, in contrast to the Uniform Act's modified inclusion of assumption of risk, which the commissioners "likened to deliberate contributory negligence,"[393] the inclusion of incurred risk in the Indiana Act is general and unqualified. The contention would be that the legislature intended to include not only that segment of incurred risk which may be likened to deliberate contributory negligence and which applies to conduct which "must have been voluntary and with knowledge of the danger,"[394] but also that part of incurred risk which may be likened to *nondeliberate* contributory negligence, and which would apply to *nonvoluntary* conduct and *constructive* knowledge of the danger.

Further support for this construction might be asserted to reside in the apportionment principle itself. This branch of the argument would contend that the motivating force behind the Act was to abolish the harsh total bar of contributory negligence, and that the same motivation induced the unqualified inclusion of incurred risk. To the extent "that the whole spirit of the defense and of the reasoning it employs bears the strong imprint of laissez faire and its concomitant philosophy of

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& Pittsburgh R.R. Co., 112 Ind. 250, 14 N.E. 70 (1887). In Indianapolis Union Ry. Co. v. Boettcher, 131 Ind. 82, 28 N.E. 551 (1891), and Terre Haute, Indianapolis & Eastern Traction Co. v. Maberry, 52 Ind. App. 114, 100 N.E. 401 (1913), the courts actually permitted plaintiffs to recover. *See also* Freitag v. Chicago Junction Ry. Co., 46 Ind. App. 491, 89 N.E. 501 (1909) *op. mod. on other issues,* 46 Ind. App. 503, 92 N.E. 1039 (1910).

[393]UNIFORM ACT, *supra* note 314, at 38.

[394]*Id.*

individualism which has passed its prime,"[395] the Comparative Fault Act marks a point of departure from that policy and philosophy in the assignment of accountability. The argument supporting this interpretation would contend that, outside the context of contractual dealings between the parties, the comparative fault system should be permitted to work its tempering effect upon the old common law principles of incurred risk. If these premises are adopted as valid, the *Haun* court's analysis of the defenses becomes a mere historical artifact. Its limitations upon incurred risk become irrelevant because the "incurred risk" part of "fault" is something entirely different from the common law defense the court tried to define. In effect, this interpretation argues that "incurred risk," whatever it might mean in the context of an action based on "fault," will trigger the apportionment principle. The "expansive" definition of contributory negligence rejected by the *Haun* court will have been outstripped by an even more expansive concept of "fault." Contributory negligence and incurred risk had their area of "overlap" which the *Haun* court almost begrudgingly acknowledged because of the practical impossibility of distinguishing results. This "total inclusion" interpretation of the definition of "fault" maintains that the area of "overlap" is coextensive with the boundaries of "incurred risk"; that whenever "incurred risk" is taken by the trier of fact as an appropriate description of the plaintiff's conduct, that conduct constitutes "fault" to be apportioned.

Summarized below are the conclusions reached about the operation of the Comparative Fault Act if this interpretation is accepted:

(1) If the segment of "implied secondary" assumption of risk is the appropriate defense, the defendant may invoke the apportionment principle by proving that the plaintiff's conduct was unreasonable.

(2) If the plaintiff's conduct constituting "implied secondary" assumption of risk was reasonable, the defendant's comparative fault defense fails and the plaintiff's recovery is not apportioned.

(3) If the circumstances present a "valid and enforceable express consent" or "lack of violation of duty," the segment of "implied secondary" assumption of risk is not applicable and the common law principles of assumption of risk remain as a complete bar.

(4) If incurred risk is the appropriate defense, whether "primary," "secondary," "express," or "implied," defendant is able to invoke the apportionment principle by satisfying the elements of incurred risk (knowledge, appreciation of peril, and a voluntary encounter) and may satisfy those

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[395] 2 F. HARPER & F. JAMES, *supra* note 307, § 21.3, at 1174.

elements by the use of either a subjective or an objective standard.

(5) In no case will the successful employment of the incurred risk defense result in a total bar unless by incurring the risk the plaintiff was more than 50% at "fault."

(6) Defendant may in any case be able to compel apportionment by proving contributory fault in some other respect.

E. Appraisal of the Competing Interpretations

1. The Clash of Fault and Nonfault Bases.—In the *Haun* case, the court was concerned that the pragmatic operational similarity of the total bar of incurred risk and the total bar of contributory negligence would obscure the conceptual and functional differences between them. It went to great lengths to lay out an analytical framework designed to maintain a separation based upon those differences. It acknowledged that in some cases, where separation made no difference, no great harm would come from treating the two as if they were simply contributory negligence. It demonstrated, however, that certain classes of cases exist where the independent existence, availability, requirements, and conceptual underpinnings of the two defenses do make a difference. The court's guest statute illustration may have been diluted by the General Assembly's recent contraction of the class of plaintiffs affected by the provisions of that statute,[396] but the court's concern remains valid nevertheless in cases where the contributory negligence defense would not have been entertained at common law.

If the Comparative Fault Act is interpreted as totally incorporating incurred risk into "fault," the differences between incurred risk and contributory negligence found to be important by the *Haun* court will be nullified. If this interpretation prevails in a guest statute case, for example, a defendant will be able to invoke the apportionment function of the Act by showing that the plaintiff incurred the risk because his conduct did not conform to the reasonableness standard. Contrary to the principle set down in *Haun*, however, where "[t]he 'unreasonableness' of the conduct is not determinative,"[397] the reasonableness standard under this interpretation *becomes* determinative in such a case. The plaintiff's "constructive" knowledge and objectively attributed appreciation of the risk would be determined by application of the reasonably prudent person standard instead of the subjective standard of actual knowledge and appreciation. The defendant would argue that no one in the plaintiff's position could have failed to have seen and appreciated the risks presented

[396]The 1984 amendment to the guest statute limits the class of persons subject to the statute to the parents, spouse, child or stepchild, brother or sister of the driver and hitchhikers. Act of Mar. 1, 1984, Pub. L. No. 68-1984, Sec. 2, § 1, 1984 Ind. Acts 925, 925-26 (codified at IND. CODE § 9-3-3-1 (Supp. 1984)).

[397]Kroger Co. v. Haun, 177 Ind. App. 403, 419, 379 N.E.2d 1004, 1014 (1978).

by the defendant's willful, wanton, and reckless driving. Defendant could make such an argument to the jury in spite of the lack of subjective awareness, appreciation, or voluntariness in plaintiff's encounter with the risk. In essence, the plaintiff's right to compensation will be limited by the degree to which he was negligent in encountering the risk. This importation of contributory negligence into guest statute cases would represent a substantial expansion of defendants' abilities to defeat such causes of action. It would set up the anomalous possibility for a defendant to argue that the more patently culpable *her* acts were, the greater the reason that the plaintiff should have known and appreciated those acts as a risk. On the other hand, since the reasonableness standard puts to work the apportionment principle,[398] some plaintiffs who surely would have lost their case at common law for having incurred the risk will, under this interpretation, recover something for their injuries. So construed, the Act also expands the abilities of plaintiffs to recover in guest statute actions.

Cursory analysis might result in the conclusion that since plaintiffs as well as defendants are benefited by this interpretation, the interests of both sides of the issue are addressed, there is a theoretical washout, and the construction of the statute should stand as a valid one. However, recall that plaintiffs suing subject to the guest statute have a higher threshold to cross in order to establish liability at all.[399] Requiring plaintiffs to satisfy a more rigorous basis for liability and then permitting defendants subject to such liability to escape part of it by proving mere unreasonable conduct by plaintiffs results in a balance of interests drastically different from that struck by the adoption of the guest statute. It may turn out in actual operation that because the trier of fact would be "comparing" mere negligence with wanton or willful misconduct plaintiffs will suffer no significant diminution in recovery. The fact that

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[398]If a plaintiff subject to the *Haun* court's view of "primary" incurred risk is permitted to escape the total bar upon the logic that "incurred risk" is unqualifiedly part of the system of comparative fault by virtue of its inclusion in the definition of "fault," and that comparative fault results in a total bar only if the plaintiff's "fault" exceeds 50% of the "total fault," such a plaintiff is likely to press the logic to argue that he was not at "fault" at all because he acted reasonably in his risk-incurring behavior, or that even if he was at "fault" by incurring the risk, he was less at "fault" than the defendant because he acted reasonably and she did not. The variations are limited only by the range of an advocate's imagination. The point is not that the total inclusion of incurred risk into the apportionment principle necessarily invokes an evaluation of the reasonableness of the plaintiff's conduct. Rather, it is that such an inclusion *permits* the reasonableness of the plaintiff's conduct to be evaluated under circumstances where a nonfault-based view of incurred risk would prohibit such an evaluation. *See generally* 2 F. HARPER & F. JAMES, *supra* note 307, § 21.1, at 1164-65; W. PROSSER, *supra* note 306, § 68, at 447.

[399]The Indiana guest statute requires these plaintiffs to prove "wanton or willful misconduct." IND. CODE § 9-3-3-1 (Supp. 1984).

plaintiffs were subject to no reduction at all, even when they were negligent, prior to the adoption of comparative fault, is reason enough for the courts and the legislature to observe the operation of the apportionment principle carefully with a view to ensuring that the objectives of both statutes are fairly served.

The observations of the *Haun* court are valid on a much broader and more important scale. Having discerned that the basis of accountability for incurred risk is not fault, the court attempted, through its guest statute discussion, to demonstrate that under some circumstances where the fault-based defense of contributory negligence with its total bar may be stripped away, the nonfault based accountability of incurred risk remains unaffected. The Comparative Fault Act calls into play those same considerations. The Act has stripped away the fault-based total bar of contributory negligence, replacing it with the apportionment principle. Whatever the policy and philosophical orientation the incurred risk defense might reflect in Indiana, the *Haun* court gave currency to it and insisted upon analytical separation of the defenses. The "total inclusion" interpretation of the Comparative Fault Act would discard the *Haun* definition of incurred risk and treat the defense as an open-ended element of "fault." Adoption of a comparative fault system brings about certain drastic changes in the process for adjusting the rights of individuals who have become involved in a relationship of nonconsensual liability. It does not mean that common law concepts of tort law which do not have fault as their foundation should automatically be transformed into fault-based concepts, even where the concept has been included in a definition of "fault."

Certain aspects of the Act belie a legislative attempt to fundamentally overturn Indiana case law. The patchwork drafting job is the first indication. The background of the Act, after all, is the Uniform Act, to which "patches" of changes were added and subtracted to suit the preferences of Indiana legislators and lobbyists. The Uniform Act addresses a unitary doctrine of the assumed risk defenses which treats all classes of plaintiffs alike, whether related by contract or not. There is no evidence that the Indiana legislature departed from the Uniform Act's policy and philosophical positions on the intended effects of assumption of risk in any respect. In addition, the adoption of a "modified" system of comparative fault hardly represents the shift in policy and philosophy necessary to support the argument for abandonment of the total bar in incurred risk for all cases. The total bar of a plaintiff's action under some circumstances remains an important feature of the Act. Legislation purported to have such a drastic effect upon the common law as the total transformation of incurred risk into comparative fault ought to display more intrinsic evidence of a legislative intention to overrule the common law than the two words "incurred risk" tucked into the carefully

turned phrases of an act intended as a model for a different system.[400]

2. Reconciling "Fault" and Nonfault.—Other problems associated with the inclusion of the unqualified term "incurred risk" in the definition of "fault" are solved differently by the two alternative interpretations. Consider a case where *P* observes *D*'s risk-producing conduct and perceives the potential for his own benefit if he can continue the observation. *D* sees *P* begin to get too close and stops the activity. *P* says to *D*: "I see that your conduct produces a risk of harm to me and that the harm may be very serious, even fatal. However, your conduct has great value to me and I am willing to take that risk upon myself. I relieve you of any duty of care toward me. Please continue as you were doing."[401] If the *Haun* case is incorporated into the Act's inclusion of incurred risk, *P* will have expressly relieved *D* of the duty of ordinary care and could not complain of *D*'s injurious conduct.[402] Whether *P*'s conduct was fault-ridden is irrelevant, and the effect of that conduct is to remove *D*'s conduct from the realm of fault. No fault of *P* or *D* would exist to be compared.

The matter is much more complicated under the "total inclusion" interpretation. Calling *P*'s incurral of risk "fault" does not change the issue of whether he placed the risk of injury within the realm of his personal responsibility. In this setting, he either took on that responsibility or he did not. Translated into the new rubric of "fault," one view of the situation is that *P* was either 100% or 0% at "fault," because he either incurred the risk or he did not. If this view prevails, however, the apportionment principle will have been rendered a nullity, and some pressures will be exerted in litigation to incorporate the old reliable reasonableness standard to avoid one-sided results.

Plaintiffs' counsel, facing the possibility of a 100% "fault" assessment for their clients in an "express" "primary" incurred risk case

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[400]The 1984 amendments to the Act also removed other nonfault-based concepts from the definition of "fault" with the deletion of strict liability and warranty from the definitions section. Without an official legislative history, it is risky to attach any significance to this modification of the Act beyond the mechanical change of language. However, the deletion does show that the legislature is not yet ready to extend comparative fault into causes of action founded upon theories of accountability having no basis in fault. This reluctance to blend the two bases of accountability in one context may be reason enough to look for strong evidence of an intention to bring about such a blend in other contexts. Such evidence does not exist in the simple language of the definitions section. Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2(a), 1984 Ind. Acts 1468, 1468-69.

[401]Readers who simply cannot proceed further without sufficient detail to make the hypothetical "concrete" may wish to assume that *D* is a knifethrower practicing her art. *P* is a photojournalist who sees a peculiar human interest angle or an especially interesting play of light and believes he must get within the range of the flying knives to get the "perfect shot."

[402]See the *Haun* court's discussion, 177 Ind. App. at 414-16, 379 N.E.2d at 1011-12.

such as this, will surely try to blunt that possibility by arguing the reasonableness of their clients' conduct. In effect, even though the defendant theoretically would have the option of satisfying the incurred risk elements by using the subjective or objective standard, the objective standard will always creep into the case. Pragmatically, contributory fault will have completely swallowed up the incurred risk defense. The trier of fact will have to consider the circumstances of each case in a manner similar to that necessary to resolve issues of contributory negligence in order to reach the determination of reasonableness. The *degree* of unreasonableness of the plaintiff's conduct will be translated into a percentage of accountability assigned in accordance with the usual apportionment procedures of the Act.

What is most noticeable about this operation is that it is not mechanically necessary, indeed, it may actually be impossible to assess the fault of the defendant during the process. The defendant's percentage of "fault" will have been reached by deduction: 100% minus plaintiff's degree of unreasonableness equals defendant's "fault." This would be mathematically true in spite of the fact that under ancient concepts of tort liability the defendant was simply not at fault.

Aside from the effect upon the apportionment process that the "total inclusion" interpretation has, consider the effect upon the actors' conduct. It requires the defendant to consider what she knows about the plaintiff's circumstances before continuing with her risk-producing conduct. If she knows enough about those circumstances to conclude that the plaintiff's conduct is unreasonable and is secure in her belief that a trier of fact would agree with her, she may proceed with the conduct knowing that the plaintiff will be at least partially accountable for any injuries that result. If her assessment of the situation produces the belief that the plaintiff could be found to have acted reasonably in incurring the risk, the defendant would be foolish to proceed as if she had been relieved of her duty. Even assuming the improbable, that actors will develop a sufficiently sophisticated understanding of the technical niceties of such an interpretation and then decide upon their course of conduct in accordance with that understanding, this interpretation presents a rather unorthodox framework to aid human judgment.

3. Differential Treatment of Assumed and Incurred Risk Defenses.—Serious difficulties are present in both interpretations because of the differences in the Act's operation upon assumed and incurred risk defenses. With respect to the "limited inclusion" interpretation, the difference is that the defendant may establish "implied secondary" assumption of risk by proving the unreasonableness of the plaintiff's conduct, whereas the defendant in an incurred risk case must prove actual subjective knowledge, appreciation, and voluntariness. Furthermore, if the defendant fails to prove *unreasonable* assumption of risk, the plaintiff recovers fully. In the incurred risk context, it does not

matter how reasonable the plaintiff's conduct was, satisfaction of the incurred risk elements totally bars the plaintiff's recovery.

In a case involving two plaintiffs whose behavior was identical suing the same defendant for the same negligent act, a court following this interpretation would be required to instruct the jury differently concerning the first plaintiff who happened to be the defendant's tenant, for example, than it would concerning the second, who was not. The jury would be told that the first plaintiff's behavior could be evaluated using the objective reasonably prudent person standard on the question of whether he assumed the risk. It would be told that the reasonableness of the second plaintiff's behavior is irrelevant, and that they can find he incurred the risk only if he subjectively knew, appreciated, and voluntarily encountered the risk.

The old distinction based upon the existence of a contractual relationship between the parties does not sustain the difference in treatment. Since the unreasonable assumption of risk defense would be available to contracting parties only when the express contractual terms fail to address the risk-producing the injury, the determination of who is to benefit from apportionment, whether plaintiff or defendant, has no logical connection to the contractual relationship. In practical terms, on the issue of whether the plaintiff consented to the risk, the contractually-related parties are on the same footing as the nonrelated parties. The new system of comparative fault should not operate so differently between cases simply because one set of litigants happens to have entered a contract and another set has not.

The legislature would have done better to have incorporated incurred risk into the definitional phrase borrowed from the Uniform Act and expanded the definitions section to clearly state an intention to sweep "implied secondary" consent to the risk into comparative fault. One possible way to accomplish this would be to incorporate the following terminology into the definitions section of the Act:

> "Fault" includes . . . unreasonable assumed or incurred risk not constituting an enforceable express consent . . . .
>
> "Assumption of risk" and "incurred risk":
>
> (1) include only the "implied secondary" senses of those terms, that is, where those terms denote that plaintiff cannot be said to have actually known, appreciated, and voluntarily encountered a risk produced by the negligence of defendant, but only impliedly has done so.
>
> (2) do not include the "primary" senses of those terms, that is, where those terms denote that plaintiff's conduct has the effect of relieving defendant of a duty or breach of that duty.
>
> (3) shall invoke the apportionment of damages provisions of this Act if and only if:

(a) the "implied secondary" sense of the terms apply to plaintiff's conduct, and
(b) plaintiff's conduct has been deemed unreasonable by the trier of fact.

(4) shall remain as a complete defense to plaintiff's action in any case where the senses of:
(a) "express or implied primary" assumed or incurred risk, or
(b) "express secondary" assumed or incurred risk apply to the circumstancees giving rise to plaintiff's claim.

The suggested provisions are complex, but the issues raised in the relationship of the nonfault assumption of risk defenses to a comparative fault system are themselves complex, as this discussion has demonstrated. The suggestions definitely spell out their intention to partially overrule *Haun* and to ensure the consistent operation of the apportionment principle in the troublesome area of "overlap" between the assumption of risk defenses and contributory negligence.

The *Haun* court made a commendable effort to articulate a theoretical separation between the two defenses and in that effort did much to dispel the theoretical confusion that had persisted in the case law. It operated, however, only in the realm of the theoretical. The court was called upon only to decide whether plaintiff Haun could have been found to have incurred the risk or to have been contributorily negligent as a matter of law. Applying its analysis, it found enough doubt in the record to answer the questions in the negative. It did not have to perform the more difficult task of deciding as a matter of fact whether Haun incurred the risk or was contributorily negligent. As demonstrated in an earlier section of this Article, the trier of fact will likely have much difficulty maintaining an analytical distinction between the defenses.[403] A jury's decision, made in secret behind the deliberation room door, is more likely to be influenced by the jury's collective experience and common sense than by a theoretical distinction which is difficult to grasp and even more difficult to apply.[404] Perhaps it is time that the law of comparative fault follow experience in this category of cases. The proposed modification permits the jury to find the elements of incurred risk to be satisfied by the application of objective criteria and the reasonableness standard in cases of "implied secondary" incurred risk, that most troublesome of areas where contributory fault and the assumption of risk defenses "overlap." At the very least, the General Assembly should define "fault" in this regard to include "unreasonable assumed or incurred risk not constituting an enforceable express consent."

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[403] *See supra* text accompanying notes 396-400.

[404] The difficult guest statute cases of concern to the *Haun* court remain troublesome, but perhaps not as much as one might suspect. First, since "reasonable implied secondary" assumption of risk does not bar recovery, and since "willful, wanton or reckless" acts

Much of the foregoing discussion concerning the different treatment of risk-assuming and risk-incurring plaintiffs applies to the "limited inclusion" interpretation. The differences permitted under the "total inclusion" interpretation, however, are more drastic and much less supportable. Since this construction permits risk-incurring plaintiffs to invoke apportionment when they have incurred the risk in any of the senses employed in this discussion,[405] such plaintiffs enjoy a marked advantage over their risk-assuming peers who receive apportioned recovery only in the "implied secondary" category of cases. Conversely, plaintiffs who reasonably assume the risk in the "implied secondary" category are entitled to full recovery while all risk-incurring plaintiffs are subject either to apportionment or a total bar.

Consider an example where plaintiff *A* and defendant *C* are contractually related, but plaintiff *B* and the same defendant are not so related. If *A*'s contract with *C* contains provisions sufficient to satisfy the assumption of risk elements, he can invoke the apportionment principle only by establishing the unenforceability of the provisions as an invalid exculpatory clause. Plaintiff *B*, on the other hand, who may have orally consented to the risk in the same terms as used by *A*, is spared the burden of proving unenforceability, and is permitted to benefit from the application of the apportionment principle.

The reasons for rejecting this difference in treatment of risk-assuming and risk-incurring plaintiffs are the same as discussed in connection with the "limited inclusion" interpretation. Since the differential treatment here encompasses a broader segment of cases, however, the reasons for avoiding the effect are multiplied by the number of possibilities where the difference could arise. There is simply no firm basis in logic, policy, fairness, or precedent for permitting one plaintiff to benefit from apportionment while another plaintiff presenting virtually the same facts as the first is totally barred merely because the second plaintiff happened to have entered into a contract with the defendant.

These comments should not be construed as an argument for sweeping all of assured risk into comparative fault as the "total inclusion" interpretation would do with incurred risk. All that has been said that is critical of the total inclusion of incurred risk applies with equal force to the total inclusion of assumed risk. The total inclusion of incurred

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are specifically made subject to the apportionment principle, the trier of fact is given much greater leeway to adjust the accountability and liability of the risk-incurring plaintiff and the willful and wanton defendant than it could have exercised under the negligence system at the time of the *Haun* decision. Second, if the courts view the guest statute as a declaration of the policy that gratuitous passengers in motor vehicles impliedly assume the risks of negligent operation of those vehicles as inherent risks and that drivers are legislatively relieved of the duty of care to those passengers, they might conclude that such a defendant has already benefited from a legislatively applied concept of incurred risk and instruct the jury accordingly.

[405]That is, "express" or "implied," and "primary" or "secondary."

risk presents problems enough, but assumption of risk cases add the complication of attempts by the parties to regulate their conduct through contract. In some of those cases the parties will have addressed the riskiness of the activity involved in the transaction and will have attempted to allocate those risks between them. Suppose, for example, that *X* validly contracts with *Y* to receive the benefit of *Y*'s services. Part of the contract expressly relieves *Y* of a duty of ordinary care toward *X*. If the Comparative Fault Act includes all of assumed risk in the definition of "fault," application of the Act under the rubric of "fault" presents some problems if *X* is injured and reneges on the contract not to sue *Y*.

It is doubtful that the parties would agree in advance that *X* would take on a stated percentage of risk as "fault" or, if they had, would expect the trier of fact to be bound by that clause. Upon what other basis may a jury return a verdict that proclaims *X* assumed only a portion of the risk? Even if the jury is permitted to infer that the contract or some other factor permits a determination of the percentage of the risk that has been assumed, what is the conceptual basis for presuming that an assumption of *N*% of the risk is equivalent to an equal percentage of contributing fault? If *X* obtains a verdict against *Y*, does *Y* then have a breach of contract action against *X* for the amount of damages he was compelled to pay *X* in the tort claim, plus the cost of defending? If *X* knows of and appreciates a danger, and specifically contracts for a benefit in a way which addresses that danger, the common law-trained mind tends to rebel at the suggestion that *X*'s conduct amounts to fault. A contract against public policy is one thing; a valid, expressed release of duty is another. An unqualified inclusion of assumed risk in the definition would resurrect a duty the law and the parties themselves had previously declared extinguished.

The above problems aside, there remains the difficulty of requiring the jury to translate *X*'s contractual assumption of risk into the defendant's "fault." Assuming that they can do so, or at least act as if they can, a finding that the plaintiff is at "fault" does not compel the conclusion that the *defendant* is at fault. The statute does not purport to change the basis of liability, and the jury should not be permitted to assume that since the plaintiff is deemed to be something less than 100% at "fault" then the defendant must have been at "fault" for the remainder. The Act's suggested instructions require the jury to reach a verdict by multiplying the defendant's percentage of "fault" by the total amount of damages. Those instructions only imply that the jury is to determine the defendant's "fault" through independent evaluation. They do not explicitly prevent the jury from deducing that the defendant was at "fault" by assuming that whatever proportion of "fault" remaining after computing the plaintiff's contribution belongs to the defendant.[406]

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[406] *See supra* text at 789 (first full paragraph).

We may not need to know precisely how juries perform their official duties. We probably cannot do otherwise but to trust them to do their best in accordance with their own understanding of the law and what is fair, and to believe that they will, within their peculiar combination of experiences, reach just decisions. Those observations are not satisfactory reasons to expect a jury to be able to translate a validly assumed risk into some artificial proportion of "fault." In asking a jury to evaluate human conduct and assign a judgment of "fault" to that conduct, we are asking its members to do more than simply decide whether a fact exists or not; we are asking them to evaluate those facts in accordance with what the law requires of their peers. This analysis has shown that the Indiana Act's definition of "fault" is imprecise, inconsistent, and thereby confusing in its declaration of what the new "fault" to be compared is. The ambivalence of the General Assembly toward the apportionment principle has crept into the definitions section, and will muddle application of the statute if not corrected by amendment or interpretation. A procedure that permits the jury to assign accountability on the basis of fault without assisting it in understanding the meaning of "fault" allows it to act without regard to law. A system which requires the jury to perform a transformation of fault and nonfault concepts into judgments of "fault" without guidance from fundamental principles of law invites confusion and frustration. Our system of tort law has long recognized more than one basis for accountability. The predominance of fault as one of those bases should not obscure the reasons for the creation and refinement of a nonfault basis. There are circumstances in our society where it is proper that a person be fully accountable for the injuries that have befallen him without reference to the faultiness of that person's conduct. The assumption of risk defenses have been a legal device for enforcing that responsibility. The fact that some courts in the past have not performed their tasks well in applying those defenses is not a good reason for discarding or transforming the defenses. The defenses should not be incorporated wholesale into comparative fault simply on the basis of a momentum established in moving toward the apportionment principle. The Indiana General Assembly has failed to pay heed to the common law development of the assumed risk defenses in this state. As a result, the Indiana Act fails to address those defenses with needed precision and consistency. As this discussion has demonstrated, adequate conceptual separation between the segments of assumed and incurred risk that "overlap" with fault and those that do not can be maintained. The areas of "overlap" should be subject to the apportionment principle. The areas that do not involve fault should be left out of comparative "fault."

IV. Plaintiff's Failure to Employ Safety Precautions as "Fault": The Doctrine of Avoidable Consequences and the Seat Belt Defense

Section two presents two phrases which raise the issue of whether the Act will permit defendants to invoke the apportionment principle by proving that the plaintiff failed to use an available safety device. The Act's definition of "fault" includes the "unreasonable failure to avoid an injury,"[407] which could simply be interpreted as a breach of a duty to prevent harm. However, this interpretation would render the encompassing phrase redundant in light of the section's preceding phrase "any act or omission that is negligent."[408] The former phrase, then, must carry a meaning different from primary or contributory negligence. The same phrase was included in the Uniform Act.[409] The commissioners' commentary does not explicitly expand the phrase's meaning, but simply states: "The doctrine of avoidable consequences is expressly included in the coverage."[410] Because the phrase "unreasonable failure to avoid an injury" may be taken as the "express inclusion" of the doctrine of avoidable consequences,[411] a strong inference arises that the Indiana Act has codified the doctrine. Accepting the inference that the Act has adopted the avoidable consequences doctrine, however, is not tantamount to accepting the suggestion that the Act recognizes the failure to employ safety devices as a defense invoking the apportionment principle. The seat belt defense, which has received most of the recent attention in the case law, will be the focus of this discussion, but the analysis would apply in other cases in which available safety precautions are not used.[412]

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[407]Ind. Code § 34-4-33-2(a) (Supp. 1984).

[408]*Id.*

[409]Unif. Comparative Fault Act § 1(b), 12 U.L.A. 35, 37 (Supp. 1984) [hereinafter cited as Uniform Act].

[410]*Id.* commissioners' comment at 38.

[411]Although "unreasonable failure to avoid an injury" is not a precise statement of the doctrine, there is no other use of "avoid" in the Uniform Act's definitions section, so the "express inclusion" is taken to be that phrase.

[412]In recent years, cases in which the plaintiff has failed to employ an available safety precaution or device such as automobile seatbelts or a motorcycle helmet have received much attention in discussion of the doctrine of avoidable consequences. *See* Bond v. Jack, 387 So. 2d 613 (La. Ct. App. 1980); Rogers v. Frush, 257 Md. 233, 262 A.2d 549 (1970); Burgstahler v. Fox, 290 Minn. 495, 186 N.W.2d 182 (1971); Dean v. Holland, 76 Misc. 2d 517, 350 N.Y.S.2d 859 (Sup. Ct. 1973); Halvorson v. Voeller, 336 N.W.2d 118 (N.D. 1983); Brown v. Smith, 604 S.W.2d 56 (Tenn. Ct. App. 1980). *Cf.* O'Donnell v. United States, 428 F. Supp. 629 (D. La. 1977). *See generally* Note, *Helmetless Motorcyclists—Easy Riders Facing Hard Facts: The Rise of the "Motorcycle Helmet Defense,"* 41 Ohio St. L.J. 233 (1980). In such cases, the defendant argues that the plaintiff's failure at least aggravated the plaintiff's injury. *See* cases cited *infra* notes 416-47. *See generally*

The seat belt defense, which Indiana appellate courts have rejected,[413] has had mixed treatment in other jurisdictions. Under traditional contributory negligence analysis, the main problem in seat belt cases is that the defendant must prove that the plaintiff's faulty conduct caused or contributed to the injury-producing event. If the injury-producing event is viewed as the tortious contact caused by the defendant's conduct, the plaintiff's failure to use protective devices will rarely help produce that contact.[414] Even if the injury-producing event is viewed as the "second collision" of the plaintiff's body with the interior of the automobile or with some object after the plaintiff is thrown from a vehicle,[415] the defendant must, nevertheless, establish a duty to fasten seat belts and a breach of that duty. Courts have generally been reluctant to find such a duty.[416] Courts have offered the following reasons for this reluctance: (1) the jurisdiction's legislature does not impose the duty;[417] (2) the state law does not require seat belts in all vehicles;[418] (3) the efficacy of using seat belts is doubtful;[419] (4) the expert testimony needed to address the question of whether or not the plaintiff would have incurred the injuries if he had used a seat belt produces delay and expense in trials.[420]

To circumvent the courts' resistance to the contributory negligence theory, defendants, whose essential argument is that the plaintiff would have suffered injuries to a lesser degree had the seat belts been worn, have framed the seat defense in terms of the avoidable consequences doctrine. This doctrine[421] prevents the plaintiff from recovering damages that could reasonably have been avoided.[422] Usually the doctrine is invoked where the plaintiff, after incurring an injury, has refused or neglected to obtain treatment for an injury, and subsequently complains

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Caiazzo v. Volkswagenwerk A.G., 647 F.2d 241 (2d Cir. 1981); Sullivan, *The Seat Belt Defense Should be Resurrected Under Pure Comparative Negligence*, 61 MICH. B.J. 560 (1982); Walker & Beck, *Seat Belts and the Second Accident,* 34 INS. COUNS. J. 352 (1969).

[413]State v. Ingram, 427 N.E.2d 444 (Ind. 1981); Volkswagenwerk v. Watson, 181 Ind. App. 155, 390 N.E.2d 1082 (1979); Rhinebarger v. Mummert, 173 Ind. App. 34, 362 N.E.2d 184 (1977); Birdsong v. ITT Continental Baking Co., 160 Ind. App. 411, 312 N.E.2d 104 (1974); Kavanagh v. Butorac, 140 Ind. App. 139, 221 N.E.2d 824 (1967).

[414]*E.g.*, Curry v. Moser, 89 A.D.2d 1, 454 N.Y.S.2d 311 (Sup. Ct. 1982).

[415]Walker & Beck, *supra* note 412.

[416]*E.g.*, Lipscomb v. Diamiani, 226 A.2d 914 (Del. Super. Ct. 1967); Volkswagenwerk v. Watson, 181 Ind. App. 155, 390 N.E.2d 1082 (1979); Dziedzic v. St. John's Cleaners & Shirt Launderers, Inc., 53 N.J. 157, 249 A.2d 382 (1969). *See also* cases cited *infra* notes 417-19.

[417]*E.g.*, State v. Ingram, 427 N.E.2d 444 (Ind. 1981).

[418]*E.g.*, Derheim v. N. Fiorito Co., 80 Wash. 2d 161, 492 P.2d 1030 (1972).

[419]*E.g.*, Amend v. Bell, 89 Wash. 2d 124, 570 P.2d 138 (1977).

[420]*E.g., id.*; Derheim v. N. Fiorito Co., 80 Wash. 2d 161, 492 P.2d 1030 (1972).

[421]The avoidable consequences doctrine is based on the principle that the law functions "not only to prevent and repair individual loss and injustice, but to protect and conserve the economic welfare and prosperity of the whole community." C. MCCORMICK, DAMAGES 127 (1935).

[422]*Id.; see also* D. DOBBS, REMEDIES 186 (1973).

of the original injury plus the aggravation produced by the lack of treatment.[423] More generally, the doctrine applies where the defendant's negligence exposes the plaintiff to a risk of injury, and the plaintiff fails to take reasonable steps to protect his interests.[424]

Defendants, seeking to draw an analogy between these situations and cases where the plaintiff did not wear seat belts, argue that the plaintiff could have reasonably avoided his injuries by doing so. A small number of jurisdictions have found the argument persuasive,[425] but the argument has generally floundered upon the distinction that the doctrine of avoidable consequences is applicable to the plaintiff's conduct *after* the defendant's negligence has occurred.[426] Two closely related principles bear on the courts' refusal to extend the avoidable consequences doctrine to seat belt cases: (1) reasonableness only requires the plaintiff to take self-protective action where there is knowledge of the facts requiring such action;[427] and (2) a person need not take self-protective action in the face of a threatened future wrong.[428] The weight of these principles, in addition to the reservations courts have expressed regarding the contributory negligence theory,[429] have led courts to reject the avoidable consequences doctrine in seat belt cases. Consequently, the courts have deferred to the legislature for any change.[430]

Some courts view the admission of the seat belt defense as tantamount to an adoption of comparative negligence, and reject the defense when comparative negligence principles are not available.[431] With Indiana's adoption of comparative fault, therefore, one might argue that the

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[423]*See,* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 65, at 422-24 (4th ed. 1971), and cases cited therein.

[424]*See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 22.10, at 1232 (1956).

[425]Pritts v. Lowery Trucking, 400 F. Supp. 867 (W.D. Pa. 1975); Mount v. McClellan, 91 Ill. App. 2d 1, 234 N.E.2d 329 (1968); Spier v. Barker, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974); Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967) (failure to use seatbelt is question for jury, but defendant failed to produce evidence of causal connection between injuries and failure to wear seatbelts); *see also* Halvorson v. Voeller, 336 N.W.2d 118 (N.D. 1983) (failure to wear motorcycle helmet admissible to reduce damages so long as expert testimony available to show use of helmet would have lessened injuries).

[426]*E.g.*, State v. Ingram, 427 N.E.2d 444 (Ind. 1981). *See generally* W. PROSSER, *supra* note 423, § 65, at 423. Nevertheless, Dean Prosser equates contributory negligence and avoidable consequences. *Id.* at 424.

[427]D. DOBBS, *supra* note 422, at 188; C. MCCORMICK, *supra* note 421, at 140-41. Professor Dobbs suggests that this limitation is perhaps not quite equivalent to the objective knowledge standard in primary negligence theory, and that subjective attributes of the plaintiff may be considered more important in this context. Professor McCormick states the limitation more in terms of a traditional objective standard.

[428]C. MCCORMICK, *supra* note 421, at 137.

[429]*See supra* notes 417-20 and accompanying text.

[430]*E.g.*, State v. Ingram, 427 N.E.2d 444 (Ind. 1981).

[431]*E.g.*, Birdsong v. ITT Contintental Baking Co., 160 Ind. App. 411, 312 N.E.2d 104 (1974); Derheim v. N. Fiorito Co., 80 Wash.2d 161, 492 P.2d 1030 (1972).

legislature has admitted the seat belt and similar defenses. This proposition would, of course, require a second argument that the legislature either has established a duty to fasten seat belts, despite the common law refusal to recognize such a duty, or that the legislature has modified the doctrine of avoidable consequences, effectively overruling the judicial obstacles to its application.

The defendants' arguments are fraught with difficulties. First, there is the matter of establishing the failure to use a seat belt as fault.[432] While the Act's definition of "fault" has rather liberally incorporated concepts of liability which are not traditional notions of fault,[433] the Act has not departed so far from those traditional notions as to create liability where none attached before. The defendants' argument would have to rely on the phrases "any act or omission that is negligent,"[434] "unreasonable failure to avoid injury,"[435] and "injury attributable to the claimant's contributory fault"[436] to satisfy the court that a new duty to employ a safety precaution is raised by the Act. A duty raised by operation of statute is no stranger to the judicial mind,[437] but the Comparative Fault Act hardly seems specific enough to establish a standard of conduct which provides foundation for an argument of a duty to wear seat belts, especially in light of the judicial refusal to find such a duty even with legislative requirements to have automobiles *equipped* with seat restraints.[438]

Even if the defendant overcomes the "duty" hurdle, the difficulty of establishing the causal connection required for apportionment remains. The Act specifically provides that "legal requirements of causal relation apply to . . . contributory fault,"[439] and the jury is permitted to apportion only with respect to fault that has "contribut[ed] to cause the . . . loss."[440] This language clearly indicates that the defendant must prove some causal connection between the plaintiff's "fault" and the injury

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[432]Compare the approach of the courts in Illinois and North Dakota, which permit evidence of the omitted safety precaution to be admitted only on the issue of damages, and consider it irrelevant on the issue of liability. *E.g.*, Wagner v. Zboncak, 111 Ill. App. 3d 268, 443 N.E.2d 1085 (1982); Halvorson v. Voeller, 336 N.W.2d 118 (N.D. 1983).

[433]*See supra* text accompanying notes 35-49.

[434]IND. CODE § 34-4-33-2(a).

[435]*Id.*

[436]*Id.* § 34-4-33-3.

[437]*See generally* 2 F. HARPER AND F. JAMES, *supra* note 424, §§ 17.5-17.6; W. PROSSER, *supra* note 423, § 36; RESTATEMENT (SECOND) OF TORTS §§ 285, 286 (1965).

[438]*E.g.*, Rhinebarger v. Mummert, 173 Ind. App. 34, 362 N.E.2d 184 (1977) (Buchanan, J., concurring). *See generally* Leonard, *The Application of Criminal Legislation to Negligence Cases: A Reexamination*, 31 SANTA CLARA L. REV. 427 (1983).

[439]IND. CODE § 34-4-33-1(b).

[440]*Id.* § 34-4-33-5(a)(1). This discussion of proof of causation does not contradict prior assertions that percentages should not be calculated by comparison of contributions to causation. *See supra* text accompanying notes 51-54.

which the defendant would attribute to that "fault."[441] The defendant may be able to present evidence of the extent to which the plaintiff's omission aggravated the injuries. However, if experts are required, the defendant faces the hurdle of convincing the courts that the additional delay and expense of such testimony are necessary costs as a matter of policy.[442]

A second approach holds little hope for defense counsel. This argument proceeds on the premise that the Act expands the avoidable consequences doctrine and, in that expanded form, overcomes the judicial refusal to adopt the seat belt defense. This argument's support rests on the mere fact that the Act's language is different from "avoidable consequences." Since the word "injury" seems more specific than "consequences," the defendant might contend that the use of such specificity in the phrase "avoid an injury" is evidence that the legislature contemplated seat belt cases when it chose the phrase. Had the legislature intended to merely codify the common law rule, it would have used the phrase "avoidable consequences." The defendant would argue that the legislature's choice of different language indicates its intent to overrule restrictive judicial applications of the avoidable consequences doctrine. Failure to fasten one's seat belts would be characterized as a precise "failure to avoid an injury." The defendant could further appeal to the inherent policy of fairness in the apportionment principle, arguing that defendants should not bear the entire cost of the plaintiff's injuries in light of the Act's policy of dividing the responsibility for injuries caused by multiple acts.

Two considerations, however, substantially weaken the foregoing argument's persuasive merit. First, the phrase "failure to avoid an injury" is borrowed from the Uniform Act, and the commissioners "expressly included" the doctrine of avoidable consequences.[443] Second, the argument based upon "specific" terms is susceptible to its own logic, considering the legislature's specific inclusion of other defenses.[444] A forceful counterargument is that had the legislature contemplated the safety precaution cases when it was framing the concept of "fault," it could have and would have inserted more descriptive terminology.

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[441]The commissioners' commentary refers to a seat belt defense in a discussion of causation, not a discussion of "failure to avoid an injury." UNIFORM ACT, *supra* note 409, at 38. This reference, however, fortifies the position that a defendant must prove that causal connection if the seat belt defense is recognized.

[442]*See* Franklin v. Gibson, 138 Cal. App. 3d 340, 188 Cal. Rptr. 23 (1982); Halvorson v. Voeller, 336 N.W.2d 118 (N.D. 1983).

[443]*See supra* note 410.

[444]The legislature appended "incurred risk" to the phrase "unreasonable assumption of risk not constituting an enforceable express consent." There may be some doubt about what the General Assembly intended to accomplish by these phrases, *see supra* notes 306-406 and accompanying text, but the use of common law terminology for defenses makes clear the reference to specific defenses.

Even if the defendant's argument survives the duty, causation, and legislative intent hurdles, the defendant's battle is not won. Since the phrases upon which the defendant must rely require that the failure to avoid an injury be "unreasonable,"[445] at the very least, defense counsel is precluded from contending that failure to fasten seat belts is "fault" per se. Furthermore, the commissioners' commentary suggests that jurisdictions should state that "[t]his rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines."[446] The argument that the Indiana Act legislatively overrules the common law doctrine suffers greatly from the omission of that suggested clause.

The leading seat belt defense case in Indiana, *Kavanagh v. Butorac*,[447] recognized some merit in the avoidable consequences argument, but found no authority for expanding the doctrine. The court recognized "the possibility of the doctrine applying in some future date."[448] Without some modification of the present language of the Comparative Fault Act, however, defendants face a nearly insurmountable task of providing that authority. Consequently, the "future date" of the availability of the seat belt defense likely remains a matter of prophesy.

V. Some Important Omissions

A. Set-Off of Counterclaims

1. Effects of Compulsory Set-Off.—Suppose that the plaintiff and the defendant are traveling at the same rate of speed in their respective automobiles on different streets. Those streets run perpendicular to each other and at their intersection there is a four-way stop. The plaintiff arrives at the intersection at the same time as the defendant and both fail to heed the warnings to stop. Both drivers sustain property damage and personal injury to the extent of $10,000 from the collision. The defendant responds to the plaintiff's comparative fault action with a counterclaim. As might be expected, the jury finds that each has been injured in the amount of $10,000 and that each is 50% at "fault." Each then receives a verdict for $5,000 against the other. In the abstract, the obligations cancel each other out; payment of the judgment by each would mean that both parties' assets would be depleted by $5,000 and both sets of assets would be replenished by the same amount. If the law of comparative fault takes cognizance of this theoretical cancellation and allows the principle of set-off to operate, each party will collect nothing and the law will in effect leave the parties where it found them.

However, the abstract situation rarely presents itself in the courtroom.

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[445]Ind. Code § 34-4-33-2(a).

[446]Uniform Act, *supra* note 409, at 38.

[447]140 Ind. App. 139, 221 N.E.2d 824 (1967).

[448]*Id.* at 149, 221 N.E.2d at 830.

It is far more likely that each of the parties will have obtained some sort of liability insurance coverage. If setoff is required, the parties collect nothing, are left to their own devices, and their insurers will have realized a windfall in the sum of the cancelled obligations plus the premiums paid on the policies. The result falls far short of the objective of the comparative fault system to provide even partially at fault actors at least some compensation for their injuries. Principles of fairness and individual responsibility are extremely important elements in the comparative fault system's refinement of the compensation function of tort law. A more precise adjustment of tort disputes to fashion a remedy which better reflects the parties' contributions of fault than was possible under prior law is the fundamental aim of the system. By adopting the system, the Indiana General Assembly has moved the law of this state at least a step away from gross, one-sided, albeit easier, methods of adjusting torts disputes. If set-off is to be automatically required in real cases like the hypothetical, the system will have literally set part of itself against another to produce gross, one-sided results that benefit neither of the injured parties. If the objectives of the liability insurance system are limited to providing a tortfeasor, at a fair cost of premiums, some security against the injurious consequences of her inadvertent acts, set-off produces no difficulty in cases like the hypothetical. The opposing party's fault, in effect, prevents him from burdening the insured's financial integrity with a claim. However, if the insurance system is supposed to provide those exposed to the risks of others' inadvertent acts with some assurance of a financially responsible entity to look to for compensation,[449] then a set-off requirement is dysfunctional. Only the insurance industry benefits, and at the expense of the people who have relied upon it for protection.

The hypothetical posing this question should not be lightly dismissed. It may well present unusual circumstances to establish a point, but other circumstances in which the parties could be found equally at fault will not occur so rarely, and the issue of set-off will inevitably arise. The Indiana Act confers considerable power upon juries to apportion fault without a great deal of controlling criteria, and it is not farfetched to expect a jury to "split it down the middle" in a difficult case. Furthermore, although the probability of a case arising where the parties suffer equal damages is low, one in which both suffer some injury will

[449]The widespread enactment of financial responsibility laws may be some evidence of the policy of providing protection for accident victims, though not *necessarily* through the medium of insurance. Several courts have expressed the policy in the context of entertaining direct actions by injured parties against insurance carriers. *See, e.g.*, Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969). *See also* 8 J. APPLEMAN & J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4862, at 571-78 (1981) and cases cited therein. Yet, the recognition of such a public policy need not be viewed as dependent upon the right of direct action by injured parties. *See* Odolecki v. Hartford Accident & Indem. Co., 55 N.J. 542, 264 A.2d 38 (1970).

not be so rare, and the latter case presents as serious an issue. Various combinations of the presence and amount of insurance coverage compound the matter. The failure of the General Assembly to provide a clear statement of public policy to guide the courts in adjusting disputes in cases posing these issues is a serious omission in the Act.

2. Effects of Prohibited Set-off.—Differences in the parties' insurance coverage or ability to pay a judgment complicates set-off problems. In the hypothetical just posed, suppose further that the plaintiff has full insurance coverage and the defendant has none. In this situation, the wisdom of a *prohibition* of set-off is drawn into question. If set-off is not permitted, the uninsured defendant collects her judgment in full and plaintiff must rely upon the uninsured motorist coverage, if any, in his own policy if defendant is insolvent. However, to the extent that the plaintiff is able to obtain satisfaction of his judgment by levying upon the policy proceeds just paid to defendant, the prohibited set-off proposition has something to recommend it over the required set-off proposition.[450] At least the person who has prepared for the financial setback of tortious injuries will be able to realize some protection stemming from that preparation. Nevertheless, certain efficiencies will have been lost by requiring the plaintiff to pay, then levy upon, the monies generated by his policy of insurance.

3. Problems of a One-Way Rule in Multiple Party Cases.—As the number of parties increase and the features of cases multiply with different combinations of counterclaims, amounts of damage incurred, and presence or nonpresence of insurance, distortions of the apportionment principle and allocations of financial burden not in keeping with the objectives of the fault insurance system can result under either a required or a prohibited set-off rule. As a background for later discussion of possible solutions, this section will illustrate how these one-way rules give rise to problems. Consider first a relatively simple situation: *P* sues *A* and *B*; *A* counterclaims against *P* and *B*; and *B* counterclaims against *P* and *A*. The jury finds *P* to be 35% at "fault," *A* 25%, and *B* 40%. Each party's damages before apportionment are $10,000. Since no party's "fault" is greater than 50% of the "total fault of all the parties," each obtains a verdict against the others and each is subject to a verdict obtained by the others.[451] The obligations resulting from the findings are represented graphically:

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[450] *See* Jess v. Herrmann, 26 Cal. 3d 131, 141 n.5, 604 P.2d 208, 213 n.5, 161 Cal. Rptr. 87, 92 n.5 (1979).

[451] A more graphic representation helps to hold the situation more clearly in mind.

Jury finds:

P- 35% at "fault"; $10,000 damages

A- 25% at "fault"; $10,000 damages

B- 40% at "fault"; $10,000 damages

Results of Verdict:

P entitled to receive $2,500 from *A*, but owes *A* $3,500

Figure #1

Party and % of Fault	Unadjusted Damages	Verdicts
P (35%)	$10,000	$2,500 against *A* 4,000 against *B*
A (25%)	$10,000	$3,500 against *P* 4,000 against *B*
B (40%)	$10,000	$3,500 against *P* 2,500 against *A*

If set-off applies, each situation would be considered separately: *P* pays *A* the difference between the judgment he obtained against *A* and the judgment *A* obtained against him, or $1,000; *A* receives from *B* the difference between the judgments relating to her and *B*, or $1,500; and *B* pays the difference between the judgments relating to him and *P*, or $500. The net "recovery" for each would then be: *P*: negative $500; *A*: $2,500; and *B*: negative $2,000.

Added to the chart, the results are shown in this manner:

P entitled to receive $4,000 from *B*, but owes *B* $3,500
P's receipts $6,500; payouts $7,000 = ($500) net loss
A entitled to receive $3,500 from *P*, but owes *P* $2,500
A entitled to receive $4,000 from *B*, but owes *B* $2,500
A's receipts $7,500; payouts $5,000 = $2,500 net recovery
B entitled to receive $3,500 from *P*, but owes *P* $4,000
B entitled to receive $2,500 from *A*, but owes *A* $4,000
B's receipts $6,000; payouts $8,000 = ($2,000) net loss.

Figure #2

COMPULSORY SET-OFF RULE

Party and % of Fault	Unadjusted Damages	Verdicts	Total Obligations	Results of Set-Off	Net Recovery
P (35%)	$10,000	$2,500 against *A* 4,000 against *B*	$7,000	Pay $1,000 to *A* Receive $500 from *B*	($500)
A (25%)	$10,000	$3,500 against *P* 4,000 against *B*	$5,000	Receive $1,000 from *P* Receive $1,500 from *B*	$2,500
B (40%)	$10,000	$2,500 against *A* 3,500 against *P*	$8,000	Pay $1,500 to *A* Pay $500 to *P*	($2,000)
TOTALS	Injuries: $30,000	Liability: $20,000	$20,000	Actual Pay Out: $3,000 (10% of total injury)	-0-

The fact that *B* comes away with nothing and must carry 66.6% of the total actual payout may seem harsh in view of the aims of the comparative fault system and the fact that he was well under the 50% contributory negligence threshold. On the other hand, he has been spared the additional $6,000 outlay which he would have been required to make if set-off had been prohibited. Even so, *B* may still prefer the no set-off approach if given the choice. That would be true in the case where, because of injuries or otherwise, *B* was experiencing cash flow difficulties. To the extent that he would have the flexibility to adjust his payout schedule with *P* and *A*, the proceeds of judgments received from *P* and *A* might relieve the cash flow problems in order to avoid catastrophe. At least he has the flexibility to try to work something out. Under the set-off rule he would have no choice but to pay out the additional $2,000 from his already severely depleted assets. The point here is that a set-off requirement tends to be overly rigid and works against the principle of comparative fault under some circumstances by distorting the apportionment of compensation. Under these facts the shift in actual liability has been in favor of *A*, who is the least "faulty" of the three, and at the greatest expense of *B*, who is the most "faulty." However, the shift is disproportionate to their relative shares of fault.

When full insurance coverage is added to the multiparty hypothetical, the misallocation effect of set-off is highlighted. For a total liability of $20,000, only $3,000 will actually be required to be paid out. Considered in this light, the $17,000 savings to the insurance carriers has come at the expense of undercompensating three people who had contracted with each of their carriers to relieve them of the financial burdens of injurious accidents.

In a case with one party uninsured, a prohibition upon set-off creates similar misallocation. The various results produced under the hypothetical facts are illustrated in the chart below. The uninsured party receives the full benefit of liability insurance coverage by the insured parties, and the insured parties are left to their own devices to obtain satisfaction of the uninsured party's obligation to them. If the proceeds of the insured parties' policies paid to the uninsured party are subject to attachment, then some of the funds made available by their own insurance planning will be accessible to the two other injured parties. However, since this would amount to a nullification of the prohibition of set-off, and would place an additional burden upon judicial processes, it offers nothing to recommend it over a requirement of set-off in the original proceeding.

Figure #3
PROHIBITED SET-OFF WITH ONE UNINSURED PARTY

Party and % of Fault	*P* (35%)	*A* (25%)	*B* (40%)
Unadjusted Damages	$10,000	$10,000	$10,000
Verdicts	$2,500 against *A* $4,000 against *B*	$3,500 against *P* $4,000 against *B*	$7,500 against *A* $3,500 against *P*
Insurance Coverage (1)	$10,000	-0-	$10,000
Receipts	0 from *A* $4,000 from *B*	$3,500 from *P* $4,000 from *B*	0 from *A* $3,500 from *P*
Payouts	$7,000 (46.6%)	-0-	$8,000 (53.3%)
Net Recovery	($3,000)	$7,500	($4,500)
Insurance Coverage (2)	-0-	$10,000	$10,000
Receipts	$2,500 from *A* $4,000 from *B*	0 from *P* $4,000 from *B*	$2,500 from *A* 0 from *P*
Payouts	-0-	$5,000 (38.5%)	$8,000 (61.5%)
Net Recovery	$6,500	($1,000)	($5,500)
Insurance Coverage (3)	$10,000	$10,000	-0-
Receipts	$2,500 from *A* 0 from *B*	$3,500 from *P* 0 from *B*	$2,500 from *A* $3,500 from *P*
Payouts	$7,000 (58.3%)	$5,000 (41.6%)	-0-
Net Recovery	($4,500)	($1,500)	$6,000

Still another problem is the matter of *under*-ability to pay. To keep this as simple as possible, the discussion will return to a two-party hypothetical. In this set of facts, assume that the plaintiff is injured to the extent of $100,000 and the defendant incurs $60,000 worth of harm. They are found equally at fault. The plaintiff's obligation to defendant would then be $30,000, and the defendant's obligation to plaintiff would be $50,000. Here, however, the plaintiff carries $35,000 worth of insurance and the defendant is insured to a maximum of only $25,000 and cannot pay any excess liability.

If a prohibition of set-off applies to these facts, only one party's claim is fully compensated, while the other receives only 50% of his claim.[452] More than 90% of the monetary resources available for compensation are utilized, but in a disproportionate manner, if the factors of equal fault and unequal preparedness for liability are taken into account. The chart below illustrates the results.

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[452]That is, plaintiff's carrier pays defendant $30,000, thereby fully discharging plaintiff's liability to defendant. Defendant's carrier pays the $25,000 policy limits to plaintiff, discharging 50% of the obligation. Since $60,000 worth of liability coverage was available, 91.66% of the protection funds available will have been expended.

Figure #4

PROHIBITED SET-OFF WITH UNDERINSURED PARTY

Party and % of Fault	Injury	Verdict Obtainted Against Other Party	Obligation To Other Party	Insurance Coverage	Payment Received	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
P (50%)	$100,000	$50,000	$30,000	$35,000	$25,000	-0-	50%	85.7%
D (50%)	$60,000	$30,000	$50,000	$25,000	$30,000	$25,000	100%	100%
TOTALS	$160,000	$80,000	$80,000	$60,000	$55,000	$25,000	68.75%	91.66%

As in the uninsured party situation, the prohibited set-off rule permits the underinsured party to receive full recovery from the adequately covered party's insurance resources, while the adequately covered party is limited to the amount of insurance protection purchased by the other party. Such may be the vicissitudes of modern life, but clearly there is no incentive for those who create risks of injury in society, and for those whose resources are inadequate to pay liability in excess of insurance coverage, to maximize their insurance protection.

From the hypothetical insurance carriers' standpoint, a required set-off rule works a little better. The system actually brings the parties' ultimate liability within the range of insurance coverage by performing the set-off operation prior to determining the respective obligations. In this sense, the set-off rule will technically solve the under-insurance problem. From the standpoint of parties equally at fault, and with the objective of utilizing available insurance resources, however, the set-off rule is much worse than a prohibition upon set-off. As the chart below illustrates, only one-third of the resources which could be committed to compensation are expended, and only one party receives them. This system requires the hypothetical defendant to pay $20,000, and allows her to recover nothing.

Figure #5

REQUIRED SET-OFF WITH UNDERINSURED PARTY

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Payment Received After Set-Off	Obligation Remaining	% of Verdict Recovered	% of Insurance Resource Expended
P (50%)	$100,000	$50,000	$30,000	$35,000	$20,000	-0-	40%	-0-
D (50%)	$60,000	$30,000	$50,000	$25,000	-0-	-0-	-0-	80%
TOTALS	$160,000	$80,000	$80,000	$60,000	$20,000	-0-	25%	33.33%

4. Alternatives to the One-Way Rules.—a. A lesser-injured pays greater-injured system.—Several methods of addressing the illustrated problems are feasible. The relative merits of each vary according to the public policy and objectives emphasized in the system. For example, if compensating the most seriously injured party is the prime concern in the system, the law might require the lesser-injured party to pay the greater-injured, using whatever resources were available until those resources were exhausted or the claim was discharged. To implement such an approach, the system would require the payment of the proceeds of both parties' insurance into court and allocate those proceeds according to an equitable principle of lesser-injured pays greater-injured.

Using the same hypothetical facts as in the last set of illustrations, the system would work in the following manner. Plaintiff's carrier would pay $30,000 into the court to cover the liability of plaintiff to defendant, and defendant's insurance carrier would do the same with defendant's $25,000 policy to cover the judgment debt. A total of $55,000 in compensation resources is thereby made available to the court for the purpose of equitable allocation. Under the guiding principle of this system, the plaintiff obtains full compensation and the defendant receives $5,000 toward her injury. It utilizes the same proportion of resources as the no-set-off rule, and allocates those resources "better" than the set-off rule in the sense that the person with the greater injury is compensated first.

Figure #6

EQUITABLE ALLOCATION ACCORDING TO LESSER-INJURED PAYS GREATER-INJURED PRINCIPLE—ONE PARTY UNDERINSURED

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
P (50%)	$100,000	$50,000	$30,000	$35,000	30,000	$50,000	-0-	100%	85.7%
D (50%)	$60,000	$30,000	$50,000	$25,000	$25,000	$5,000	-0-	16.66%	100%
TOTALS	$160,000	$80,000	$80,000	$60,000	$55,000	$55,000	-0-	68.75%	91.66%

However, the allocation is more disproportionate than the no set-off rule, and while it happens in this case to put the heaviest burden on the lesser-injured *and* lesser-prepared party, the burden does not necessarily follow from the latter factor.[453] If some incentive toward adequate financial responsibility is a strong policy in the jurisdiction, and is desired in the compensation system, this method would not be attractive.

b. A lesser-prepared pays greater-prepared system.—A policy which emphasizes financial responsibility might give primacy to an equitable principle which requires the lesser-prepared tortfeasor to bear the greater burden of allocation. Such a system would require, as in the previous alternative, the parties to pay the proceeds of insurance into court prior to allocation of recovery amounts. Under the facts of this discussion's hypothetical, an allocation in accordance with a principle of lesser-prepared pays greater-prepared produces the same results as the system previously illustrated.[454] If the injuries happened to be reversed, and the magnitude of preparedness is considered to be a matter of proportion of actual liability covered by insurance, the matter of who is the lesser-prepared becomes a closer question, and illustrates the weakness of the principle. "Lesser-" and "greater-prepared" are determined by reference to the magnitude of the injury. Since that factor is a mere fortuity, there may be some incentive to insure to the maximum, but there is also a temptation to hedge, on the hope that the other party will be the "lesser-insured." Furthermore, a major misallocation results at any rate. This alternative system requires some rather significant tradeoffs in order to give primacy to its driving principle. A system which would be able to address more than one concern at a time would be more attractive than either alternative considered thus far.

c. The Uniform Comparative Fault Act's system.—The Commissioners on Uniform State Laws have attempted to develop a system which purports to take into account the elements of obligation and ability to meet the obligation. The Uniform Act imposes a prohibition upon set-off, and provides for a court distribution upon motion of one of the parties.[455] The commentary to that section sets out several illustrations involving various combinations of proportions of fault, amounts of injury, and availability of insurance to guide adopting jurisdictions

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[453]That is, if defendant remained the most thinly covered, but happened to have incurred the larger amount of injuries, the burden would be borne by plaintiff, the party most prepared (defendant received $30,000 and plaintiff gets $25,000 as before).

[454]Illustrated graphically:

Plaintiff (most prepared) pays $30,000 policy proceeds into court. Defendant (least prepared) pays $25,000 policy proceeds into court. Plaintiff's claim of $50,000 is satisfied first.

Defendant receives remaining $5,000.

[455]UNIF. COMPARATIVE FAULT ACT § 3, 12 U.L.A. 35, 41 (Supp. 1984). [hereinafter cited UNIFORM ACT]. That section provides:

in the allocations of compensation resources. The illustrations are framed in terms of the "pure" system of comparative fault, however, and under a "modified" system would not give rise to the set-off issue because in each illustration one party's "fault" is greater than 50%.

However, one illustration in the commissioners' commentary sets out a formula applicable where both parties are under-insured which might be applied in a "greater than 50% rule" jurisdiction. That formula is "$D = C - O + P$,"[456] where D equals the amount to be distributed to a party; C equals the amount of a party's claim after reduction by the fault percentage; O equals the amount owed to the other party; and P equals the amount paid into court. Applying the formula to our hypothetical, in the plaintiff's case, C would equal $50,000, and O would equal $30,000. Performing the operation of the formula would produce $20,000 as a function of C minus O. Adding the $30,000 liability insurance coverage paid into court to that figure produces a value for D of $50,000. Defendant's distribution amount would be ($30,000 − $50,000 + $25,000) = $5,000. That, of course, is the same distribution produced in the example based upon the lesser-injured pays the greater-injured principle. If the injuries were reversed, however, the distributions would be

Plaintiff: ($30,000 − $50,000 + $35,000) = $15,000
Defendant: ($50,000 − $30,000 + $25,000) = $45,000

After these figures are inserted into the chart being used for illustrative purposes, the system produces these results:

A claim and counterclaim shall not be set off against each other, except by agreement of both parties. On motion, however, the court, if it finds that the obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party and any distribution of those funds back to the party making payment had been a payment to him by the other party.

[456] *Id.* commissioners' comment, illustration No. 8, at 42.

Figure #7

EQUITABLE ALLOCATION ACCORDING TO THE UNIFORM ACT'S SYSTEM
(AMOUNT OF INJURIES REVERSED)

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
P (50%)	$60,000	$30,000	$50,000	$35,000	35,000	$15,000	-0-	50%	100%
D (50%)	$100,000	$50,000	$30,000	$25,000	$25,000	$45,000	-0-	90%	100%
TOTALS	$160,000	$80,000	$80,000	$60,000	$60,000	$60,000	-0-	75%	100%

In this setting, the formula appears to work somewhat better than a straight set-off rule, but somewhat worse than a straight prohibition of set-off, in terms of relative proportions of compensation recovered.[457] The formula seems to be skewed in favor of the lesser-injured pays greater-injured principle and provides little incentive for financial responsibility.

This effect can be best illustrated in the context of one party being *un*insured. For example, assume that the defendant in the hypothetical carried no insurance. Applying the formula produces this result:

Plaintiff: ($50,000 − $30,000 + $30,000) = $50,000

Defendant: ($30,000 − $50,000 + 0) = ($20,000)

The negative figure produced for the defendant denotes a continuing obligation in the plaintiff's favor in that amount, and will correspond with the figure reached by subtracting the amount of insurance proceeds paid into court by the plaintiff from the amount of the plaintiff's allocation.[458] The results are charted below:

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[457]This criticism in comparison to the straight no set-off rule would not apply in the case where the defendant (with the $50,000 claim) was uninsured and unable to pay. The straight no set-off rule would allow the defendant to recover her full $30,000 claim, while the plaintiff would be required to execute upon the insurance proceeds to get anything at all. Applying the formula, the court would award the plaintiff $15,000 and the defendant $20,000. The formula works a little better in this circumstance, but it is nevertheless closely tied to the least-injured pays most-injured principle, and some distortion thereby results.

[458]The commissioners' commentary states that the figure "corresponds with a number larger by that figure than the amount of deposit with the court . . . ." As can be seen by the example presented in this discussion, the statement by the commissioners is incomplete. UNIFORM ACT, *supra* note 455, at 42.

Figure #8

EQUITABLE ALLOCATION ACCORDING TO THE UNIFORM ACT'S SYSTEM (UNINSURED PARTY)

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
P (50%)	$100,000	$50,000	$30,000	$35,000	30,000	$30,000	-0-	60%	100%
D (50%)	$60,000	$30,000	$50,000	-0-	-0-	-0-	$20,000	-0-	-0-
TOTALS	$160,000	$80,000	$80,000	$35,000	$30,000	$30,000	$20,000	37.5%	100%

If the plaintiff is the uninsured party, the formula produces this result:

Plaintiff: ($50,000 − $30,000 + 0) = $20,000
Defendant: ($30,000 − $50,000 + $25,000) = $5,000

Charted, the results are:

Figure #9

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
P (50%)	$100,000	$50,000	$30,000	-0-	-0-	$20,000	-0-	40%	-0-
D (50%)	$60,000	$30,000	$50,000	$25,000	$25,000	$5,000	-0-	16.66%	100%
TOTALS	$160,000	$80,000	$80,000	$25,000	$25,000	$25,000	-0-	31.25%	100%

If the injuries were reversed the formula produces the following results:

(1) Defendant with no insurance:
Plaintiff: ($30,000 − $50,000 + $35,000) = $15,000
Defendant: ($50,000 − $30,000 + 0) = $20,000

(2) Plaintiff with no insurance:
Plaintiff: ($30,000 − $50,000 + 0) = $20,000
Defendant: ($50,000 − $30,000 + $25,000) = $45,000

Placed in the charts, the allocation looks like this:

Figure #10

(1) Defendant with no insurance:

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
P (50%)	$60,000	$30,000	$50,000	$35,000	$35,000	$15,000	-0-	50%	100%
D (50%)	$100,000	$50,000	$30,000	-0-	-0-	$20,000	-0-	40%	-0-
TOTALS	$160,000	$80,000	$80,000	$35,000	$35,000	$35,000	-0-	43.75%	100%

Figure #11

(2) Plaintiff with no insurance:

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
P (50%)	$60,000	$30,000	$50,000	-0-	-0-	-0-	$20,000	-0-	-0-
D (50%)	$100,000	$50,000	$30,000	$25,000	$25,000	$25,000	-0-	50%	100%
TOTALS	$160,000	$80,000	$80,000	$25,000	$25,000	$25,000	$20,000	31.25%	100%

Clearly, some incentive is present to obtain some insurance protection, since the allocation takes not only uninsured but also under-insured parties into account. However, with one exception, the incentive is wholly subordinated to the lesser-injured pays greater-injured principle so long as *one* of the parties has some insurance protection. Interestingly, the only time the incentive is not subordinated to the latter principle is when the lesser-injured also has sufficient coverage to produce a surplus over the amount of the allocation for the greater-injured.

d. An "equal-division" system: variation one.—Another approach might not give primacy to either of the principles behind the systems discussed above. Instead, this alternative would take into account the parties' *collective* ability to compensate for injuries they cause, and would permit an equitable division of those resources. This system of allocation would have reference to the equal fault of the parties. One variation would be simply to require the parties to share equally in the compensation resources to the extent of their claims or the sum of those resources. Thus, where plaintiff had $30,000 worth of insurance coverage available and defendant had $25,000, each would receive $27,500 in the distribution. This "equal-division" method could produce some disproportion in allocation relative to the parties' respective injuries, but it also produces a stronger incentive than the above systems for financial responsibility. Each party would know in advance of an accident that if they elect to go partially uncovered, recovery will assuredly be less than it would be under full coverage. If the incentive were strong enough to induce full coverage for both parties, the misallocation relative to the size of injury would disappear. However, since the lesser-prepared pays greater-prepared principle is not part of the system, an uninsured party benefits from the adequately prepared party's financial responsibility. That effect may be tempered somewhat by judicial refusal to discharge the more responsible party's claim against the unprepared party, but in the case of an insolvent party, little protection would actually result. Nevertheless, the system is uncomplicated and simple to administer, and its simplicity may outweigh its disadvantages.[459]

The results of this system are shown below in chart form in Figures #12 and 13 for comparison with the other systems discussed.

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[459]The system also works for cases involving multiple parties and unequal fault. See the chart on page 824, *infra*.

EQUITABLE ALLOCATION ACCORDING TO EQUAL DIVISION OF COMPENSATION RESOURCES: VARIATION ONE—MULTIPLE PARTY—UNEQUAL FAULT CASE

Party and % of Fault	Injury	Verdict Against Party One	Verdict Against Party Two	Total Obligation To Other Parties	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received After Allocation	Obligation Remaining (Party)	% of Verdict Recovered	% of Insurance Proceeds Expended
P (35%)	100,000	*A*- 25,000	*B*- 40,000	45,500	25,000 (per person)	45,500	60,000	——	92.3%	100%
A (25%)	60,000	*P*- 21,000	*B*- 24,000	42,500	30,000 (per person)	42,500	45,000	——	100%	100%
B (40%)	70,000	*P*- 24,500	*A*- 17,500	64,000	35,000 (per person)	59,000	42,000	5,000 (P)	100%	100%
TOTALS	230,000	70,500	81,500	152,000	180,000	147,000	147,000	——	96.7%	100%

Equal division of the $147,500 insurance proceeds produces a figure of $49,166.66 per party. Since *A*'s and *B*'s claims are less than that amount, their claims are paid in full and the excess is returned to the pool of funds for reallocation to *P*. Since that reallocation does not fully satisfy *P*'s claim, the obligation from *B* to *P*, who was not fully insured, may be permitted to remain open by the court.

Figure #12

EQUITABLE ALLOCATION ACCORDING TO EQUAL DIVISION OF COMPENSATION RESOURCES: VARIATION ONE

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
P (50%)	$100,000	$50,000	$30,000	$35,000	30,000	$27,500	-0-	55%	100%
D (50%)	$60,000	$30,000	$50,000	$25,000	$25,000	$27,500	$22,500	91.66%	100%
TOTALS	$160,000	$80,000	$80,000	$60,000	$55,000	$55,000	$22,500	68.75%	100%

Figure #13

EQUITABLE ALLOCATION ACCORDING TO EQUAL DIVISION OF COMPENSATION RESOURCES: VARIATION ONE (INJURIES REVERSED)

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
P (50%)	$60,000	$30,000	$50,000	$35,000	$35,000	$30,000	$20,000	100%	100%
D (50%)	$100,000	$50,000	$30,000	$25,000	$25,000	$30,000	-0-	60%	100%
TOTALS	$160,000	$80,000	$80,000	$60,000	$60,000	$60,000	$20,000	75%	100%

Comparison with the other systems shows that, with respect to total percentage of verdict recovered, the system performs as well as any of the previously discussed alternatives and as well as any system might hope, given compensation resources amounting to only 75% of the total obligation. This alternative actually performs slightly better than the Uniform Act's formula when individual percentages of verdicts recovered are compared. However, since the equitable allocation method does not include an adjustment factor for lack of financial responsibility, the presence of an uninsured party produces significant differences in result which may not be desirable. Compare the charted results below with the allocations in previously discussed alternatives:

Figure #14

EQUITABLE ALLOCATION ACCORDING TO EQUAL DIVISION OF COMPENSATION RESOURCES: VARIATION ONE (DEFENDANT UNINSURED)

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
P (50%)	$100,000	$50,000	$30,000	$35,000	30,000	$15,000	-0-	30%	100%
D (50%)	$60,000	$30,000	$50,000	-0-	-0-	$15,000	$35,000	50%	-0-
TOTALS	$160,000	$80,000	$80,000	$35,000	$30,000	$30,000	$35,000	37.5%	100%

This method of allocation also works easily in a multiple party situation. Adjusting the facts of the hypothetical to add a third party produces the following results:

Figure #15

EQUITABLE ALLOCATION ACCORDING TO EQUAL DIVISION OF COMPENSATION RESOURCES: VARIATION ONE (PLAINTIFF UNINSURED)

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
P (50%)	$100,000	$50,000	$30,000	-0-	-0-	$12,500	$17,500	25%	—
D (50%)	$60,000	$30,000	$50,000	$25,000	$25,000	$12,500	$25,000	41.66%	100%
TOTALS	$160,000	$80,000	$80,000	$25,000	$25,000	$25,000	$42,500	31.25%	100%

Figure #16

EQUITABLE ALLOCATION ACCORDING TO EQUAL DIVISION OF COMPENSATION RESOURCES: VARIATION ONE (MULTIPLE PARTY—EQUAL FAULT CASE)

Party and % of Fault	Injury	Verdict Against Party One	Verdict Against Party Two	Total Obligation To Other Parties	Insurance Coverage	Insurance Proceeds Paid into Court	Amount Received After Allocation	Obligation Remaining (Party)	% of Verdict Recovered	% of Insurance Proceeds Expended
P (33 1/3%)	$100,000	(D^1) $33,333	(D^2) $33,333	$43,331	$35,000 per injury	$43,331	$40,831*	-0-	61.2%	100%
D^1 (33 1/3%)	$60,000	(*P*) $20,000	(D^2) $20,000	$56,664	$25,000 per injury	$48,331	$40,000	(*P*) $8,333	100%	100%
D^2 (33 1/3%)	$70,000	(*P*) $23,331	(D^1) $23,331	$53,333	$15,000 per injury	$30,000	$40,831*	(*P*) $18,333 ($D^1$) $5,000	87.5%	100%
TOTALS	$230,000	$76,662	$76,662	$153,328	$150,000	$121,662	$121,662	$31,666	79.3%	100%

* *P*'s and D^2's allocations are larger than D^1's because D^1's claims are fully satisfied from the equal division (1/3 share of $121,662 = $40,554). The excess from the first allocation is then returned to the resources "pool" and reallocated in equal share to *P* and D^2.

However, the allocation above illustrates the serious malapportionment that can result in this system which can come at the expense of the most seriously injured and the most financially responsible party. In addition, since the touchstone of the system is equal division, which in turn rests upon the presumption of equal fault of the parties, when fault is not equally apportioned, the allocation loses its foundation and parties who are much less at fault would underwrite others with greater fault.

e. An "equal-division" system: variation two.—The other variation of this system would permit a different form of equal participation in the compensation resources. In this system, apportionment would refer to what the parties collectively "bring" to the lawsuit by way of ability to pay for compensation and account for their equal fault by permitting each to "take away" an equalized *proportion* of those resources. It also addresses the relative magnitude of injury by permitting the *dollar amount* of compensation to vary according to that magnitude. Under this system, the claims of both parties after adjustment for "fault" would first be totalled. In the hypothetical case, this figure would amount to $80,000. Next, the amount of resources applicable toward compensation would be totalled; here that figure would be the plaintiff's $30,000 obligation and the defendant's $25,000 worth of insurance coverage, or $55,000. The proportion of the total claims which the total compensation resources represents would determine the proportion of each party's claim which they could recover from the lawsuit. Here, $55,000 is 68.75% of $80,000. The plaintiff would then be entitled to collect 68.75% of $50,000, or $34,375. The defendant would receive 68.75% of $30,000, or $20,625. Illustrated in chart form:

Figure #17

EQUITABLE ALLOCATION ACCORDING TO EQUAL DIVISION: VARIATION TWO

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
P (50%)	$100,000	$50,000	$30,000	$35,000	$30,000	$34,375	-0-	68.75%	100%
D (50%)	$60,000	$30,000	$50,000	$25,000	$25,000	$20,625	-0-	68.75%	100%
TOTALS	$160,000	$80,000	$80,000	$60,000	$55,000	$55,000	-0-	68.75%	100%

The description of the system in these terms is actually a simplification of how the distribution would be accomplished. Since the plaintiff's compensation actually exceeds the amount of the defendant's liability insurance proceeds, the full description of the process of equitable distribution to accomplish that fact is fairly complicated.

The following is a more precise explanation of the distribution process. After determining the proportion of claims to be compensated, the court first makes an allocation designed to discharge the legal obligation each owes to the other. From the proceeds of insurance paid into court, it allocates $30,000 to the defendant toward defendant's claim, thereby discharging the plaintiff's obligation. Then, the court allocates the remainder of the compensation resources to the plaintiff, which in this case would be $25,000. Since the plaintiff's claim is not yet satisfied, the court then turns back to the defendant's resources to begin a second allocation. Since the defendant still owes a plaintiff $25,000 and has the resources to meet that obligation by virtue of the first allocation, the court reallocates $25,000 of that $30,000 back to plaintiff, thereby legally satisfying plaintiff's claim. However, since the process has, at this stage, resulted in an actual misallocation of compensation, and is at odds with the equal proportions principle, the court must enter a third stage of equitable allocation to adjust the awards. Since the equitable proportion is 68.75%, the court then reallocates from the $50,000 the plaintiff has received up to now the amount necessary to make up the difference between the defendant's allocation ($5,000) and 68.75% of the defendant's claim ($20,625), or $15,625. That leaves the parties with their equitable proportion of the compensation resources and each claim against the other has been discharged.

The dollar amount distributed to each party by this system is more consistently proportionate than any of the systems discussed previously. For example, where the injuries are reversed:

Figure #18

EQUITABLE ALLOCATION ACCORDING TO EQUAL DIVISION: VARIATION TWO (INJURIES REVERSED)

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
P (50%)	$60,000	$30,000	$50,000	$35,000	$35,000	$22,500	-0-	75%	100%
D (50%)	$100,000	$50,000	$30,000	$25,000	$25,000	$37,500	-0-	75%	100%
TOTALS	$160,000	$80,000	$80,000	$60,000	$60,000	$60,000	-0-	75%	100%

The weakness of this system, of course, is that its "equal proportions" principle treats each of the parties the same, even though they have disproportionately contributed to the compensation resources. An incentive to be fully financially responsible exists, since to the extent that one's ability to pay is added to the compensation resource pool, the proportion of recoverable claims is increased. Yet in actual operation, the well-prepared person's resources are burdened by the ill-prepared person's recovery without direct relation to the amount supplied by the financially responsible person. If a stronger incentive to be financially responsible is desired in the system, some method of allocation would have to be developed[460] which would reward the well-prepared party and penalize the ill-prepared. Furthermore, as is the case with the other alternatives, the system does not work in a situation where the fault of the parties is assessed in unequal percentages. Unless the fault of the parties is to be ignored—something hardly consistent with a comparative fault system—a system based on equal proportion produces misallocation.

f. An injury-fault-responsibility apportioned system.—A method of taking into account the relative magnitudes of injury, fault, and financial responsibility is possible. The system can work in multiple party cases as well as two-party ones. It is complicated, but no more than some of the other alternatives.

Starting from the assumption that the only meaningful "claim" an injured party has is one that can attach to recoverable resources, this system first determines the total pool of resources subject to compensation payments. That step will require reference to the amount of the verdicts and the amount of financial resources available for payment of those verdicts. In the two-party hypothetical discussed above, the verdicts produce insurance proceeds subject to payment totalling $55,000.[461]

In the second step, the proportion of injuries are calculated. Here, the plaintiff's injuries constitute 62.5% and the defendant's equal 37.5% of the total amount of injuries in the case.

The third step in the process would require the court to determine a "base recovery" figure for each of the parties. That "base recovery" represents the same proportion of the resource pool that the parties' injuries bear to the total injuries. The plaintiff's "base recovery" would be computed by applying the 62.5% injury percentage to the $55,000 resource pool figure, producing a figure of $34,375. The defendant's "base recovery" would be $20,625 ($55,000 x 37.5%.)

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[460]Recovery might be permitted in direct proportion to the amount of financial resources applicable to compensation which have been brought into the action. In the hypothetical presented in the text that would mean that the plaintiff would recover $30,000 and the defendant $25,000. Such an allocation would, of course, effectively transform liability insurance into loss insurance, a step the courts may not wish to take without legislative assistance.

[461]The amount would be $60,000 if the injuries were reversed.

The relative contributions of fault of the parties would next be taken into account. Each party's "base recovery" would be reduced in proportion to that party's percentage of fault. Since the two-party hypothetical has assumed equal fault, the "base recoveries" of each would be reduced by 50%.[462] The adjusted base recovery figures would then be $17,187.50 and $10,312.50 for the respective parties. The amounts from the reduction would then be "returned" to the resources pool for the final level of allocation. Here, $27,500 remains in the pool.

In the final step, the proportionate contributions to the resource pool are computed, and the funds remaining in the pool are distributed in those proportions. Since the plaintiff contributed 54.5% of the insurance proceeds, he would receive $14,987.50 in the final stage of allocation, while the defendant would receive $12,512.50. Total allocations would then be $32,175 for the plaintiff and $22,825 for the defendant:

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[462]See the discussion on following pages for an illustration involving unequal fault. Here, if the plaintiff's fault was assessed at 60%, for example, no occasion would arise for equitable allocation since the contributory negligence bar would be operable.

Figure #19

EQUITABLE ALLOCATION ACCORDING TO INJURY-FAULT-RESPONSIBILITY APPORTIONMENT

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
P (50%)	$100,000	$50,000	$30,000	$35,000	$30,000	$32,175	-0-	64.35%	100%
D (50%)	$60,000	$30,000	$50,000	$25,000	$25,000	$22,825	$17,825	76.08%	100%
TOTALS	$160,000	$80,000	$80,000	$60,000	$55,000	$55,000	$17,825	68.75%	100%

(INJURIES REVERSED)

P (50%)	$60,000	$30,000	$50,000	$35,000	$35,000	$28,749	$18,752	95.8%	100%
D (50%)	$100,000	$50,000	$30,000	$25,000	$25,000	$31,248	$1,251	62.5%	100%
TOTALS	$160,000	$80,000	$80,000	$60,000	$60,000	$59,997	$20,003	75%	100%

Clearly, neither the lesser-injured pays greater-injured principle nor the lesser-prepared pays greater-prepared principle dominates the allocation. Each is factored into the final recovery along with a consideration of fault (although here each party's fault balances the other), and produces allocations that reflect the particular combination of elements for each party. A comparison with the other alternatives in the context of the uninsured party demonstrates this effect very well:

Figure #20

EQUITABLE ALLOCATION ACCORDING TO INJURY-FAULT-RESPONSIBILITY APPORTIONMENT
(DEFENDENT UNINSURED)

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
P (50%)	$100,000	$50,000	$30,000	$35,000	$30,000	$24,375	-0-	48.75%	100%
D (50%)	$60,000	$30,000	$50,000	-0-	-0-	$5,625	$25,625	18.75%	-0-
TOTALS	$160,000	$80,000	$80,000	$35,000	$30,000	$30,000	$25,625	37.5%	100%

(PLAINTIFF UNINSURED)

P (50%)	$100,000	$50,000	$30,000	-0-	-0-	$7,812.50	$12,812.50	15.63%	-0-
D (50%)	$60,000	$30,000	$50,000	$25,000	$25,000	$17,187.50	$42,187.50	57.29%	100%
TOTALS	$160,000	$80,000	$80,000	$25,000	$25,000	$25,000	$55,000	31.25%	100%

In each case, recovery is substantially less for the uninsured party, both in dollar amount and in relative percentages of verdict. However, some recognition for magnitude of injury is given and, even if the greater-injured party is uninsured, some recovery is permitted. In the case where both parties' financial resources are inadequate, the obligation is not treated as discharged in order to permit later recovery should circumstances change. It may amount to an empty remedy, but at least the possibility of full recovery remains open. If the obligation is discharged, the final adjustment of the parties' relative claims could produce a meager remedy. If further inducement toward financial responsibility is desired as a matter of policy, the obligations could be treated as discharged using the method of allocation described above.

The strongest feature of this system is its ability to produce allocations in multiparty unequal fault cases. Because one level of allocation is keyed to the proportions of fault, it is able to address the case where the parties' percentages of fault are different without distorting or abandoning a principle driving the system. The same method is used as in the two-party case. A demonstration of the method is shown in the chart below.

Figure #21

EQUITABLE ALLOCATION ACCORDING TO INJURY-FAULT-RESPONSIBILITY
MULTI-PARTY-UNEQUAL FAULT SITUATION

Party and % of Fault	Injury	Verdict Against Party One	Verdict Against Party Two	Total Obligation To Other Parties	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received After Allocation	Obligation Remaining (Party)	% of Verdict Recovered	% of Insurance Proceeds Expended
P (35%)	$100,000	(D^1) $25,000	(D^2) $40,000	$45,500	$35,000 per injury	$45,500	$48,779.62	-0-	75.05%	100%
D^1 (25%)	$60,000	(*P*) $21,000	(D^2) $24,000	$42,500	$25,000 per injury	$42,500	$37,503.68	-0-	83.34%	100%
D^2 (40%)	$70,000	(*P*) $24,500	(D^1) $17,500	$64,000	$15,000 per injury	$30,000	$31,716.70	(*P*) $25,000 ($D^1$) $9,000	75.52%	100%
TOTALS	$230,000	$70,500	$81,500	$152,000	$150,000	$118,000	$118,000	$34,000	77.63%	100%

g. The system rejected by the Indiana General Assembly.—The Indiana legislation as originally proposed included a mandatory set-off provision.[463] Set-off was mandatory, that is, except with respect to "that portion of a claim . . . covered by liability insurance."[464] So, where the plaintiff had a claim of $50,000 and insurance coverage of $35,000, and the defendant had a claim of $30,000 and insurance of $25,000, each claim would be first paid to the extent of coverage. Here, the plaintiff's claim would then be reduced to $25,000, and the defendant's would be paid in full. The defendant would then still owe the plaintiff $25,000.

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[463]Senate Bill No. 331, 102d Gen. Ass., 1st Reg. Sess., Sec. 1, § 6 (1983) (this section was subsequently deleted in the final version of the Act).

[464]*Id.*

Figure #22

THE SET-OFF RULE REJECTED BY THE INDIANA GENERAL ASSEMBLY

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	%of Insurance Resources Expended
P (50%)	$100,000	$50,000	$30,000	$35,000	——	$25,000	-0-	50%	100%
D (50%)	$60,000	$30,000	$50,000	$25,000	——	$30,000	$25,000	100%	100%
TOTALS	$160,000	$80,000	$80,000	$60,000	——	$55,000	$25,000	68.75%	100%

If the injuries were reversed, and each party's insurance coverage were first applied to the other's claim, the plaintiff would still have $5,000 of his claim unsatisfied and the defendant would have $15,000 of her claim remaining. Set-off would then be applied, with the result that the plaintiff would still owe the defendant $10,000.

Figure #23

THE SET-OFF RULE REJECTED BY THE INDIANA GENERAL ASSEMBLY
(INJURIES REVERSED)

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	%of Insurance Resources Expended
P (50%)	$60,000	$30,000	$50,000	$35,000	——	$25,000	$10,000	83.33%	100%
D (50%)	$100,000	$50,000	$30,000	$25,000	——	$35,000	-0-	70%	100%
TOTALS	$160,000	$80,000	$80,000	$60,000	——	$60,000	$10,000	75%	100%

The principle of lesser-prepared pays greater-prepared is thus subordinated to the principle of lesser-injured pays greater-injured. The system provides some incentive for financial responsibility, since the only way one can be assured of receiving any benefit of set-off is to make sure liability is covered.

Where one party is insured but the other is not, the uninsured party benefits by receiving the proceeds of the more-prepared party's insurance coverage, and may benefit even further if set-off is applied to the claims remaining outstanding after deduction of insurance proceeds. Thus, where the plaintiff is uninsured and incurs an $80,000 claim against the defendant, for example, and the defendant has a $40,000 claim against the plaintiff with $30,000 worth of liability insurance, the plaintiff is entitled to the entire $30,000 proceeds and then may offset the remainder of his claim against the defendant's. The defendant receives nothing, and still owes the plaintiff $10,000:

Figure #24

THE SET-OFF RULE REJECTED BY THE INDIANA GENERAL ASSEMBLY
(PLAINTIFF WITH LARGER CLAIM AND UNINSURED)

Party and % of Fault	Injury	Verdict Obtained Against Other Party	Obligation To Other Party	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received From Allocation	Obligation Remaining	% of Verdict Recovered	% of Insurance Resources Expended
P (50%)	$160,000	$80,000	$40,000	-0-	——	$30,000	-0-	37.5%	-0-
D (50%)	$80,000	$40,000	$80,000	$30,000	——	-0-	$10,000	-0-	100%
TOTALS	$240,000	$120,000	$120,000	$30,000	——	$30,000	$10,000	25%	100%

Furthermore, this system suffers from the same tendency to distort apportionment as the systems discussed above where one principle is permitted to control the allocation. The distortion is perhaps not as great, but clearly apportionment based upon fault is rendered all but inoperative beyond the determination of the verdicts. Unlike many of the other alternatives, however, it can work in a multiple party, unequal-fault setting:

Figure #25

THE SET-OFF RULE REJECTED BY THE INDIANA GENERAL ASSEMBLY
(MULTIPARTY-UNEQUAL FAULT SITUATION)

Party and % of Fault	Injury	Verdict Against Party One	Verdict Against Party Two	Total Obligation To Other Parties	Insurance Coverage	Insurance Proceeds Paid Into Court	Amount Received After Allocation	Obligation Remaining (Party)	% of Verdict Recovered	% of Insurance Proceeds Expended
P (35%)	$100,000	(D^1) $25,000	(D^2) $40,000	$45,500	$35,000 per injury	——	$40,000	-0-	61.5%	100%
D^1 (25%)	$60,000	(*P*) $21,000	(D^2) $24,000	$42,500	$25,000 per injury	——	$36,000	-0-	80%	100%
D^2 (40%)	$70,000	(*P*) $24,500	(D^1) $17,500	$64,000	$15,000 per injury	——	$42,000	(*P*) $25,000 ($D^1$) $9,000	100%	100%
TOTALS	$230,000	$70,500	$81,500	$152,000	$150,000	——	$118,000	$34,000	77.63%	100%

However, the same weakness in regard to misallocations resulting in uninsured and underinsured cases is graphically illustrated in the above hypothetical. The grossly underinsured party (D^2) is permitted to recover fully as a result of the other parties' adequate coverage. The others receive only the meager proceeds of D^2's insurance policy and a continuing obligation from D^2. The latter may be an empty remedy if D^2 has no other way of satisfying the judgment.

A benefit of the system, however, is that it is quite easy to apply in comparison to some of the others discussed here. That ease of administration may make the system attractive despite its shortcomings.

As demonstrated, several approaches to set-off are possible, each with its advantages and disadvantages. In refusing to address the issue, the General Assembly may have intended to give the courts the flexibility to develop an acceptable approach along the lines of any of these models or other alternatives. Whether it had such intentions or not, the courts certainly have the power to adjust the parties' claims using methods which have the flexibility to address the several issues raised in this discussion. With that power resides the responsibility to consider the issues carefully and to avoid adoption of a rigid, one-way rule which cannot address all of the interests of the parties and the public at the same time.

B. Last Clear Chance

The doctrine of last clear chance is a common law rule that permits a negligent plaintiff to recover from a negligent defendant.[465] A plaintiff uses the doctrine to counteract the defendant's assertion that if the plaintiff had exercised due care, the injury would not have occurred. In effect, the doctrine permits the plaintiff to admit to contributory negligence without having recovery barred because the defendant's duty of care includes protecting the plaintiff in his position of peril. The similarity in function between the doctrine and comparative fault raises a question of its continued availability in the new system, a question the Indiana Act fails to address.

Consider these hypothetical facts as a background for the following discussion: The plaintiff, without looking or listening for trains, drove his new car upon defendant's railroad tracks at the top of an incline. Because the plaintiff was unfamiliar with the operation of the clutch and manual transmission, his car sputtered and stopped on the tracks. The plaintiff was not aware that the defendant's diesel engine was on the tracks. The engineer was travelling faster than required because he wanted to go home. No railroad cars were attached to the engine. At

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[465] *See generally* 2 F. Harper & F. James, The Law of Torts, §§ 22.12-.14, at 1241-63 (1956); W. Prosser, Handbook of the Law of Torts § 66, at 427-33 (4th ed. 1971).

the time the engineer saw the plaintiff drive onto the tracks and stop and for some moments thereafter, he could have stopped the engine without hitting the plaintiff's car. Thinking the plaintiff was trying to frighten a passenger, the engineer slowed the engine but did not sound the required warning signal. When he realized that the plaintiff was not going to drive the car off the tracks, the engineer belatedly attempted to brake the train and a spectacular collision occurred. The plaintiff was severely injured.[466] If the plaintiff sues the defendant under present Indiana law, the defendant will raise contributory negligence, and the plaintiff will respond with the theory of last clear chance.

To successfully invoke last clear chance, the plaintiff must prove that the defendant's employee did *in fact* have the last clear chance to avoid the injury. To do that the plaintiff must show that:

(1) The defendant had actual knowledge of the plaintiff;
(2) The defendant knew of the plaintiff's perilous position;
(3) The defendant had physical control over the instrumentality and had the last opportunity through the exercise of reasonable care to avoid the injury; and
(4) The plaintiff was oblivious to his own danger, notwithstanding his own contributory negligence.[467]

A plaintiff establishing those facts will defeat the defendant's contributory negligence defense, and will be entitled to recover fully for his injuries.[468]

Given this significant exception to the contributory negligence bar, it is important to know whether the doctrine will operate as an exception to the apportionment principle in comparative fault. Some comparative fault statutes have specifically addressed the matter.[469] The Uniform Comparative Fault Act, for example, states that "[t]his rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance."[470] The Uniform Act proposes "pure" comparative fault, and attempts to completely displace contributory negligence and its kindred doctrines. The Indiana Act, by virtue of its "greater than 50%" modification, may not have abandoned all vestiges of con-

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[466]The hypothetical is a modification of the facts in the Indiana case of Terre Haute, Indianapolis & Eastern Traction Co. v. Stevenson, 189 Ind. 100, 123 N.E. 785 (1919).

[467]McKeown v. Calusa, 172 Ind. App. 1, 6, 359 N.E.2d 550, 554 (1977) (quoting National City Lines, Inc. v. Hurst, 145 Ind. App. 278, 282, 250 N.E.2d 507, 510 (1969)).

[468]Terre Haute, Indianapolis & Eastern Traction Co. v. Stevenson, 189 Ind. 100, 123 N.E. 785 (1919); McKeown v. Calusa, 172 Ind. App. 1, 359 N.E.2d 550 (1977). *See generally* 2 F. HARPER & F. JAMES, *supra* note 465, §§ 22.12-.14, at 1241-63; W. PROSSER, *supra* note 465, § 66, at 427-33.

[469]*See* CONN. GEN. STAT. ANN. § 52-572h(c) (West Supp. 1984); OR. REV. STAT. § 18.475 (1977).

[470]UNIFORM ACT, *supra* note 455, § 1(a), at 36.

tributory negligence. The Indiana Act does not include the sentence quoted from the Uniform Comparative Fault Act. Its exclusion raises the issue of whether a plaintiff may still employ the doctrine of last clear chance to completely defeat the defendant's contributory fault defense.

Much of the uncertainty surrounding the future of last clear chance can be traced to the doctrine's past. The doctrine wandered upon the torts scene in 1842 in the famous "jackass" case of *Davies v. Mann*,[471] and has never been adequately defined.[472] The court in *Davies* spoke in general terms only of defendant's failure to exercise "proper care" to avoid the injury and of his duty to travel at a "pace as would be likely to prevent mischief" without considering whether plaintiff's donkey was lawfully on the highway.[473] Subsequent courts have offered greater precision of language, without adding precision of thought.[474] The precision that has been lacking concerns the foundation of the doctrine. Some courts and commentators consider last clear chance an offshoot of

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[471]152 Eng. Rep. 588 (1842). Plaintiff allowed his donkey to wander in the public highway, though he did "fetter" its front legs. Defendant, driving his wagon down a hill at a fast clip, struck and killed the donkey. The court held defendant liable. Professor MacIntyre points out that cases containing the formula, though not the language, of last clear chance predated the *Davies* case. MacIntyre, *The Rationale of Last Clear Chance,* 53 HARV. L. REV. 1225, 1228-30 (1940).

[472]*See* James, *Last Clear Chance—A Transitional Doctrine,* 47 YALE L.J. 704 (1938); MacIntyre, *supra* note 471, at 1230; 2 F. HARPER & F. JAMES, *supra* note 465, § 22.14, at 1255-60; W. PROSSER, *supra* 465, § 66, at 427-29.

[473]152 Eng. Rep. at 589.

[474]Professor James cites two good examples in his article, *supra* note 472, at 709 n.31. In Rasmussen v. Fresno Traction Co., 15 Cal. App. 2d 356, 59 P.2d 617 (1936), the court stated:

> As has frequently been said, the doctrine of the last clear chance means exactly what the words imply and the essence of the rule is that it is applicable only where the defendant, notwithstanding the plaintiff's negligence, has a clear chance, after realizing that the plaintiff cannot escape, to avoid the accident by the exercise of ordinary care, and where the plaintiff cannot avoid it by the use of such care.

15 Cal. App. 2d at 362, 59 P.2d at 619. The court was content that sufficient explication of the doctrine had been given and then proceeded to reverse a judgment for the plaintiff. The holding was based on evidence which showed (1) the defendant's agent did not see the plaintiff because he was distracted in giving change to his passengers and (2) the plaintiff did not check the tracks again after having seen the defendant's streetcar some 200 feet away. The court said that such evidence would not support the inference that the defendant's agent "had a clear opportunity to avoid the accident" nor that the plaintiff "was unable to escape from his position of peril." *Id.* at 369, 59 P.2d at 623.

In Keller v. Norfolk & W. Ry. Co., 109 W. Va. 522, 156 S.E. 50 (1930), the court Keller v. Norfolk & W. Ry. Co., 109 W. Va. 522, 156 S.E. 50 (1930), the court said:

> The doctrine of last clear chance is a simple and meritorious one, and bears its definition in its title. Its simple test is whether the defendant had the opportunity to prevent the accident after the plaintiff ceased to have it . . . . Its application needs no perversion of logic or distortion of facts.

Id. at 528, 156 S.E. at 52. The court denied recovery to the plaintiff based on evidence

proximate cause.[475] Others consider it an early form of comparative or apportioned fault.[476] The future of the doctrine and the approach courts may use in interpreting it in light of comparative fault are directly linked to their view of the doctrine's theoretical source.

1. Proximate Cause.—Often the doctrine has been linked to proximate cause, and that view is favored by Indiana courts.[477] Adherents of the proximate cause theory look for the "last wrongdoer." Pursuant to this view, if a defendant could avoid injurious contact with a plaintiff whose own faulty acts exposing him to harm had "come to rest," the defendant may not use the plaintiff's negligence as a defense. The defendant's failure to avoid the negligent plaintiff is taken to be the legally responsible cause of the injury,[478] although sometimes such an analysis will not bear scrutiny. The weakness of linking last clear chance to proximate cause is demonstrated by changing the facts of the automobile-train hypothetical. In the revised hypothetical, the driver did not own the car but had borrowed it from a friend. If the owner sued the driver to recover for damage to the car, the driver could not escape liability by claiming that his acts were not the proximate cause of the accident.[479] It would be inconsistent for the driver to be considered a proximate cause of the injury in a suit with the car owner and not to be a proximate cause in a suit with the railroad.

For this reason, the proximate cause foundation of last clear chance has been termed a rationalization.[480] Even if the proximate cause link is a rationalization, a state's highest court could scarcely admit to having rationalized all along and then order that all earlier decisions be treated only as casuistic artifacts of an effort to protect plaintiffs. Such an admission would be especially difficult in a jurisdiction where the legislature, not the court, had adopted comparative fault. In such a jurisdiction, the legislature will have deprived the courts of an opportunity

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that the defendant's fireman saw the plaintiff's car approaching the railroad crossing and blew the whistle when he saw that the automobile was not going to stop. The engineer did not see the automobile "until it was right at the crossing." *Id.* at 524, 156 S.E. at 51. The court seemed to base its holding upon its belief that the defendant's agent was "ignorant of the plaintiff's danger." *Id.* at 528, 156 S.E. at 52. The court refused to impute knowledge in the absence of actual knowledge, and found defendant not liable.

[475]*See infra* text and citations accompanying notes 477-84. *See also* James, *supra* note 472, at 709-15; W. PROSSER, *supra* note 465, § 66, at 427.

[476]*See,* James, *supra* note 472, at 715-23; MacIntyre, *supra* note 471, at 1226-35; W. PROSSER, *supra* note 465, § 66, at 428. *See also infra* text and citations accompanying notes 485-92.

[477]McKeown v. Calusa, 172 Ind. App. 1, 359 N.E.2d 550, 559 (1977) (citing Bates v. Boughton, 151 Ind. App. 139, 278 N.E.2d 316 (1972)). *See also* Terre Haute, Indianapolis & Eastern Traction Co. v. Stevenson, 189 Ind. 100, 123 N.E. 785 (1919).

[478]*See* James, *supra* note 472, at 709-15; W. PROSSER, *supra* note 465, § 66, at 427.

[479]*See* Lincoln City Lines v. Schmidt, 245 F.2d 600 (8th Cir. 1957); Atlantic Coast Line R. Co. v. Coxwell, 93 Ga. App. 159, 91 S.E.2d 135 (1955).

[480]James, *supra* note 472, at 710-11. *See* MacIntyre, *supra* note 471, at 1226.

to address such doctrines as last clear chance on an incremental basis through transitional cases.[481]

The proximate cause theory, when used by a court, may be more than rationalization. It may be something entirely different from a concealed attempt to mitigate the harshness of the contributory negligence doctrine. It might be a distillation of all of the court's thoughts about policy, justice, fairness, experience, pragmatics, and cultural and religious values to answer the question: Should this defendant be liable to this plaintiff for this injury?

"Proximate cause" may be a special linguistic shorthand, an almost talismanic representation for the larger and more complex thoughts that courts sometimes avoid expressing. The phrase in the context of last clear chance possibly stands for judicial thinking that:

(1) The defendant's duty to avoid harm to others exposed to the risks he creates includes a duty to those who have been exposed to the risk through their own fault; and

(2) The defendant's duty extends to such plaintiffs because considerations such as policy, justice, fairness, experience, pragmatics, and cultural and religious values[482] demand that injury to even inattentive and inadvertent persons be avoided by the exercise of ordinary care; and

(3) The defendant's duty may not be excused by the plaintiff's conduct because the considerations in part (2) prompt the belief that such a defense would in effect declare otherwise "antisocial" conduct acceptable merely because it impinged upon other negligent conduct; and

(4) The defendant's duty differs from and is larger than the plaintiff's duty because it includes the risk that someone else will be inattentive and inadvertent and because accidents can be better prevented if the costs of failure are borne by the actor who had the best chance to avoid the accident; and

(5) The defendant's breach of duty makes him legally accountable to a plaintiff who may in turn be legally accountable to others.[483]

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[481]Where comparative fault has been judicially adopted, courts are more willing to abolish last clear chance than where the legislature has adopted it. On the other hand, compartive fault has been adopted in many jurisdictions only recently, and it may be too early to draw any firm conclusions from the relatively small samples. *See* HEFT & HEFT, COMPARATIVE NEGLIGENCE App. 2, at 188-89 (Supp. 1983).

[482]Of course, each of *these* terms are themselves shorthand, almost talismanic representations of larger and more complex thoughts. A court may prefer to use the representative terms rather than set out the thoughts behind them.

[483]Thus, a court dealing with the railroad crossing hypothetical might well announce its decision only in terms that defendant's failure to take the last clear chance to avoid

When courts do not engage in this larger and more complex explication of "proximate cause," one cannot know whether they really meant to say all of that. The previous paragraph could be a totally different basis for a court's decision that a particular defendant ought to compensate a particular plaintiff for a particular injury. A court using proximate cause as a special shorthand in last clear chance cases may have difficulty jettisoning the doctrine as mere rationalization. A court which specifically disavowed any attempt to apportion fault in applying last clear chance would have even more trouble rejecting the doctrine.[484] To such a court, a comparative fault statute would not of itself compel the abandonment of the doctrine of last clear chance because the shorthand meaning of "proximate cause" shows that the doctrine's roots go deep into the very core of societv.

2. *Apportioned Fault.*—A competing theory links the doctrine of last clear chance to apportioned fault and suggests that last clear chance is a way of balancing or weighing the conduct of the parties. In this theory, the doctrine will bar the defendant's contributory negligence defense if the defendant's "later"[485] failure to act is more faulty than the plaintiff's contributory fault.[486] This theory is also susceptible to charges of rationalization, because the doctrine operates in an "all-or-nothing" fashion even in jurisdictions that disavow degrees of negligence.[487] In many cases, the results are inconsistent with the actual culpability of the parties.[488] Furthermore, if the doctrine were a rationalization for camouflaged comparative fault, once comparative fault had been adopted, last clear chance could be abandoned, and jurisdictions retaining the "all-or-nothing" aspect of the doctrine after adopting comparative fault would appear rather foolish.[489]

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harm was the proximate cause of injury. If the above construction of thought stood behind the words "proximate cause," it might well represent a "countervailing morality" which maintains that defendants should not have "an 'open season' upon plaintiffs who are caught in a negligent position." L. GREEN, JUDGE AND JURY 119, 234 (1930).

[484]*E.g.,* Terre Haute, Indianapolis & Eastern Traction Co. v. Stevenson, 189 Ind. 100, 108, 123 N.E. 785, 787 (1919).

[485]It is not always actually later. In some instances, according to Professor James, plaintiff actually has the later opportunity to escape the peril, but defendant is held responsible because her "earlier opportunity is so much greater." James, *supra* note 472, at 717.

[486]*See* MacIntyre, *supra* note 471, at 1232-52; W. PROSSER, *supra* note 465, § 66, at 428.

[487]Indiana is one of those jurisdictions. *Cf.* Birdsong v. ITT Continental Baking Co., 160 Ind. App. 411, 413, 312 N.E.2d 104, 106 (1974) (where the court rejected the seat belt defense partially on the basis that Indiana does not recognize degrees of negligence) (citing Pawlisch v. Atkins, 96 Ind. App. 132, 182 N.E. 636 (1932)).

[488]*See* W. PROSSER, *supra* note 465, § 66, at 428 and authorities cited therein.

[489]There is, of course, the possibility of judicial refusal or inability to recognize and depart from an anomalous rule of law. However, Professor James does not suggest that

Commentators have agreed that courts use last clear chance to escape the harsh consequences of contributory negligence[490] and to allow injuries to "apportion" fault according to "popular notions and prejudices."[491] Apportionment is a descriptive term, however, which may explain *why* some courts employ the doctrine to reach a particular result but does not explain *how* a court concluded that the defendant rather than the plaintiff should bear the cost of the accident. A need might well exist for a doctrine that tempers the harshness of contributory fault, but that need alone cannot justify the doctrine,[492] especially where the harshness is merely redirected toward the defendant. If avoidance of harsh results is the goal, the doctrine should operate evenhandedly. A court which allowed a plaintiff to benefit from the doctrine because the contributory negligence bar is too harsh would be hardpressed to explain why the doctrine itself was not harsh, especially if the plaintiff's actions were more faulty than the defendant's.

If this need to ameliorate contributory negligence is valid, then the last clear chance doctrine may no longer be needed after the apportionment principles of comparative fault are adopted. If apportioned fault is the basis of the doctrine, the adoption of a general, more refined concept of fault comparison could easily displace it. Several jurisdictions have abolished last clear chance on this basis.[493]

The Indiana legislature has not adopted pure apportionment or comparative fault because a plaintiff who is greater than 50% at fault is barred from recovery by contributory negligence.[494] Because of this vestige of traditional contributory negligence, Indiana courts may wish

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a disguised comparative fault principle explains the genesis and development of last clear chance in all judicial minds. *See* James, *supra* note 472, at 709-15. If other principles apply, it would be fallacious to characterize the retention of the doctrine in comparative fault jurisdictions necessarily as a needless and foolish practice. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 7.2, at 136-37 (1974); H. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT § 8.2, at 172-73 (1978).

[490]*See* W. PROSSER, *supra* note 465, § 66, at 428, § 68, at 439 and authorities cited at 439 n.7; at 439 n.7; V. SCHWARTZ, *supra* note 489, § 7.1, at 131-32, § 7.2, at 139 and authorities cited therein.

[491]2 F. HARPER & F. JAMES, *supra* 465, § 22.14, at 1261.

[492]*See* MacIntyre, *supra* note 471, at 1236-51; *see also*, James, *supra* note 472, at 716-19.

[493]As of the time of this writing eight jurisdictions appear to have abandoned the doctrine based upon the adoption of comparative fault. Four of those jurisdictions have adopted the "pure" form of comparative fault. Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li. v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981). Four "modified" comparative fault jurisdictions have also abolished the doctrine. Cushman v. Perkins, 245 A.2d 846 (Me. 1968); Davies v. Butler, 95 Nev. 763, 602 P.2d 605 (1979); Ratlief v. Yokum, 280 S.E.2d 584 (W. Va. 1981); Danculovich v. Brown, 593 P.2d 187 (Wyo. 1979).

[494]IND. CODE § 34-4-33-4(a), (b).

to retain the doctrine of last clear chance simply as a matter of balance.[495] That is, since plaintiffs are totally barred under some circumstances, defendants ought to bear total liability under some circumstances.

No matter what the source of the doctrine, last clear chance is difficult to apply and confuses juries.[496] It has come under sharp and well-considered criticism by courts[497] and commentators[498] and is showing signs of drowning in the tide of comparative fault.[499] Last clear chance has figured into a significant amount of litigation in Indiana.[500] Continued recognition of the doctrine, with its obscure theoretical bases and potential to confuse, might undermine a comparative fault system by distorting the apportionment of fault. The doctrine traditionally requires jurors to bifurcate the defendant's conduct into two "levels" of fault. The first "level," the negligence producing the risk of injury, could be excused by plaintiff's own contributory fault. The second "level," the failure to exercise ordinary care to prevent that risk from causing actual harm, cannot be excused merely by reference to plaintiff's fault. Using apportionment or comparative fault principles, a jury would not split the defendant's conduct into levels of fault, but would simply be required to decide how much the defendant's total course of conduct was at "fault" in injuring the plaintiff. Both "parts" of defendant's conduct would be considered as a whole and then compared to plaintiff's "fault" for purposes of apportionment.

If the negative features of the last clear chance doctrine are considered unjustifiable costs of its continued vitality, and the policy and functional bases of the doctrine can be served by the comparative fault system, the courts of Indiana would do well to abandon it. Whatever the outcome, the failure of the Comparative Fault Act to address the issue puts the onus upon the Indiana courts to consider the doctrine carefully when the issue arises.[501]

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[495]*See* V. SCHWARTZ, *supra* note 489, § 7.2, at 136-37, 139-40.

[496]2 F. HARPER & F. JAMES, *supra* note 465, § 22.14, at 1261.

[497]*E.g.*, authorities cited *supra* note 493.

[498]*See* authorities cited *supra* note 472.

[499]*See* authorities cited *supra* note 493. In addition, Judge Woods suggests that several other comparative fault jurisdictions have abandoned the doctrine without a judicial pronouncement by removal from jury instructions and official commentary. H. WOODS, *supra* note 489, Appendix and Cumulative Supplement to Appendix (1982) (state by state treatment).

[500]Research at the time of this writing shows that the doctrine was at issue in 32 reported appellate level cases in Indiana in the last 18 years.

[501]Legislatures generally have found it unnecessary to address the issue (or, perhaps more accurately, have found it necessary to *not* address it). Only Connecticut and Oregon have abolished the doctrine by comparative fault legislation. CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1983-84); OR. REV. STAT. § 18.475(1) (1977).

VI. Conclusion

Adoption of a "modified" system of comparative fault is an extremely important first step in reforming the torts compensation system in Indiana, but travel along the comparative fault path has yet to begin. Many adjustments in manner and means of travel will doubtless occur as experience with features of the terrain traversed increases. To draw firm conclusions about the Comparative Fault Act at this early stage of the journey is, in this light, risky business. There are several forks in the path and many conclusions about the operation and effect of the Act are dependent upon which branches of the forks are selected. In some instances the Act has decided in advance which branch to take and in others provides some guidelines for making the decision, but in others the finders of fact and law are on their own. This discussion has attempted to identify some of each of those instances.

The way is not, however, through completely alien territory. The general terrain has been traversed many times before on different pathways. It has been the thesis of this Article that the Comparative Fault Act should not be viewed as a complete displacement of principles of accountability that have been developed in the common law of tort. The domain of tort liability remains essentially the same as prior to the adoption of comparative fault. Significantly, the apportionment principle permits us to traverse that domain in a manner much different than before. The parties concerned are now permitted to share in the benefits and detriments of that method of travel on a much more equitable basis than under traditional systems. Yet the lessons of the past, the principles, policies, and pragmatics already developed in the common law, should be helpful elements in the most important decisions to be made regarding the direction the courts should take along the comparative fault path. Some of those principles, policies, and pragmatics have been highlighted here in an attempt to generate thinking in preparation for those decisions.

This is not to say that the journey will be an easy one. Application of the Act in even the limited sense of mechanics is a fairly complex proposition. When viewed as an overlay upon the preexisting foundation of tort liability, as this Article has attempted to do, many difficult issues arise which have not, and in some instances should not have been, answered in the Act. In some cases, because of the Act's expansive definition of "fault," perhaps the foundations of liability will have to be readjusted to accommodate the overlay of the apportionment principle superstructure. Attorneys and judges should not, however, lose sight of the principles, policies, and pragmatics that form those foundations. To assist juries performing the apportionment function, lessons of the past should unhesitantly be brought to bear upon the issues that arise. There is room for healthy disagreement about which branches of the path should be taken, but judges and juries should not in the face of that

disagreement resign themselves out of frustration to arbitrary, mechanical "easy ways out." The new system, in comparison to the old, is complex and difficult to apply. For awhile, it will seem cumbersome to those of us accustomed to the quick simple answers provided by the contributory negligence system. Yet the old system was more than just a series of results. It was and remains a system of thought from which we have learned lessons about the way the law ought to fashion remedies for harms.

Likewise, where those lessons teach that a clear break from concepts outmoded by comparative fault is wise, attorneys and judges should unhesitatingly step in the new direction and assist the jury through the new territory. Officers of the court should resist temptations to simply turn hard questions over to jurors in hopes that they will "work something out." The apportionment of fault, as this discussion has attempted to demonstrate, is not simply an unprincipled factual determination of "compromise" verdicts. Nor is it a matter of simple, mechanical "yes or no" decisionmaking. Our formal system of dispute resolution places an awesome responsibility upon jurors and requires them to discharge that responsibility through a series of exceedingly difficult decisions. On the basis of sometimes sketchy and circumstantial evidence, we require them to decide the existence or nonexistence of a fact upon which the financial and emotional interests of people depend. As attorneys working daily within the system, we sometimes lose sight of the difficulty of such decisions and the pressures they bring to bear upon fact finders. A question of whether the defendant failed to place guards and warnings around her street excavation may seem a fairly simple matter of observation of physical attributes, but destruction of the scene from the effects of the ensuing crash of the plaintiff's vehicle complicate the otherwise easy decision. Deciding whether the defendant was at fault in leaving the excavation unprotected may not be a matter of particular difficulty in the majority of cases. The significance of that decision, and its underlying factual determination, for the fortunes of the disputants demands that the officers of the court and the jury not take it lightly. Whether the plaintiff's vehicle was out of control when it hit the defendant's excavation may be another simple decision of fact. If it was, that complicates the question of whether the defendant's fault was a cause of the plaintiff's injuries. Whether the plaintiff was at fault in allowing the vehicle to get out of control adds another complication. Even in the traditional contributory negligence system, jurors need careful assistance in working their way through cases like this.[502] Under comparative fault, a complicated and difficult overlay has been placed upon all cases, whether factually simple or complicated. Now jurors must not

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[502]The hypothetical facts are a "modernization" of the facts in Stacy v. Knickerbocker Ice Co., 84 Wis. 614, 54 N.W. 1091 (1893).

only decide whether the defendant's and plaintiff's acts and omissions constitute "fault," they must somehow act as if that "fault" is quantifiable and assign precise percentages of that "fault" to the parties. Conscientious jurors will require a great deal of assistance in such decisions. Conscientious attorneys and judges will not send those jurors off to the deliberation room with the mere admonition to do their best and a hope that they will.

The comparative fault system does not cast the officers of the court into the journey without tools of assistance. Extremely important principles of law, old and new, exist to guide the ultimate assignment of responsibility. This Article has attempted, on a somewhat selective basis, to raise some of the issues that will arise during the journey, to highlight some of the principles pertinent to those issues, and to suggest some methods for resolving those issues in the context of comparative fault.