

Drafting and Legislative History of the Comparative Fault Act

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I. PASSAGE OF THE ACT

A. *Historical Background*

Efforts to secure passage of a comparative negligence bill commenced in Indiana in 1973. Separate bills were offered in that year by Representatives Nelson Becker of Logansport and Craig Campbell of Anderson.¹ Showing remarkable persistence, these veteran legislators were also co-sponsors of the comparative fault bill which was finally enacted into law in 1983.² Through the years other bills were offered.³ None received much attention until 1981 when Representative Jerome Reppa of Munster introduced a bill⁴ based on the 1977 Uniform Comparative Fault Act of the National Conference of Commissioners on Uniform State Laws.⁵ As such, it was a "pure" comparative fault bill.⁶ Reppa's bill progressed only as far as a committee hearing.⁷

Lobbyists representing liability insurance company interests stoutly opposed the 1981 bill. They were especially concerned with the prospect of plaintiffs and defendants both being able to recover in the same action.⁸

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¹H.B. 1680 and 1771, 98th Gen. Assembly, 1st Sess. (1973). Neither bill emerged from the House Judiciary Committee, 1973 HOUSE JOURNAL 1893, 1907.

²Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 4, 1983 Ind. Acts 1930, 1931 (codified at IND. CODE § 34-4-33-4 (Supp. 1984)).

³See, e.g., H.B. 195B, 100th Gen. Assembly, 1st Sess. (1977); H.B. 1141, 101st Gen. Assembly, 1st Sess. (1979).

⁴H.B. 2054, 102nd Gen. Assembly, 1st Sess. (1981).

⁵UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 35 (Supp. 1984).

⁶A "pure" comparative fault law is one which allows recovery by a claimant if there was any fault on the part of the defendant, subject to the claimant's damages being reduced in proportion to his own fault.

⁷IND. HOUSE & SENATE JOURNAL INDEX 220 (1981).

⁸Under "pure" comparative fault laws, a plaintiff who is 90% at fault, for example, may recover 10% of his total damages from a defendant who is 10% at fault, and the defendant, if injured, may recover 90% of his damages from the plaintiff who is 90% at fault. On the other hand, under a "modified" comparative fault law, the right of recovery of a claimant who is partly at fault is cut off after the claimant's fault reaches some designated threshold. Typically, the threshold may be reached when the claimant's fault is greater than slight, greater than 49%, or greater than 50%. Where the threshold of the modified plan is greater than 50%, the potential for both plaintiff and defendant to recover against each other in the same action still exists, but only in one instance, namely, when each is 50% at fault. In cases involving multiple defendants, where the modified plan does not require

The insurance lobbyists also claimed to find the bill so complex as to be incomprehensible. They assured the legislative committee members that even a Philadelphia lawyer could not understand it. They pointed especially to the provisions of section 3 of the Uniform Act and the accompanying commissioners' comments as supporting their argument. Those provisions relate to when a set-off will be allowed under various combinations of circumstances involving liability insurance coverage.

Learning from experience, the comparative fault proponents proposed a simpler "modified" bill in the 1983 session of the General Assembly. Senate Bill 331,⁹ introduced by Senators John M. Guy of Monticello and James R. Monk of Sullivan, provided that when the claimant's fault was greater than fifty percent he was barred from any recovery; otherwise the claimant's fault only diminished the amount of his recovery.

B. Key Provisions of the 1983 Bill

Senate Bill 331, as introduced, and its successor, Senate Bill 287,¹⁰ as eventually passed, were framed in terms of comparative "fault" rather than comparative "negligence." A comparative "fault" bill encompasses more than negligence actions and contributory negligence defenses. It covers strict liability, warranty, and willful and wanton misconduct actions as well as defenses based upon assumption of risk, incurred risk, misuse, unreasonable failure to avoid an injury, and failure to mitigate damages. In so providing, the bill borrowed the provisions of section 1 of the Uniform Act with slight modifications. But in other respects, the bill departed substantially from the Uniform Act.

The most significant departure was the adoption of the more conservative greater-than-fifty-percent threshold rather than a pure comparative fault standard. Other notable differences were the bill's failure to provide for rights of contribution; the failure to preclude set-off of claims and counterclaims covered by liability insurance; and a partial modification of the rule of joint and several liability for concurrent wrongs.¹¹

In the proponents' view, these departures from the Uniform Act caused the bill to fall short of the ideal. Nevertheless, the compromise was strongly advocated in the belief that Indiana otherwise might well become the fiftieth, rather than the fortieth, state to adopt comparative fault principles.

the plaintiff's fault to be compared individually with each defendant but rather with all defendants (or with all defendants and all nonparties), there are other instances in which both plaintiffs and defendants may recover against each other.

⁹S.B. 331, 103rd Gen. Assembly, 1st Sess. (1983).

¹⁰S.B. 287, 103rd Gen. Assembly, 1st Sess. (1983).

¹¹*Cf.* UNIF. COMPARATIVE FAULT ACT, §§ 1-8, 12 U.L.A. 35-46 (Supp. 1984).

C. Procedural History

The bill passed the Senate by a vote of 34-15¹² and went to the House where it was assigned to the Public Policy and Veterans Affairs Committee. After a hearing, the committee sent the bill to the full House without amendments.¹³ On the House floor, the bill was amended to rearrange the order of matters to be considered by the jury. As amended, the bill required the jury first to consider the percentages of fault of the parties and then to consider the damages sustained, but only if the claimant's fault was not greater than fifty percent.¹⁴ Another amendment was added to make clear that the bill would not apply to intentional wrongs.¹⁵

Once these changes were made, opponents of the bill then attacked what they termed the "empty chair" problem. Their concern was that claimants would fail to bring into the lawsuit all of the parties whose fault had contributed to the claimants' injuries. The opponents feared that the defendants would have to pay not only for damages caused by their individual wrongs but also for damages caused by the wrongs of nonparties. Nevertheless, the bill cleared the second reading amendment stage without further amendments.¹⁶

At this point, word was received that Attorney General Linley E. Pearson had informed House Speaker J. Roberts Dailey that passage of the bill would cost the state of Indiana millions of dollars each year. As a result, the Speaker was unwilling to hand down the bill for a final vote unless the objections of the Attorney General could be satisfied. The Attorney General was willing to meet with proponents of the bill to discuss his objections, but only if a group of designated persons was assembled for the meeting. Included were interested legislators and representatives of the Indiana Supreme Court, the Indiana Court of Appeals, and the insurance industry. The meeting was arranged and at the end of an all-day effort, the objections of the Attorney General had been satisfied—but only at substantial cost. That cost was an agreement to amend the bill to permit consideration of the fault of nonparties, and to exclude governmental entities from its coverage.

By the time the meeting with the Attorney General had been held, the deadline for House action on Senate bills had passed. This meant that the only way the bill could be enacted was by stripping the contents of another bill, which had passed both houses, and substituting the amended language of the comparative fault bill. The substituted language would still require the approval of a House-Senate conference committee

¹²IND. HOUSE & SENATE JOUR. INDEX 135 (1983).

¹³IND. HOUSE JOUR. 629 (1983).

¹⁴*Id.* at 658.

¹⁵*Id.*

¹⁶*Id.*

and ultimately the full House and Senate. Senator James Butcher of Kokomo made available Senate Bill 287,¹⁷ which dealt with distribution of trust assets. That bill was stripped, and the comparative fault language was duly substituted. Senate Bill 287 was successively approved by the conference committee,¹⁸ by the Senate by a vote of 41-6,¹⁹ by the House by a vote of 78-12,²⁰ and by Governor Robert Orr.²¹ Its effective date was set for January 1, 1985,²² and its application was limited to civil actions accruing on or after January 1, 1985.²³

II. FEATURES OF THE ACT

A. *Threshold of Fault Required to Preclude Recovery*

With the exception of "pure" comparative fault plans,²⁴ such as that contained in the Uniform Act, Indiana's plan is among those most favorable to claimants in the aspect of when recovery is allowable. Thus, to constitute a complete bar, under the Indiana plan, the claimant's fault must be greater than fifty percent not only in two-party cases, where there is only one claimant and one defendant,²⁵ but also in multiple party cases. In multiple party cases, the claimant may recover even though his fault is equal to, but not greater than, the aggregate fault of all tortfeasors who contributed to the harm.²⁶ The tortfeasors with whom the claimant's fault must be compared include not only the defendants but also non-party tortfeasors, such as those with whom the claimant has reached a settlement, tortfeasors over whom the claimant could not get jurisdiction, and any other tortfeasors who are liable to the claimant and who can be identified by name.²⁷ Section 6's requirement that a nonparty tortfeasor be identified by name presumably precludes the assertion of a nonparty defense based upon the conduct of an unnamed "phantom."²⁸

¹⁷S.B. 287, 103rd Gen. Assembly, 1st Sess. (1983).

¹⁸IND. HOUSE JOUR. 777 (1983).

¹⁹IND. SENATE JOUR. 641, 642 (1983).

²⁰IND. HOUSE JOUR. 783 (1983).

²¹*Id.* at 876.

²²Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 3, 1983 Ind. Acts 1930, 1933.

²³Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 2, 1983 Ind. Acts 1930, 1933.

²⁴Eleven states have "pure" comparative fault plans. Some have been adopted by statutes, but most "pure" plans have been adopted by judicial decisions. Fourteen states, excluding Indiana, have "greater than 50%" plans. Eleven states have "49%" type plans (where recovery is precluded if claimant's fault is equal to or greater than that of the defendant). Two states have plans under which the claimant may recover if his negligence is slight. One state, Tennessee, has a still more restricted plan. See C.R. HEFT & C.J. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* 118-19 (Supp. 1982) [hereinafter cited as HEFT & HEFT]; *Goetzman v. Wichern*, 327 N.W.2d 742 (Iowa 1982).

²⁵IND. CODE 34-4-33-4(a) (Supp. 1984).

²⁶*Id.* § 34-4-33-4(b).

²⁷*Id.* §§ 34-4-33-4 to -6.

²⁸California, Kansas, and Ohio permit consideration of the contribution of phantoms. HEFT & HEFT, *supra* note 24, at 118-19.

In contrast to the liberality of the Indiana Act in multiple party cases, Wisconsin will not permit a recovery unless the claimant's fault is not greater than that of each individual defendant against whom recovery is sought.²⁹ The trend in most states, however, appears to be toward comparing the claimant's fault with the aggregate fault of all the defendants.³⁰ Indiana may be the only state which expressly goes one step further and makes the comparison with the aggregate fault of all tortfeasors, whether sued or not.³¹

B. *Partial Abrogation of Joint and Several Liability Principles*

As implied above, a claimant who is fifty percent at fault may recover against each of three defendants who were twenty percent, twenty percent, and ten percent at fault, respectively, or against a defendant who is ten percent at fault where there were nonparty tortfeasors who were forty percent at fault. Of course, under traditional rules governing the liability of concurrent tortfeasors, the defendant who is ten percent at fault would be liable for the full amount of the claimant's recovery.³² However, limiting recovery against each defendant to the percentage of his own fault, as provided by sections 5(a)(4) and 5(b)(4) of the 1983 Act, implicitly abrogates the traditional rule of joint and several liability for concurrent wrongs, but only in certain instances. The trade off for permitting the claimant who is fifty percent at fault to recover from the defendant who is ten percent at fault was, in part, this partial abrogation of the joint and several liability rule.

Nevada, Vermont, New Hampshire, and Kansas seem to have abrogated the joint and several liability rule completely.³³ Oklahoma has done likewise where the plaintiff is partly at fault.³⁴ Oregon and Texas have also abrogated the joint and several liability rule in only those instances where the fault allocated to a defendant is less than that allocated to the claimant.³⁵

Nothing in the Indiana Act, however, indicates a legislative intention that there be an abrogation of the joint and several liability rule among defendants who collectively are to be treated as a single party, as allowed

²⁹*Soczka v. Rechner*, 73 Wis. 2d 157, 242 N.W.2d 910, 914 (1976). New Jersey and Wyoming follow the same rule. *Van Horn v. William Blanchard Co.*, 173 N.J. Super. 280, 281, 414 A.2d 265, 266, (1980), *aff'd*, 88 N.J. 91, 93, 438 A.2d 552, 554 (1981); *Board of County Comm'rs. v. Ridenour*, 623 P.2d 1174, 11183, *reh'g denied* 627 P.2d 162 (Wyo. 1981).

³⁰*HEFT & HEFT*, *supra* note 24, § 8.130. *See also* *Mountain Mobile Mix, Inc. v. Gifford*, 660 P.2d 883, 888 (Colo. 1983).

³¹IND. CODE 34-4-33-4(b) (Supp. 1984).

³²*Hoesel v. Cain*, 222 Ind. 330, 344-46, 53 N.E.2d 165, 171, *reh'g denied* 222 Ind. 349, 53 N.E.2d 769 (1944).

³³H. WOODS, *COMPARATIVE FAULT* § 13:4, at 226 (1978).

³⁴*Id.* at 77 (Supp. 1983).

³⁵*Id.* § 13:4, at 226.

by section 2(b) of the Act. In other words, the plaintiff with a judgment against an agent and a principal should be able to collect the full amount of his judgment from either. Likewise, nothing in the Act indicates a legislative intention that the joint and several liability rule be abrogated in cases in which claims under the Comparative Fault Act are joined with the claims not covered by the Act. Among other claims excluded under the Act are those based on intentional wrongs;³⁶ claims under the Indiana Tort Claims Act;³⁷ and claims based on strict liability and breach of warranty.³⁸

Requiring one tortfeasor to bear all of the burden of a wrong committed jointly with others has been perceived as out of step with the philosophy of comparative fault laws that claimants should no longer be completely barred from recovery by their own contribution to the wrong. Indiana's response to that perception, in the form of a partial abrogation of the joint and several liability rules, is in contrast to the approach of most other states. Most states retained the joint and several liability rule, and established a right of contribution among concurrent tortfeasors.³⁹ The inevitable accompaniment of rights of contribution is the enlargement of the scope of the litigation by permitting the claimants to bring in additional parties or by permitting the filing of later suits.⁴⁰

Section 7 of the Indiana Act ensures against any possibility of rights of contribution being engrafted onto the Act by the courts. It provides: "In an action under this chapter, there is no right of contribution among tortfeasors."⁴¹ The Indiana plan simplifies lawsuits. This simplification is beneficial to claimants and especially beneficial to their counsel. Additional parties brought in by defendants may greatly increase the lawyer effort required to handle the claim, as well as the time required to get to trial. Such additional effort and time may be of keen significance to claimants' counsel working on a contingent fee basis. The purchase of this greater simplicity came at a high price. That price, in multiple tortfeasor cases, was the shifting of the risk of insolvency of one or more tortfeasors from the solvent tortfeasors to the claimants. Of course, the risk of insolvency of a single defendant has always rested with claimants.

C. *Nonparty Practice or the "Empty Chair" Problem*

Under Indiana law, as well as in other states, there is a problem when one of multiple tortfeasors is not brought into the action. Under present

³⁶IND. CODE § 34-4-33-2 (Supp. 1984).

³⁷*Id.* § 34-4-33-8.

³⁸*Id.* § 34-4-33-2.

³⁹H. WOODS, *supra* note 33, at 13:5-10.

⁴⁰*Id.*

⁴¹IND. CODE § 34-4-33-7 (Supp. 1984). Section 7 goes on to provide: "However, this section does not affect any rights of indemnity." *Id.* In other words, a principal may still seek indemnity from his agent who is at fault.

law, the theoretical possibility exists that a defendant who is ten percent at fault may be required to pay one hundred percent of the damages caused by himself and an insolvent joint tortfeasor who is ninety percent at fault. The experience of most practitioners, however, has been that jurors can rarely stomach this outcome. The result is that most such cases end up with verdicts in favor of the defendant who is ten percent at fault. The Indiana program comes to grips with this problem directly by providing, in effect, that a claimant's recovery shall be diminished by the percentage of fault of named nonparties.

Despite the cries of anguish by plaintiffs' lawyers, the nonparty features of the Act will not be totally injurious to claimants. The same jurors who find it hard to bring themselves to find for plaintiffs against defendants who are ten percent at fault may, under the Indiana plan, find it much easier to rule for plaintiffs when they are required to award only ten percent of the plaintiffs' damages against defendants who are ten percent at fault.

The Indiana plan will serve the interests of both sides by furnishing a straightforward method of dealing with situations in which claimants have settled with one or more tortfeasors. Jurors will simply diminish the claimant's recovery by the percentage of fault (not by the amount paid) of the tortfeasors who have settled.

D. Temporary Inclusion of Strict Liability and Breach of Warranty Cases

Section 2(a) of the 1983 Act expressly provided that comparative fault principles should apply to strict liability and breach of warranty cases. That provision was borrowed from section 1(b) of the Uniform Act. However, the 1984 amendments to the Act deleted strict liability and breach of warranty cases from its coverage.⁴² The effects of this change will be discussed in some detail later in this Article.⁴³

Interestingly, in states which have adopted comparative "negligence" statutes, courts have ruled that strict liability cases are encompassed by comparative fault principles,⁴⁴ even though the statutes do not specifically mention such cases.

E. Exclusion of State Tort Claims

Section 8 of the Act specifically exempts claims against governmental entities or public employees under Indiana Code sections 34-4-16.5-1 to

⁴²Act of Mar. 5, 1984, Publ. L. No. 174-1984, Sec. 8, § 13, 1984 Ind. Acts 1468, 1473 (codified at IND. CODE § 34-4-33-13 (Supp. 1984)).

⁴³See *infra* notes 54-67 and accompany text.

⁴⁴See, e.g., *Kennedy v. City of Sawyer*, 228 Kan. 439, 450, 618 P.2d 788, 798 (1980); *Busch v. Busch Construction, Inc.*, 262 N.W.2d 377, 393 (Minn. 1977); *Baccelleri v. Hyster Co.*, 287 Or. 3, 12, 597 P.2d 351, 355 (1979); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 352 (Tex. 1977); and cases collected at Annot., 9 A.L.R. 4TH 633 (1981).

-19. Nothing in the Act, however, prohibits joinder of governmental entities with nongovernmental entities. Thus, the right to join such defendants should continue to exist.

Ironically, the governmental exemption could pose a decided disadvantage to governmental entities. Faultless claimants may recover the entire awards from governmental entities even though the fault of other defendants substantially contributed to their injuries. The partial abrogation of joint and several liabilities applies only to claims brought under the Act, and because the Act does not apply to governmental entities, it will give governmental entities no protection on this score. On the other hand, if there is any contributory fault on the part of claimants, they will be completely barred from recovering from any governmental entities. In addition, these claimants will have the governmental entities' negligence set off against them as to the remaining defendants.

This unbalanced situation came about because the Indiana Attorney General had the political power to ensure defeat of any bill which did not exempt governmental entities. In a future session of the General Assembly, the symmetry of the law should be restored by the repeal of section 8.

F. Forms of Verdicts

In cases based upon fault, juries no longer will be able to simply find for plaintiffs or defendants and, in the case of verdicts for the plaintiffs, fill in figures. Future juries will be required, under section 5, to determine the percentage of fault of all tortfeasors, including plaintiffs, defendants, and nonparties; and, where the fault of plaintiffs does not exceed fifty percent, they will be required to determine the total damages of the plaintiffs as if fault were to be disregarded. Finally, juries will be required to multiply the percentages of fault of each defendant by the total damages to render individual verdicts against each defendant or, where appropriate, against each group of defendants who should be treated as a single party. The content of the instructions which the trial court must give to juries is set out under section 5(a) where single defendants are involved and under section 5(b) where multiple defendants are involved. The precise forms of verdicts which trial courts should furnish juries is left to the court's discretion. If confusion is to be avoided, it probably will be necessary for trial courts to design and furnish juries with separate verdict forms for each claim, counterclaim, or cross-claim.

A suggested form of verdict to be used where the fault of one plaintiff and one defendant (or one defendant and additional related defendants) are involved is set out below:

VERDICT

1. We find that the comparative fault of plaintiff, *P*, was _____ %
2. We find that the comparative fault of defendant, *D*₁, and defendant, *D*₂, was _____ %
3. Disregarding the comparative fault of the parties, we find that plaintiff's total damages are \$ _____
4. A. We find for the plaintiff, *P*, against the defendants, *D*₁ and *D*₂, in the sum of \$ _____

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- B. We find for the defendants, *D*₁ and *D*₂.

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A suggested form of verdict to be used where the fault of one plaintiff, two defendants, and a nonparty are involved is set out below:

VERDICT

1. We find that the comparative fault of plaintiff, *P*, was _____ %
2. We find that the comparative fault of defendant, *D*₁, was _____ %
3. We find that the comparative fault of defendant, *D*₂, was _____ %
4. We find that the comparative fault of nonparty, *NP*, was _____ %
5. Disregarding the comparative fault of the parties and the nonparty, we find that plaintiff's total damages are \$ _____
- 6.A. We find for the plaintiff, *P*, against the defendant, *D*₁, in the sum of \$ _____
- B. We find for the plaintiff, *P*, against the defendant, *D*₂, in the sum of \$ _____

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- 7.A. We find for the defendant, *D*₁.

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- B. We find for the defendant, *D*₂.

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In using these verdict forms when there are multiple plaintiffs, the fault of any other plaintiff (when that fault is not imputable to the plaintiff for whose claim the verdict form is being supplied) should be treated as the fault of a nonparty. In addition, where there are claims against additional defendants who are not subject to adjudication under the Act, such as claims for strict liability, breach of warranty, or claims against governmental units, those defendants should be treated as nonparties for purposes of the comparative fault verdict. Other verdict forms should be furnished with respect to all such noncomparative fault claims.

One of the purposes of requiring that jurors not only determine the percentages of fault and total damages but also the ultimate general verdict or verdicts was to ensure that jurors would know the effects of their determinations. In Wisconsin, jurors determine total damages and percentages of fault but are precluded from returning a general verdict *and* from knowing the effects of their findings.⁴⁵ The Wisconsin practice is reported to result in many mistrials because of inadvertent, or attempted covert, disclosures to jurors about the effects of their determinations. The practice reflects a lack of confidence in the good judgment of jurors.

In contrast to the Wisconsin statute, a Colorado statute reads:

In a jury trial in any civil action in which contributory negligence is an issue for determination by the jury, the trial court shall instruct the jury on the effect of its finding as to the degree of negligence of each party. The attorneys for each party shall be allowed to argue the effect of the instruction on the facts which are before the jury.⁴⁶

This language was added to the Colorado law following a decision which precluded counsel from informing the jury of the effects of their findings.⁴⁷

Several other states whose comparative fault laws preclude jurors from returning general verdicts have mandated, either by statute or court decision, that jurors be informed of the effects of their special verdicts.⁴⁸

⁴⁵HEFT & HEFT, *supra* note 24, § 3.570, at 81.

⁴⁶COLO. REV. STAT. ANN. § 13-21-111(4) (1983).

⁴⁷*Simpson v. Anderson*, 186 Colo. 163, 526 P.2d 298 (1974).

⁴⁸The Connecticut comparative negligence statute has language somewhat similar to the Colorado statute. The statute reads in pertinent part: "(b) In any action to which this section is applicable, the instructions to the jury given by the court shall include an explanation of the effect on awards and liabilities of the percentage of negligence found by the jury to be attributable to each party." CONN. GEN. STAT. ANN. § 52-572h (1982). The Oregon statute requires that the jury be informed of the legal effect of its answers to questions as to percentages of fault. OR. REV. STAT. § 18.480(2) (1983). In North Dakota the jury is entitled to know the effect of their determination of percentages of fault and the parties may comment to the jury concerning the same. N.D. CENT. CODE § 9-10-07 (1983). Idaho has reached the same result by court decision. *Seppi v. Betty*, 99 Idaho 186, 195, 579 P.2d 683, 692 (1978). The Idaho decision contains a good rationale as to why the jury should be informed of the effects of their special verdicts. New Jersey holds that the jury is entitled to know the legal effect of its allocation of negligence because the jury will thereby

Maine,⁴⁹ New Hampshire,⁵⁰ and Oklahoma⁵¹ achieve the result of jurors knowing the entire effects of their finding by the device of requiring general verdicts.

III. 1984 AMENDMENTS TO THE ACT

A. *Passage of Senate Bill 419*

Senator Guy with the cosponsorship of Senator Monk and Representatives Becker and Campbell introduced Senate Bill 419 in the 1984 session. The bill was debated, modified, and polished. Thereafter it was passed in the Senate by a vote of 42-1⁵² and in the House by a vote of 80-15.⁵³

B. *Removal of Claims for Strict Liability and Breach of Warranty from the Act*

The most far-reaching change made by the Senate Bill 419 was the removal of claims for strict liability and breach of warranty from the coverage of the Act.⁵⁴

By this change, the comparative *fault* plan of the Act was converted into something closer to a comparative *negligence* plan. The impetus for the change came from the Indiana Manufacturers Association. One of its lobbyists declared that his organization did not want to lose the absolute defenses of assumption of risk, misuse of the product, and the "open and obvious danger" rule. The breach of warranty exclusion tagged along with no expressed analysis as to why.

The manufacturers' objective will undoubtedly be realized as long as the action is brought under the theory of strict tort liability. However, if a products liability action is not brought under the theory of strict liability but, instead, under the theory of negligence, the objective will fail. The manufacturers' representatives understood these facts but, notwithstanding, pressed successfully for the change.

C. *Tactical Considerations Arising from Exclusion of Strict Liability and Breach of Warranty Actions from the Act*

The exclusion of strict liability and breach of warranty claims from the comparative fault plan presents claimants' counsel with options to

be better able to fulfill its fact finding function. *Roman v. Mitchell*, 82 N.J. 336, 345, 413 A.2d 322, 327 (1980).

⁴⁹ME. REV. STATS. ANN. tit. 14, § 156 (1983-84).

⁵⁰N.H. REV. STATS. ANN. § 507:7-a (1983).

⁵¹*Smith v. Gizzi*, 564 P.2d 1009, 1013, (Okla. 1977).

⁵²IND. SENATE JOUR. 559 (1984).

⁵³IND. HOUSE JOUR. 599 (1984).

⁵⁴As previously noted, strict liability and breach of warranty were included in the 1983 version of the Comparative Fault Act. See *supra* notes 43-44 and accompanying text.

file products liability claims in negligence, strict liability, or both. The choice may profoundly affect the outcome of the case.

Of course, not every product liability case lends itself to being pursued under a negligence theory as in strict liability. Nevertheless, there are some products liability cases in which proof of one theory is proof of the other, or in which proof of one theory is as easily made as that of the other. Under *Ortho Pharmaceutical Corp. v. Chapman*,⁵⁵ the elements of a strict liability case based upon inadequate warnings are indistinguishable from the elements of a negligence case.⁵⁶ The same conclusion appears to remain valid under the 1983 amendments to the Products Liability Act.⁵⁷

Section 2.5 of that statute recites that a product is defective if the seller fails to "properly" label the product so as to give "reasonable warnings" of danger. This language is standard negligence language. Similarly, the same section speaks about products which are defective by reason of inadequate instructions for use in terms having the ring of negligence.⁵⁸

The "state of the art" language of the strict liability statute also suggests that a *design* strict liability case may be little different than a negligence case.⁵⁹

On the other hand, when the problem with the product is in the way it was made, it is much easier to prove that the product is defective and unreasonably dangerous than it is to prove that it was the negligence of the defendant which caused the product to be defective. Notwithstanding such difficulty, the greater burden of proving negligence should be considered when there is need either of the ameliorating effects of comparative fault or of avoiding some limitation or restriction upon strict liability.

There are several instances in which the negligence theory may have an advantage over the strict liability theory. The first of these instances is when the claimant misuses the product. Product misuse is a complete defense to strict liability.⁶⁰ But in a negligence case when the defense is appropriately translated into a form of assumption of risk, it becomes only a partial defense.⁶¹ The second situation in which a negligence theory

⁵⁵180 Ind. App. 33, 388 N.E.2d 541 (1979).

⁵⁶*Id.* at 45, 388 N.E.2d at 549.

⁵⁷Act of Apr. 21, 1983, Pub. L. No. 297-1983, 1983 Ind. Acts 1814 (codified at IND. CODE § 33-1-1.5-1 to -5 (Supp. 1984)).

⁵⁸IND. CODE § 33-1-1.5-2.5(b) (Supp. 1984). This section provides: "A product is defective under this chapter if the seller fails to: (1) . . . (2) give *reasonably* complete instructions on proper use of the product; when the seller, by *exercising reasonable diligence*, could have made such warnings or instructions available to the user or consumer." *Id.* (emphasis added).

⁵⁹*Id.* § 33-1-1.5-4(b)(4). This section provides: "When physical harm is caused by a defective product, it is a defense that the design, manufacture, inspection, packaging, warning, or labeling of the product was in conformity with the generally recognized state of the art at the time the product was designed, manufactured, packaged, and labeled." *Id.*

⁶⁰*Id.* § 3-1-1.5-4(b)(2).

⁶¹*Id.* § 34-4-33-2.

may have an advantage over strict liability is when the claimant assumes the risk of the product's defectiveness.⁶² Here, again, a complete defense is reduced to a partial defense. The final instance is when the defectiveness of the product is open and obvious.⁶³ If, as asserted by Paul Rheingold, in *Expanding Liability of the Product Supplier: A Primer*,⁶⁴ the open and obvious danger rule is merely assumption of risk as a matter of law, then a complete bar, in yet another instance, has been reduced to a partial bar.⁶⁵

By contrast there are other instances in which asserting a strict liability theory may be to the advantage of the claimant. Among such instances are the following:

(1) When the claimant is partly at fault, but that fault is contributory negligence as opposed to assumption of risk, product misuse, or using a product with an open and obvious danger. While contributory negligence constitutes a partial defense under section 2, it is no defense to a strict liability action.⁶⁶

(2) When there are other defendants who are partly at fault and there is doubt as to their solvency, so that the partial abrogation of the joint and several liability rule would be a problem.

(3) When there are parties who were partly at fault whom the claimant cannot sue, or does not want to sue, so that the nonparty provisions of the Act would be a problem.

(4) When the claimant has an opportunity to secure a substantial payment under a loan agreement, whose beneficial effects are largely destroyed when the Act applies.⁶⁷

It might be urged that the need to weigh the advantages of strict liability versus negligence could be avoided by asserting both theories. However, before this easy avenue is chosen, counsel should consider carefully the extent to which the jury may be confused by having to cope with both theories and the diverse effects flowing from them.

D. Elimination of "Primary Defendant" Concept

Section 2(a) of the 1983 Act contained a provision reading: "'Primary defendant' means a defendant against whom recovery is sought based upon

⁶²*Id.*

⁶³*Bemis Co. v. Rubush*, 427 N.E.2d 1058, 1061 (Ind. 1981).

⁶⁴2 HOFSTRA L. REV. 521 (1974).

⁶⁵*Id.* at 541.

⁶⁶IND. CODE § 33-1-1.5-4 (Supp. 1984).

⁶⁷Loan agreements have achieved much popularity in Indiana since the case of *NIPSCO v. Otis*, 145 Ind. App. 159, 250 N.E.2d 378 (1969). The loan agreement derives its great advantage to claimants from the joint and several liability rule. Thus, if Defendant *A* lends the claimant \$100,000.00 subject to repayment only if the claimant recovers \$200,000.00 from the Defendant *B*, the claimant may proceed against Defendant *B* for the full amount of his damages and do so as if the payment under the loan agreement had not been made. When the Act applies, however, much of the former advantage of the loan agreement is destroyed by virtue of the claimant's recovery from Defendant *B* being diminished by Defendant *A*'s percentage of fault.

his own alleged act, omission, or product and not based upon his relationship to another defendant."⁶⁸ This provision was stricken from the Act by the 1984 amendments.⁶⁹ In so doing, sections 1 and 2 of the Act were brought more in line with sections 1 and 2 of the Uniform Comparative Fault Act, upon which Indiana's sections 1 and 2 were patterned.⁷⁰ The Uniform Act, and now the Indiana Act, leaves it to the courts to determine when defendants should be treated as a single party. The commissioners' comments to section 2 of the Uniform Act describe appropriate instances for treating defendants as a single party: "In situations such as that of principal and agent, and driver and owner of a car, or manufacturer and retailer of a product, the court may under appropriate circumstances find that the two persons should be treated as a single party for purposes of allocating fault."⁷¹

E. Inconsistent Verdicts

Senate Bill 419 added section 9 to the 1983 Act to cope with mistakes by juries which cause inconsistencies in the determinations of percentages of fault, total damages, and ultimate general verdicts. Before discharging the jury the trial court is required to inspect the verdict or verdicts to determine whether or not all components are consistent. If they are not, the trial court is then required to "(1) inform jurors of the inconsistencies; (2) order them to resume deliberations to correct the inconsistencies; and (3) instruct them that they are at liberty to change any portion or portions of the verdicts to correct the inconsistencies."⁷²

F. Combined Claims Against Qualified Health Care Providers and Nonhealth Care Providers

The medical malpractice statute⁷³ creates a problem as to claims asserted against a defendant covered by the Medical Malpractice Act and a defendant not so covered. Typically, the claims would be joined in one action. One of the purposes of the joinder would be to prevent the claimant from being whipsawed by two defendants, i.e., by a defendant physician blaming the other defendant, for example a drug company, and by the defendant drug company in turn blaming the physician. This kind of

⁶⁸IND. CODE § 34-4-33-2(a) (Supp. 1983) (repealed 1984).

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

⁷⁰Compare UNIF. COMPARATIVE FAULT ACT §§ 1, 2, 12 U.L.A. 37-40 (Supp. 1984) with IND. CODE §§ 34-4-33-1, -2 (Supp. 1984).

⁷¹UNIF. COMPARATIVE FAULT ACT § 2 commissioners' comments, 12 U.L.A. 39 (Supp. 1984).

⁷²Act of Mar. 5, 1984, Pub. No. 174-1984, Sec 4, § 9, 1984 Ind. Acts 1468, 1471 (codified at IND. CODE § 34-4-33-9 (Supp. 1984)).

⁷³IND. CODE §§ 16-9.5-1-1 to -10-5 (1982).

finger pointing by defendants is likely to do the claimant no harm when it occurs in the same action. It may cause serious harm, however, when the defendants are sued in separate actions. The abrogation of the joint and several liability rule plus the nonparty provisions of the Act may increase that possibility of harm. Nevertheless, the time required to complete the medical review panel process (before suit can be filed against a physician) militates against joinder. If the claimant waits to sue a nonparty, such as a drug company, until the medical review panel has rendered its opinion, the statute of limitations on the claim against the drug company may have run.

Section 11 of the Act, added by Senate Bill 419,⁷⁴ deals with this situation by simply providing that the claimant may sue the nonhealth care provider; then, upon request by the claimant, the court shall grant reasonable delays in that action until the medical review panel procedure has been completed. Thereafter, the court is required to permit joinder of the qualified health care provider as an additional defendant. Thus, a claimant who is worried that the drug company will succeed in laying the blame on the physician in the first action, and that the physician will succeed in tying the blame on the drug company in the later separate action has in section 11 an antidote for his worry.

G. Liens and Claims for Payment of Medical Expenses

Senate Bill 419 added section 12 to the Act to deal with subrogation liens or other claims stemming from the payment of medical expenses or other benefits in a claim for personal injuries or death. It provides that when the claimant's recovery is diminished by comparative fault, lack of the defendant's solvency, or by any other cause, the subrogation lien or other claim shall be diminished in the same proportion as the claimant's recovery is diminished.⁷⁵ Liens under Indiana Code sections 22-3-2-13 or 22-3-7-36 for the payment of worker's compensation or occupational disease benefits are excluded from this provision.⁷⁶

H. Nonparty Practice

As earlier mentioned, the "empty chair" or "nonparty" language of the Act was added at the eleventh hour before passage in 1983. Upon reflection, proponents of the Act felt that the extent to which the concept had been defined and the provisions respecting the effects which should

⁷⁴Act. of Mar. 5, 1984, Pub. L. No. 174-1984, Sec 6, § 11, 1984 Ind. Acts 1468, 1472 (codified at IND. CODE § 34-4-33-11 (Supp. 1984)).

⁷⁵Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 7, § 12, 1984 Ind. Acts 1468, 1472-73 (codified at IND. CODE § 34-4-33-12 (Supp. 1984)).

⁷⁶*Id.*

follow were inadequate. An effort to remedy this deficiency was made in Senate Bill 419 by adding a definition of the meaning of "nonparty," and a new section devoted to the "nonparty defense." The 1984 amendment defines nonparty as "a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant. A nonparty shall not include the employer of the claimant."⁷⁷

The last sentence of the "nonparty" definition was not included in the original proposal. Instead, an entirely different section had been proposed and provided essentially that when the claimant's recovery was diminished by comparative fault, the employer's lien for payment of worker's compensation benefits under Indiana Code section 22-3-2-13 should be similarly diminished. The insurance lobbyists were opposed to any such "tinkering" with the Indiana Workmen's Compensation Act.⁷⁸ As a trade-off, they offered as an addition to the original nonparty definition a sentence reading: "A nonparty shall not include the employer of the claimant." Even though the trade off was not a like-for-like nature, it was accepted by the proponents of the bill.

The new section pertaining to the nonparty defense provides that the burden of proof of the defense shall be on the defendant.⁷⁹ Lobbyists for the Indiana Manufacturers Association were concerned that this recitation might somehow reduce the claimant's burden of proof. To allay this concern, the following sentence was added: "However, nothing in this chapter relieves the claimant of the burden of proving that fault on the part of the defendant or defendants caused, in whole or in part, the damages of the claimant."⁸⁰

Section 10(c) deals with a concern that defendants might delay asserting their nonparty defenses until after the statute of limitation had run upon the claimant's right to sue the nonparty. This subsection requires a defendant who has knowledge of a nonparty defense to assert it as part of his first answer. If the defendant does not have knowledge of the defense at the outset, guidelines are set out directed toward the twin objectives of giving the defendant a reasonable opportunity to discover that he has a nonparty defense and of requiring the defendant to disclose that defense in sufficient time to allow the additional party to be brought into the litigation before the claim becomes time barred.⁸¹

Section 10(d) attacks the same problem as section 10(c), but in the context of cases filed under the medical malpractice statute. When a

⁷⁷Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2, 1984 Ind. Acts 1468, 1468-69 (codified at IND. CODE § 34-4-33-2(a) (Supp. 1984)).

⁷⁸IND. CODE tit. 22, art. 3 (1982 & Supp. 1984).

⁷⁹Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 5, § 10(b), 1984 Ind. Acts 1468, 1471 (codified at IND. CODE § 34-4-33-10(b) (Supp. 1984)).

⁸⁰*Id.*

⁸¹*See* IND. CODE § 34-4-33-10(c) (Supp. 1984).

medical malpractice claim is filed with the Indiana Insurance Commissioner, the defendant is required to plead his nonparty defense within ninety days. The defendant may apply to any court having jurisdiction over the claim for additional time to assert that defense. The court may grant additional time but must give due consideration to the claimant's need for time to commence an action against any nonparty who may be identified by the defendant before the running of the statute of limitations.⁸²

IV. CONCLUSION

The Act provides solutions to many issues which otherwise would have taken years of litigation to resolve. The solutions, whether ideal or not, at least represent a consensus of diverse groups who spent more than a year, over two legislative sessions, striving to achieve a plan under which they could live and which the General Assembly would pass.

By ruling out rights of contribution, a large problem area, with which other states have wrestled, was sidestepped. In so doing, Indiana simplified its plan.

By requiring jurors to record their determinations of percentages of fault, total damages, and the mathematics by which they compute general verdicts, we have made our plan more complex than the plans of most other states. Nevertheless, jurors can meet the challenge of complex verdicts if lawyers and judges will first meet the challenge of designing understandable jury verdict forms which lead jurors step-by-step along the path they must follow.

Not all issues with which the courts of other states have struggled are solved by the Act. Some of the issues not dealt with are: set-off where the parties have liability insurance; the continued role, if any, of the rule of last clear chance; the continued role, if any, of the sudden peril doctrine; the continued role, if any, of the open and obvious danger rule; how the fault of subsequent, but not joint or concurring, tortfeasors shall be handled; whether comparative fault principles shall apply to the recovery of punitive damages; and many others. These issues are left to the courts to decide. Since it is the genius of the common law to deal with problems on a case by case basis, the failure of the legislature to provide all of the answers eventually needed is not necessarily a mistake.

It is undoubtedly true that the adoption of comparative fault principles will add much complexity to Indiana tort law. The contributory negligence system did indeed lend itself to simplicity. Simplicity, however, is not the ultimate test of a good tort system. The simplicity of the rules of contributory negligence was purchased at a price of much harshness and injustice. The correction of that harshness and injustice was long

⁸²See *id.* at § 34-4-33-10(d).

overdue. Despite the compromises made to achieve passage of the Indiana Comparative Fault Act, it provides a workable plan which should be a marked improvement over existing law.