

The Indiana Comparative Fault Act: How Does It Compare With Other Jurisdictions?

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I. INTRODUCTION

On January 1, 1985, comparative negligence will finally become law in Indiana.¹ The Indiana courts will face a challenging task in interpreting and applying the provisions of the Indiana Comparative Fault Act. Their primary resource for interpreting the Indiana Act may be the multitude of decisions from other jurisdictions interpreting the provisions of their respective comparative negligence laws.

This article will review decisions from other jurisdictions to show how they have applied their comparative negligence laws with regard to critical issues in civil litigation. Moreover, certain provisions of the Indiana Act will be compared with the laws of other jurisdictions in an effort to provide some guidance in construing the Indiana Comparative Fault Act.

II. OVERVIEW

To date, the vast majority of states have adopted some form of comparative negligence. These forms fall primarily into three basic categories: pure, modified, and slight-gross. The pure form provides for the apportionment of damages between a negligent defendant and a contributorily negligent plaintiff regardless of the extent to which either party's negligence contributed to the injury. Under the modified approach, however, while damages are apportioned between the parties, contributory negligence continues to be a complete defense where a plaintiff's negligence exceeds that of the defendant. Finally, under the slight-gross form of comparative negligence a plaintiff's contributory negligence will bar his recovery unless his negligence is slight and/or the defendant's negligence was gross in comparison.

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¹Act 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)). In 1951, the Indiana Appellate Court declined to adopt comparative negligence in Indiana. *Lewis v. Mackley*, 122 Ind. App. 247, 253, 99 N.E.2d 442, 445 (1951).

A. *Pure Comparative Negligence*

Twelve states have adopted the pure form of comparative negligence.² This form permits a contributorily negligent plaintiff to recover damages regardless of the extent to which his negligence contributed to the injury. Thus, the doctrine of contributory negligence no longer acts as a complete bar to recovery unless the plaintiff's negligence is the sole proximate cause of the injury.³ Contributory negligence remains as a partial bar to recovery, however, to the extent that a plaintiff's negligence proportionately reduces the amount of damages attributable to the entire injury to which a non-negligent plaintiff would be entitled.⁴

Proponents of the modified comparative negligence system have criticized the pure comparative negligence rule stating that it favors the party who has incurred the most damages regardless of the degree of his negligence.⁵ To illustrate, consider a plaintiff, twenty percent at fault and suffering \$100,000 in damages, and a defendant, eighty percent at fault who has suffered only \$10,000 in damages. Under the pure form the plaintiff would recover eighty percent of his damages or \$80,000. However, suppose it was the defendant who had suffered the \$100,000 in damages and the plaintiff who had suffered only \$10,000 in damages. The plaintiff would still recover eighty percent of his damages, \$8,000, but the defendant, assuming he counterclaimed, would be able to recover from the plaintiff twenty percent of his damages or \$20,000. Critics of the pure system view this result as unfair and fear that under this scenario a plaintiff would be reluctant to file suit against a defendant even though the defendant is eighty percent at fault.⁶

The jurisdictions which have adopted the pure comparative negligence rule point out, on the other hand, that neither party escapes liability for his negligence and neither party is unjustly enriched:

How can it be argued that such a result would be unfair, when each party would be held responsible to the other for the harm

²Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981); Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982); Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979); Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981); LA. CIV. CODE ANN. art. 2323 (West Supp. 1984); MISS. CODE ANN. § 11-7-15 (1972); N.Y. CIV. PRAC. LAW & R. § 1411 (McKinney 1976); R.I. GEN. LAWS § 9-20-4 (Supp. 1983); WASH. REV. CODE ANN. § 4.22.005 (Supp. 1983). (Of the eight states adopting comparative negligence by judicial decision, only one, West Virginia, adopted a modified form.)

³See Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973).

⁴Scott v. Rizzo, 96 N.M. 682, 689, 634 P.2d 1234, 1241 (1981); see also Placek v. City of Sterling Heights, 405 Mich. 638, 660-61, 275 N.W.2d 511, 519 (1979).

⁵Bradley v. Appalachian Power Co., 256 S.E.2d 879, 883 (W. Va. 1979).

⁶*Id.* at 885 n.15. Proponents of the modified system agree that such a result would not occur under a modified rule because the defendant, being more at fault than the plaintiff, would be precluded from recovery.

caused to that other person by his proportionate fault? It surely is a fairer allocation of liability than the "modified" forms which require plaintiff to have been less negligent than or not more than equally as negligent as defendant. Those formulae punish either the plaintiff or counter-plaintiff who is but slightly more negligent with bearing his own loss and about one-half of the losses of the other party as well. . . . In cases of multiple defendants, if plaintiff's individual fault exceeds the individual degree of fault of each other defendant—even though the totality of defendants' fault exceeds plaintiff's—under the "modified" concepts, plaintiff recovers nothing.

. . . Pure comparative negligence denies recovery for one's own fault; it permits recovery to the extent of another's fault; and it holds all parties fully responsible for their own respective acts to the degree that those acts have caused harm.⁷

Thus, under the pure system each party is responsible for contributing his share of the total damages suffered by both parties' negligent acts.

Another, more realistic, objection to the pure comparative negligence rule arises when both parties have liability insurance. Then, as can be seen in the earlier example where the plaintiff suffered \$10,000 in damages and was twenty percent at fault, and the defendant was eighty percent at fault and sustained \$100,000 in damages, the benefits of pure comparative negligence would clearly flow to the insurers.⁸ Some commentators have pointed out that this flaw does not lie "in the concept of pure comparative negligence, but rather in the operation of set-off."⁹ To solve this problem, some states have statutorily precluded set-off in all circumstances,¹⁰ and some courts have precluded set-off when both parties are insured and the separate verdicts are to be paid by their respective insurance companies.¹¹ Therefore, each party would recover damages for injuries not attributable to his own fault.

B. *Modified Comparative Negligence*

The majority of comparative negligence states have adopted a less extreme, modified system of which there are two distinct types. Under both systems the doctrine of contributory negligence remains a complete defense to a plaintiff's recovery when the plaintiff's negligence exceeds

⁷Scott v. Rizzo, 96 N.M. 682, 690, 634 P.2d 1234, 1241-42 (1981). See also Hoffman v. Jones, 280 So. 2d 431, 439 (Fla. 1973). ("The liability of the defendant in such a case should not depend upon what damage he *suffered*, but upon what damages he *caused*."); Alvis v. Ribar, 85 Ill. 2d 1, 25, 421 N.E.2d 886, 897 (1981).

⁸In that example, defendant's insurer, because of set-off, would not have to compensate plaintiff, and plaintiff's insurer would only have to pay defendant \$12,000.

⁹Note, *Comparative Negligence*, 81 COLUM. L. REV. 1668, 1672 (1981).

¹⁰See, e.g., R.I. GEN. LAWS § 9-20-4.1 (Supp. 1983).

¹¹See, e.g., Stuyvesant Ins. Co. v. Bournazian, 342 So. 2d 471, 474 (Fla. 1976).

a designated figure. The rationale cited in support of modified systems is that a party should not be able to recover damages when he is more at fault than the party from whom he seeks recovery. As stated by the court in *Bradley v. Appalachian Power Co.*,¹² "it is difficult, on the theoretical grounds alone, to rationalize a system which permits a party who is 95 percent at fault to have his day in court as a plaintiff because he is 5 percent fault-free."¹³

The majority of states that have adopted a modified version of comparative negligence have selected a "not greater than" system.¹⁴ Under the not greater than rule, a negligent plaintiff may recover damages reduced in proportion to the percentage of negligence attributable to him provided his negligence is not greater than that of the defendant's.¹⁵ Accordingly, where a plaintiff and defendant are each fifty percent negligent, the plaintiff may recover one half of his damages.¹⁶

Under the "less than" rule, the minority approach of the two modified comparative negligence systems,¹⁷ a plaintiff may recover damages diminished in proportion to the amount of his negligence so long as his negligence is less than that of the defendant's.¹⁸ Hence, if a plaintiff and defendant were each fifty percent negligent, the plaintiff would be barred from recovery under the "less than" rule just as he would be barred under the doctrine of contributory negligence.¹⁹

¹²256 S.E.2d 879 (W. Va. 1979).

¹³*Id.* at 883.

¹⁴CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1984); HAWAII REV. STAT. § 663-31 (1976); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1984); MINN. STAT. ANN. § 604.01 (West Supp. 1984); MONT. CODE ANN. § 58.607.1 (Cum. Supp. 1977); NEV. REV. STAT. § 41.141 (1973); N.H. REV. STAT. § 507:7-a (1983); N.J. STAT. ANN. § 2A:15-5.1 (West Supp. 1983); OHIO REV. CODE ANN. § 2315.19 (Page 1981); OKLA. STAT. ANN. tit. 23, § 13 (West Supp. 1983); OR. REV. STAT. § 18.470 (1983); PA. STAT. ANN. tit. 42, § 7102 (Purdon 1982); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1984); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1983); WIS. STAT. ANN. § 895.045 (West 1983). This form has also been known as the "New Hampshire approach." Note, *supra* note 9, at 1673.

¹⁵See, e.g., *Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir. 1974); *Becker's, Inc. v. Breyare*, 361 Mass. 117, 279 N.E.2d 651 (1972); *Dunham v. Southside Nat'l Bank*, 169 Mont. 466, 548 P.2d 1383 (1976); *Howard v. Backman*, 524 S.W. 2d 414 (Tex. Civ. App. 1975); *Shea v. Peter Glenn Shops, Inc.*, 132 Vt. 317, 318 A.2d 177 (1974); *Schuh v. Fox River Tractor Co.*, 63 Wis. 2d 728, 218 N.W.2d 279 (1974).

¹⁶See, *Leyva v. Smith*, 557 S.W.2d 169 (Tex. Civ. App. 1977).

¹⁷*Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979). ARK. STAT. ANN. §§ 27-1763 to 27-1765 (1979); COLO. REV. STAT. § 13-21-111 (1974); GA. CODE ANN. § 105-603 (1968); IDAHO CODE § 6-801 (1979); KAN. STAT. ANN. § 60-258a (Supp. 1984); ME. REV. STAT. ANN. tit. 14, § 156 (1980); N.D. CENT. CODE § 9-10-07 (1975); UTAH CODE ANN § 78-27-37 (1977); WYO. STAT. § 1-1-109 (1983). This system has also been referred to as the "Wisconsin approach," having been initiated in Wisconsin. Note, *supra*, note 9, at 1672-73. However, in 1971, the legislature amended the Wisconsin statute placing it under the not greater than rule.

¹⁸*Jackson v. Frederick's Motor Inn*, 418 A.2d 168 (Me. 1980); *Brittain v. Booth*, 601 P.2d 532 (Wyo. 1979).

¹⁹*Lee v. Howard*, 483 S.W.2d 922 (Tex. Civ. App. 1972) (applying Arkansas law).

Advocates of the pure comparative negligence rule assail the modified systems primarily on the ground that they involve the drawing of an arbitrary line beyond which contributory negligence may still be asserted as a complete bar to a plaintiff's suit.²⁰ The court in *Scott v. Rizzo*²¹ stated:

[The modified approach] "simply shifts the lottery aspect of the contributory negligence rule to a different ground." We add the "gross-slight" form of comparative negligence to that appraisal, as well. Those rules do not abrogate contributory negligence; they merely slightly reduce defendant's chances of a defense verdict if there is a showing of plaintiff's contributory negligence.²²

On the other hand, proponents of the modified systems assert that the arbitrary line argument is more theoretical than real. As the *Bradley* court discussed, it is doubtful that any jury would be able to apportion contributory negligence so closely: "In all probability, when the contributory negligence rises near the 50 percent level the jury will conclude that plaintiff is guilty of such substantial contributory negligence that it will fix his percentage at 50 or higher to bar his recovery."²³

Another criticism of the modified approach is the problem that arises where multiple defendants are present. In these cases the issue becomes whether the plaintiff's negligence should be compared with that of individual defendants or the collective negligence of all of the defendants in determining whether contributory negligence will bar the plaintiff's recovery.²⁴ Although most states deal with the problem by comparing the plaintiff's negligence with the combined defendants' negligence under the less restrictive collective negligence approach,²⁵ this issue would not arise under the pure comparative negligence rule where each party is responsible for his own negligence.

²⁰See *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 827, 119 Cal. Rptr. 858, 874, 532 P.2d 1226, 1242 (1975) (The court rejected the modified system of comparative negligence because it merely shifted "the lottery aspect of the contributory negligence rule to a different ground."); *Alvis v. Ribar*, 85 Ill. 2d 1, 17, 421 N.E.2d 886, 898 (1981) (court agreed with reasoning of *Li*); *Placek v. City of Sterling Heights*, 405 Mich. 638, 660-61, 275 N.W.2d 511, 519 (1979) (quoting *Kirby v. Larson*, 400 Mich. 585, 642-44, 256 N.W.2d 400, 428 (1977). "The rule preventing recovery if plaintiff's negligence exceeds 50% of the total fault is just as arbitrary as that which completely denies recovery. Is the person who is 49% negligent that much more deserving than the one who is 51% negligent?").

²¹96 N.M. 682, 634 P.2d 1234 (1981).

²²*Id.* at 690, 634 P.2d at 1242 (quoting *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 827, 119 Cal. Rptr. 858, 874, 532 P.2d 1226, 1242 (1975).

²³256 S.E.2d at 884 n.12.

²⁴Note, *supra* note 9, at 1673-74.

²⁵See *Walton v. Tull*, 234 Ark. 884, 356 S.W.2d 20 (1962).

C. Slight-Gross Comparative Negligence

Under the slight-gross system, followed in Nebraska, a plaintiff's contributory negligence bars his recovery unless his negligence is slight and the defendant's negligence is gross in comparison.²⁶ Another variation of this rule is found in South Dakota, which requires the determination of a plaintiff's slight contributory negligence to be made in direct comparison with the negligence of the defendant, eliminating the need of showing the defendant's negligence to be gross.²⁷ Under both systems, slight contributory negligence as compared to the defendant's negligence varies with the facts and circumstances of each case.²⁸

D. Indiana Comparative Negligence

The Indiana legislature adopted a modified "not greater than" comparative negligence system. Under the statute, which governs any action based on fault brought to recover damages for death or personal injury and for injury to property, "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault" ²⁹ However, a claimant whose contributory fault exceeds that "of all persons whose fault proximately contributed to the claimant's damages" cannot recover.³⁰ Accordingly, under the Indiana statute, a plaintiff whose negligence is equal to the defendant's negligence will not be barred from recovery but will be entitled to recover fifty percent of his damages.

The Indiana statute also provides a solution to a problem common to modified comparative law systems, that is, whether the plaintiff's negligence will be compared to the defendants' negligence collectively or individually where multiple defendants are present. Under the new statute, the plaintiff will be barred from recovery if his contributory negligence is greater than that of *all* persons whose negligence proximately contributed to the plaintiff's damages.³¹ Thus, the plaintiff's fault will be compared to that of all defendants and all "non party" tortfeasors.³²

²⁶NEB. REV. STAT. § 25-1151 (1979).

²⁷S.D. CODIFIED LAWS ANN. § 20-9-2 (1979).

²⁸See *In re Estate of Tichota*, 190 Neb. 775, 212 N.W.2d 557 (1973); *Crabb v. Wade*, 84 S.D. 93, 167 N.W.2d 546 (1969).

²⁹IND. CODE § 34-4-33-3 (Supp. 1984).

³⁰*Id.* § 34-4-33-4(a).

³¹*Id.* § 34-4-33-4(b).

³²Other states following this approach include Kansas, *Beach v. M. & N. Modern Hydraulic Press Co.*, 428 F. Supp. 956 (D. Kan. 1977); Minnesota, *Lines v. Ryan*, 272 N.W.2d 896 (Minn. 1978); and Oklahoma, *Laubach & Morgan*, 588 P.2d 1071 (Okla. 1978).

Some states compare the plaintiff's negligence with that of each individual defendant. See *Mishoe v. Davis*, 64 Ga. App. 700, 14 S.E.2d 187 (1941); *Marier v. Memorial Rescue Serv., Inc.*, 296 Minn. 242, 207 N.W.2d 706 (1973); *Van Horn v. William Blanchard*

The Indiana statute does not, however, consider how comparative fault principles should apply in derivative cases. Most jurisdictions hold that the concept of comparative negligence applies to derivative causes of action and, in determining the plaintiff's amount of recovery, will consider the negligence of the person from whom the claim is derived.³³ The Indiana courts follow this rule in contributory negligence cases.³⁴ Because there is nothing in the Indiana Comparative Fault Act indicating an intent to modify this rule, it seems likely that Indiana courts will follow the majority by applying derivative rules in comparative negligence cases.

A second area not addressed by the Indiana statute is that of set-off. This issue will arise any time a defendant counterclaims and there is a recovery by both the plaintiff and the defendant. While permitting set-off of the recoveries might appear to be equitable, the issue becomes more complex when the parties are insured.³⁵ Ideally, Indiana courts, not being restricted by provisions in the Act, will follow the lead of the Florida and California courts denying set-off in those cases where both parties are insured.³⁶

Finally, the Indiana Comparative Fault Act definitively resolves many issues that are litigated and debated in other jurisdictions. First, the Act expressly provides that it does not apply to breach of warranty cases.³⁷ Second, section 2(a) provides that the comparative negligence statute

Co., 88 N.J. 91, 438 A.2d 552 (1981); Board of County Comm'rs v. Ridenour, 623 P.2d 1174 (Wyo. 1981).

The majority of jurisdictions adopting modified comparative negligence compare the plaintiff's negligence to the defendants' negligence as a whole. *See, e.g.*, Walton v. Tull, 234 Ark. 882, 356 S.W. 2d 20 (1962). *See also* Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979); ARK. STAT. ANN. § 27-1764 (1979); CONN. GEN. STAT. ANN. § 52-572h(2) (West Supp. 1984); HAWAII REV. STAT. § 663-31(a) (1976); KAN. STAT. ANN. § 60-258a (West Supp. 1984); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1984); NEV. REV. STAT. § 41.141(2)(a) (1973); OHIO REV. CODE ANN. § 2315.19(A)(1) (Page 1981); OKLA. STAT. ANN. tit. 23, § 13 (West Supp. 1983); OR. REV. STAT. § 18.470 (1983); PA. STAT. ANN. tit. 42, § 7102(a) (Purdon 1982); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1984).

³³Ferguson v. Ben M. Hogan Co., 307 F. Supp. 658 (W. D. Ark. 1969) (damages reduced by wife's negligence in husband's loss of consortium action); Garrison v. Fundenburk, 262 Ark. 711, 561 S.W.2d 73 (1978) (minor driver's negligence imputed to parents); Hannabass v. Florida Home Ins. Co., 412 So. 2d 376 (Fla. Dist. Ct. App. 1981) (child's negligence imputed to parents in suit by parents for medical expenses).

³⁴Bender v. Peay, 433 N.E.2d 788 (Ind. App. 1982) (contributory fault of one having primary claim is imputed to one asserting derivative claim).

³⁵*See supra* notes 8-11 and accompanying text.

³⁶Stuyvesant Ins. Co. v. Bournazian, 342 So. 2d 471 (Fla. 1976); Jess v. Herrmann, 26 Cal.3d 131, 161 Cal. Rptr. 87, 604 P.2d 208 (1979).

³⁷IND. CODE § 34-4-33-13 (Supp. 1984). Most other jurisdictions do apply comparative fault principles to breach of warranty actions. *See, e.g.*, Lesmeister v. Dilly, 330 N.W.2d 95 (Minn. 1983). *Contra* Duff v. Bonner Bldg. Supply, Inc., 103 Idaho 432, 649 P.2d 391 (1982); Correia v. Firestone Tire & Rubber Co., 388 Mass. 342, 446 N.E.2d 1033

applies in cases involving willful or wanton misconduct.³⁸ Third, the comparative fault principles will not apply to strict liability cases.³⁹ Finally, the Indiana Act does not apply in cases of intentional tort.⁴⁰

III. DEFENSES

The Indiana Comparative Fault Act could have a significant impact on the various defenses currently available under Indiana law. To aid in interpreting whether certain defenses will apply under the Indiana Comparative Fault Act, this section will review how the well-established defenses of last clear chance and assumption of risk have fared in those jurisdictions that have adopted some form of comparative negligence.⁴¹

(1983). Though, some qualify the extent of the application. *Broce-O'Dell Concrete Prod., Inc. v. Mel Jarvis Constr. Co., Inc.*, 6 Kan. App. 2d 757, 634 P.2d 1142 (1981) (comparative negligence will not apply in breach of warranty cases in which the action is only to recover the economic loss and not for injury to person or property); *Peterson v. Bendix Home Sys., Inc.* 318 N.W.2d 50 (Minn. 1982) (comparative negligence not applicable to buyer's action to recover for damages to the product itself and incidental damages).

— ³⁸IND. CODE § 34-4-33—2(a) (Supp. 1984).

³⁹IND. CODE § 34-4-33-13 (Supp. 1984). Several other jurisdictions have determined that comparative negligence is inapplicable to products liability actions because the focus of products liability is upon the product rather than the conduct of the parties or because the fault of the defendant has no bearing on his liability and, as such, cannot be compared to any fault of the plaintiff. *See Zahrt v. Sturm, Ruger & Co.*, 498 F. Supp. 389 (D. Mont. 1980); *Robinson v. Parker-Hannifin Corp.*, 4 Ohio Misc. 2d 6, 447 N.E.2d 781 (1982); *Seay v. Chrysler Corp.*, 93 Wash. 2d 319, 609 P.2d 1382 (1980). Other courts, however, have applied comparative law principles in products liability cases. *See, e.g., Stueve v. American Honda Motors Co., Inc.*, 457 F. Supp. 740 (D. Kan. 1978); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162 (1978); *Kaneko v. Hilo Coast Processing*, 65 Hawaii 447, 654 P.2d 343 (1982); *Sanford v. Chevrolet Div. of General Motors*, 292 Or. 590, 642 P.2d 624 (1982); *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301 (Utah 1981).

⁴⁰IND. CODE § 34-4-33-2(a) (Supp. 1984).

⁴¹The Indiana Comparative Fault Act will have a major impact on several frequently used defenses in addition to the two reviewed in detail in this article. For example, the "open and obvious danger rule" will be affected by the definition of "fault" in section 34-4-33-2(a) of the Act.

The "open and obvious danger rule," as set forth in *Bemis Co., Inc. v. Rubush*, 427 N.E.2d 1058 (Ind. 1981), *cert. denied*, 103 S. Ct. 56 (1982), alleviates the manufacturer's duty to warn of a known defect if the danger is open and obvious to all. In interpreting statutory language almost identical to the language of section 34-4-33-2(a) of the Indiana Comparative Fault Act, the Minnesota Supreme Court held that the obvious nature of a products' danger is no longer an absolute defense. *Holm v. Sponco Mfg., Inc.*, 324 N.W.2d 207, 213 (Minn. 1982). Similarly, the Florida Court of Appeals has held that comparative negligence standards apply to cases in which a patent danger defense is asserted. *Zambito v. Southland Recreation Enter., Inc.*, 383 So. 2d 989 (Fla. Dist. Ct. App. 1980). Therefore, the Indiana Comparative Fault Act may abolish the "open and obvious danger rule" as a complete defense.

A. Last Clear Chance

The doctrine of last clear chance allows a contributorily negligent plaintiff to recover where the defendant had knowledge of the plaintiff's perilous position, an opportunity to avoid injuring the plaintiff, and yet failed to exercise reasonable care by not avoiding the accident. This doctrine, which originated in England in 1842,⁴² has often been criticized.⁴³ However, it has been applied in several states, including Indiana.⁴⁴ Generally, those jurisdictions adopting comparative negligence have abolished the doctrine of last clear chance either by case law or by statute.

1. *Abolished by Case Law.*—The majority of jurisdictions that have adopted some form of comparative negligence have abolished the doctrine of last clear chance by case law.⁴⁵ These jurisdictions have generally determined that the underlying rationale for the doctrine of last clear chance no longer exists under comparative negligence.⁴⁶ Moreover, some jurisdictions have recognized that the doctrine of last clear chance is incompatible with the apportionment of damages under comparative

⁴²Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. D. 1842).

⁴³"No very satisfactory reason for the rule has ever been suggested." W. PROSSER, THE LAW OF TORTS § 66, at 427 (4th ed. 1971). See also Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Street v. Calvert, 541 S.W.2d 576 (Tenn. 1976). In Kaatz, the court opined, "the search for limits to the doctrine and for the proper sphere of its application has led to great confusion in the law of tort, much of which can probably never be dispelled." 540 P.2d at 1050 (footnote omitted).

⁴⁴See, e.g., Sims v. Huntington, 271 Ind. 368, 393 N.E.2d 135 (1979); McKeown v. Calusa, 172 Ind. App. 1, 359 N.E.2d 550 (1977).

⁴⁵See, e.g., Kaatz v. State, 540 P.2d 1037, 1050 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal.3d 804, 824, 532 P.2d 1226, 1240-41, 119 Cal. Rptr. 858, 872 (1975); Burns v. Ottai, 513 P.2d 469, 472 (Colo. Ct. App. 1973); Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973); Alvis v. Ribar, 85 Ill.2d 1, 28, 421 N.E.2d 886, 898 (1981); Stewart v. Madison, 278 N.W.2d 284, 293 (Iowa 1979); Cushman v. Perkins, 245 A.2d 846, 847 (Me. 1968); Davies v. Butler, 95 Nev. 763, 775-76, 602 P.2d 605, 613 (1979). Davila v. Sanders, 557 S.W.2d 770, 771 (Tex. 1977); Britton v. Hoyt, 63 Wis. 2d 688, 691, 218 N.W.2d 274, 277-78 (1974). In abolishing the doctrine of last clear chance, the Wisconsin Supreme Court declared that it was "doubtful the doctrine of last clear chance was ever the law in Wisconsin." 63 Wis. 2d at 691, 218 N.W.2d at 277.

⁴⁶See, e.g., Kaatz v. State, 540 P.2d 1037 (Alaska 1975). In Kaatz, the court said, "it is recognized by nearly all who have reflected upon the subject that the last clear chance doctrine is, in the final analysis, merely a means of ameliorating the harshness of the contributory negligence rule. Without the contributory negligence rule there would be no need for the palliative doctrine of last clear chance." *Id.* at 1050 (footnote omitted).

The Illinois Supreme Court adopted this same rationale for abolishing the doctrine of last clear chance in *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886 (1981). In *Alvis*, the court stated that "the doctrine of 'last clear chance' was created to escape the harshness of the contributory negligence rule. As the need for it disappears in the face of this decision, the vestiges of the doctrine of 'last clear chance' are hereby abolished." *Id.* at 13, 421 N.E.2d at 898.

negligence.⁴⁷ A few of these jurisdictions have, however, chosen to preserve portions of the doctrine of last clear chance to be considered by the jury in apportioning fault.⁴⁸

2. *Abolished by Statute.*—In at least two jurisdictions the doctrine of last clear chance has been abolished by statute.⁴⁹ Oregon takes the approach of complete abolition of the doctrine of last clear chance.⁵⁰ In contrast, the Connecticut comparative negligence statute contains language limiting the abolition of the doctrine of last clear chance only to actions governed by that statute.⁵¹

3. *Retained.*—The minority of jurisdictions that have adopted some form of comparative negligence have retained the doctrine of last clear chance.⁵² These jurisdictions have generally viewed the doctrine of last clear chance as a rule of proximate cause and not incompatible with comparative negligence.⁵³ A further argument raised in support of retaining the doctrine of last clear chance is that since contributory negligence still exists to a limited extent under modified comparative negligence, the doctrine of last clear chance should also survive under modified

⁴⁷See, e.g., *Kaatz v. State*, 540 P.2d 1037, 1050 (Alaska 1975); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 824, 532 P.2d 1226, 1240, 119 Cal. Rptr. 858, 872 (1975). In *Kaatz*, the court held that “[t]o give continued life to that principle would defeat the very purpose of the comparative negligence rule—the apportionment of damages according to the degree of mutual fault. There is, therefore, no longer any reason for resort to the doctrine of last clear chance in the courts of Alaska.” 540 P.2d at 1050 (footnote omitted).

⁴⁸See, e.g., *Cushman v. Perkins*, 245 A.2d 846 (Me. 1968). In *Cushman*, the court explained its reason for the abolition of the doctrine of last clear chance:

In our view when our contributory negligence rule as an absolute bar disappeared (in cases where the plaintiff’s negligence is less than defendant’s) through legislative action, the last clear chance rule disappeared with it and no longer exists as an absolute rule. Its component parts—such as the degree of plaintiff’s negligence, its remoteness in time, the efficiency of its causation, the degree of defendant’s negligence, the efficiency of its causation, defendant’s awareness of plaintiff’s peril, defendant’s opportunity to avoid doing damage and his failure to do so—remain as factors to be considered by the jury in measuring and comparing the parties’ relative fault.

Id. at 850-51.

⁴⁹See CONN. GEN. STAT. ANN. § 52-572h(c) (West Supp. 1984); OR. REV., STAT. § 18.475(1) (1977).

⁵⁰OR. REV. STAT. § 18.475(1) (1977) states that “[t]he doctrine of last clear chance is abolished.”

⁵¹CONN. GEN. STAT. ANN. § 52-572h(c) (West Supp. 1984) states that “[t]he legal doctrines of last clear chance and assumption of risk in actions to which this section is applicable are abolished.”

⁵²*Tiedeman v. Chicago M.S.P.R. Co.*, 513 F.2d 1267, 1273 (8th Cir. 1975); *Underwood v. Illinois Cent. R.R. Co.*, 205 F.2d 61, 64 (5th Cir. 1953); *Southland Butane Gas Co. v. Blackwell*, 211 Ga. 665, 669-70, 88 S.E.2d 6, 10 (1955); *Bezdek v. Patrick*, 170 Neb. 522, 530-31, 103 N.W.2d 318, 325 (1960); *Vlach v. Wyman*, 78 S.D. 504, 508, 104 N.W.2d 817, 819 (1960).

⁵³See, e.g., *Vlach v. Wyman*, 78 S.D. 504, 508, 104 N.W.2d 817, 819 (1960). Several

comparative negligence.⁵⁴

4. *Last Clear Chance in Indiana.*—The Indiana Comparative Fault Act does not expressly abolish the doctrine of last clear chance.⁵⁵ Therefore, the task will probably be left to the courts to decide whether the doctrine of last clear chance has survived the adoption of comparative fault in Indiana.

The modern trend in other jurisdictions is clearly in favor of abolishing the doctrine of last clear chance.⁵⁶ An example of the evolution of this trend is found in West Virginia. In *Bradley v. Appalachian Power Co.*,⁵⁷ the West Virginia Supreme Court implied that the doctrine of last clear chance was still available in “appropriate circumstances.”⁵⁸ However, two years later, in *Ratlief v. Yokum*,⁵⁹ the West Virginia Supreme Court concluded that “the historical reason for the doctrine of last clear chance no longer exists since our adoption of comparative negligence.”⁶⁰ The court further said that “the better course would be to abolish the use of the doctrine of last clear chance for the plaintiff.”⁶¹

The sentiment expressed by the West Virginia Supreme Court in *Ratlief* is a reflection of Dean Prosser’s view that the doctrine of last clear chance has outlived its usefulness.⁶² Dean Prosser’s opinion has recently been echoed by the Michigan Court of Appeals in *Bell v.*

courts have taken the opposite position and have held that the doctrine of last clear chance is incompatible with the apportionment of damages under comparative negligence. See *supra* note 45. See also *Danculovich v. Brown*, 593 P.2d 187 (Wyo. 1979). In *Danculovich*, the court used the following example to express its opinion that the doctrine of last clear chance cannot logically be applied under comparative negligence:

If the jury found two causes directly contributing to the damages, it would determine the relative degrees of negligence accordingly, including consideration of the elements of the last clear chance. It would be illogical to have the jury first determine that plaintiff and defendant were both negligent (including the element of direct causation of the damage), and then—under the last clear chance theory—again address the question indirectly by considering whether or not plaintiff’s negligence was the *sole* proximate cause of the damage.

Id. at 195.

⁵⁴See *Bezdek v. Patrick*, 167 Neb. 754, 756-57, 94 N.W.2d 482, 486 (1959).

⁵⁵IND. CODE § 34-4-33-1 to -13.

⁵⁶Since 1975, six jurisdictions have specifically addressed the issue of the applicability of last clear chance under comparative negligence; all six have favored the abolition of the doctrine. See *Alvis v. Ribar*, 85 Ill. 2d 1, 28, 421 N.E.2d 886, 898 (1981); *Stewart v. Madison*, 278 N.W.2d 284, 293 (Iowa 1979); *Davies v. Butler*, 95 Nev. 763, 775-76, 602 P.2d 605, 613 (1979); *Davila v. Sanders*, 557 S.W.2d 770, 771 (Tex. 1977); *Ratlief v. Yokum*, 280 S.E.2d 584, 589 (W. Va. 1981); *Danculovich v. Brown*, 593 P.2d 187, 195 (Wyo. 1979).

⁵⁷256 S.E.2d 879 (W. Va. 1979).

⁵⁸*Id.* at 887.

⁵⁹280 S.E.2d 584 (W. Va. 1981).

⁶⁰*Id.* at 589.

⁶¹*Id.*

⁶²W. PROSSER, THE LAW OF TORTS § 66, at 427-33 (4th ed. 1971).

Merritt.⁶³ This would seem to be the logical conclusion for the Indiana courts to reach based upon the adoption of comparative fault in Indiana.

The abolition of the doctrine of last clear chance in Indiana would not necessarily mean the end of all consideration of that doctrine. Some may advocate that Indiana courts should at least preserve the consideration by the jury of some of the doctrine's component parts. The Supreme Court of Maine took this approach when it abolished Maine's doctrine of last clear chance in *Cushman v. Perkins*.⁶⁴ However, Indiana courts will probably follow the majority and abolish the doctrine completely, while allowing the underlying theory of the doctrine to be argued at trial in persuading the jury that one party is more at fault under Indiana law.⁶⁵

B. Assumption of Risk

The term assumption of risk has been defined in numerous ways, leading to considerable confusion.⁶⁶ To alleviate this confusion, assumption of risk is generally separated into two distinct categories: express and implied.⁶⁷ Express assumption of risk occurs when a plaintiff expressly agrees by contract or otherwise to accept a risk of harm arising from the defendant's negligent or reckless conduct.⁶⁸ Implied assumption of risk occurs when a plaintiff does not expressly agree to assume a risk of harm, but he fully understands the risk of harm and voluntarily chooses to enter or remain within the area of that risk.⁶⁹

In Indiana, assumption of risk is categorized in a somewhat different

⁶³118 Mich. App. 414, 420, 325 N.W.2d 443, 446 (1982).

⁶⁴245 A.2d 846, 850-51 (Me. 1968).

⁶⁵See *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975). In *Kaatz*, the court noted: This is not to say that the notion of last clear chance is unavailable as a matter of trial court advocacy. Either party may attempt to persuade the trier of fact that one party or another should bear a greater proportion of the liability for an accident by reason of the factual pattern adduced, including a consideration of the helplessness or inattentiveness which may have led to a plaintiff's predicament, with subsequent injury at the hands of a negligent defendant.

Id. at 1050 n.32.

⁶⁶See, e.g., RESTATEMENT (SECOND) OF TORTS § 496A comment c (1965); *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54 (1943) (Frankfurter, J., concurring); *Moore v. Burton Lumber & Hardware Co.*, 631 P.2d 865 (Utah 1981). In his concurring opinion in *Tiller*, Justice Frankfurter noted:

The phrase "assumption of risk" is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, indiscriminately used to express different and sometimes contradictory ideas.

318 U.S. at 68.

⁶⁷See F. HARPER AND F. JAMES, *THE LAW OF TORTS* 1162 (1956).

⁶⁸RESTATEMENT (SECOND) OF TORTS § 496B (1965).

⁶⁹*Id.* § 496C.

manner; Indiana courts recognize a distinction between assumed risk and incurred risk.⁷⁰ Incurred risk differs from assumed risk only in that assumed risk is predicated on the existence of a contractual relationship while incurred risk is noncontractual.⁷¹ The doctrine of incurred risk is applicable when two elements are present. First, the plaintiff must act voluntarily. Second, the plaintiff must know and understand (or, in the exercise of reasonable care, should know and understand) the risk to which he voluntarily exposes himself.⁷² It has also been stated that incurred risk is a species of contributory negligence in Indiana.⁷³

Many jurisdictions had abolished some form of assumption of risk prior to adopting comparative negligence.⁷⁴ In those jurisdictions that had retained assumption of risk, the adoption of comparative negligence has had a divergent impact.

1. *Abolished or Merged by Case Law.*—The leading approach in those jurisdictions that have adopted some form of comparative negligence has been to abolish the doctrine of assumption of risk or merge it into contributory negligence through case law.⁷⁵ The primary reason for merging assumption of risk with contributory negligence is that it would be inequitable to apportion fault when contributory negligence exists and to bar recovery when a plaintiff has assumed a known risk.⁷⁶

⁷⁰See, e.g., *Petroski v. Northern Indiana Pub. Serv. Co.*, 171 Ind. App. 14, 354 N.E.2d 736 (1976); *Coleman v. DeMoss*, 144 Ind. App. 408, 246 N.E.2d 483 (1969).

⁷¹*Fruehauf Trailer Div. v. Thornton*, 174 Ind. App. 1, 366 N.E.2d 21 (1977); *Stallings v. Dick*, 139 Ind. App. 118, 210 N.E.2d 82 (1965).

⁷²*Sullivan v. Baylor*, 163 Ind. App. 600, 325 N.E.2d 475 (1975). In *Sullivan*, the plaintiff was assisting his neighbor in raising a basketball goal post. The plaintiff was aware of the risk that the post might fall as he positioned himself with a board for the purpose of balancing the goal post. As the goal post began to fall, the plaintiff turned and ran. After he tripped over another board, the goal post fell on his right ankle. The court held that the plaintiff incurred the risk of his injuries as a matter of law.

⁷³*Rouch v. Bisig*, 147 Ind. App. 142, 258 N.E.2d 883 (1970).

⁷⁴See, e.g., *Leavitt v. Gillaspie*, 443 P.2d 61, 68 (Alaska 1968); *Felgner v. Anderson*, 375 Mich. 23, 55-57, 133 N.W.2d 136, 153 (1965); *Bolduc v. Crain*, 104 N.H. 163, 166-67, 181 A.2d 641, 644 (1962).

⁷⁵See, e.g., *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 824-25, 532 P.2d 1226, 1240-41, 119 Cal. Rptr. 858, 872-73 (1975); *Blackburn v. Dorta*, 348 So. 2d 287, 293 (Fla. 1977); *Wilson v. Gordon*, 354 A.2d 398, 401-02 (Me. 1976); *Wentz v. Deseth*, 221 N.W.2d 101, 104-05 (N.D. 1974); *Farley v. MM Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975); *Lyons v. Redding Constr. Co.*, 83 Wash. 2d 86, 94-96, 515 P.2d 821, 826 (1973); *Brittain v. Booth*, 601 P.2d 532, 534 (Wyo. 1979).

⁷⁶See *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977). In *Blackburn*, the court reasoned:

Is liability equated with fault under a doctrine which would totally bar recovery by one who voluntarily, but reasonably, assumes a known risk while one whose conduct is unreasonable but denominated "contributory negligence" is permitted to recover a proportionate amount of his damages for injury? Certainly not. Therefore, we hold that the affirmation defense of implied assumption of risk is merged into the defense of contributory negligence and the principles of

The primary reasons for abolishing assumption of risk have either been judicial interpretation of legislative intent,⁷⁷ or simply recognition that assumption of risk should be treated like any other form of contributory negligence when apportioning fault under the respective comparative negligence statute.⁷⁸

2. *Abolished or Merged by Statute.*—Several jurisdictions have abolished the doctrine of assumption of risk or merged it into contributory negligence by statute.⁷⁹ These jurisdictions have either expressly abolished it⁸⁰ or have made it only a factor in apportioning fault.⁸¹ Merging assumption of risk into contributory negligence is accomplished by including assumption of risk within the meaning of contributory negligence.⁸²

3. *Retained.*—A minority of jurisdictions have retained assumption of risk as a complete defense despite their adoption of some form of comparative negligence.⁸³ The basic argument supporting this position is that the defense of assumption of risk is not based on fault but upon knowledge and consent, so that apportioning damages on the basis of fault is not appropriate.⁸⁴

comparative negligence enunciated in *Hoffman v. Jones*, supra, shall apply in all cases where such defense is asserted.

Id. at 293.

⁷⁷See, e.g., *Wilson v. Gordon*, 354 A.2d 398 (Me. 1976); *Wentz v. Deseth*, 221 N.W.2d 101 (N.D. 1974); *Brittain v. Booth*, 601 P.2d 532 (Wyo. 1979).

⁷⁸See *Kopischke v. First Continental Corp.* 187 Mont. 471, 610 P.2d 668 (1980). In *Kopischke*, the court stated that "we will follow the modern trend and treat assumption of the risk like any other form of contributory negligence and apportion it under the comparative negligence statute." *Id.* at 507, 610 P.2d at 687.

⁷⁹See, e.g., ARK. STAT. ANN. § 27-1763 (1979); CONN. GEN. STAT. ANN. § 52-572h(c) (West Supp. 1984); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1984); N.Y. CIV. PRAC. LAW & R. § 1411 (McKinney 1976); UTAH CODE ANN. § 78-27-37 (1977).

⁸⁰See, e.g., CONN. GEN. STAT. ANN. § 52-572h(c) (West Supp. 1984); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1984).

⁸¹See, e.g., ARK. STAT. ANN. § 27-1763 (1979); N.Y. CIV. PRAC. LAW & R. § 1411 (McKinney 1976).

⁸²See, e.g., UTAH CODE ANN. § 78-27-37 (1977).

⁸³See, e.g., *Yankey v. Battle*, 122 Ga. App. 275, 176 S.E.2d 714 (1970); *Blum v. Brichacek*, 191 Neb. 457, 215 N.W.2d 888 (1974); *Bartlett v. Gregg*, 77 S.D. 406, 92 N.W.2d 654.

⁸⁴V. SCHWARTZ, COMPARATIVE NEGLIGENCE, § 9.3 (1974). See also *Kennedy v. Providence Hockey Club, Inc.*, 119 R.I. 70, 376 A.2d 329 (1977). In *Kennedy*, the court specifically addressed the issue of retaining the doctrine of assumption of risk under comparative negligence. The court retained the doctrine:

Negligence analysis, couched in reasonable man hypotheses, has no place in the assumption of the risk framework. When one acts knowingly, it is immaterial whether he acts reasonably. The postulate, then, that assumption of the risk is merely a variant of contributory fault, is not, to our minds, persuasive. Ac-

4. *Assumption of Risk in Indiana.*—As previously noted, Indiana has divided the defense of assumption of risk into two distinct categories: assumed risk and incurred risk.⁸⁵ The Indiana Comparative Fault Act follows the statutes of several other jurisdictions⁸⁶ in using the definition of “fault” to determine whether assumption of risk is retained.⁸⁷ The language in the Indiana Comparative Fault Act is derived from the Uniform Comparative Fault Act.⁸⁸ Yet, the Indiana statute specifically includes “incurred risk” in the definition of “fault.”⁸⁹ This inclusion of “incurred risk” in the definition of “fault” abolishes incurred risk as a complete bar to recovery and places it as a factor in apportioning fault.

Assumed risk may survive in some form under the definition of fault in the Indiana statute, as the definition includes only “unreasonable assumption of risk not constituting an enforceable express consent.”⁹⁰ Thus, it is apparent that the Indiana Comparative Fault Act provides ample guidance for Indiana courts with respect to the doctrine of assumption of risk.

IV. MULTIPLE DEFENDANTS

Under traditional common law principles joint tortfeasors are jointly and severally liable with no right to contribution. Thus, a plaintiff may sue one or more joint tortfeasors and if a joint judgment is obtained, the plaintiff may collect the entire amount from any one of the defendants.⁹¹ Under such circumstances, most states either do not permit contribution among the joint tortfeasors or hold that a defendant is not entitled to contribution until he has paid more than his equitable share of the recovery.⁹² Yet, these principles clash with the overall goal of

cordingly, it is our determination that [the comparative negligence statute] does not affect the validity of assumption of risk as a complete bar to recovery.

119 R.I. at 77, 376 A.2d at 333.

⁸⁵See *supra* notes 70-73 and accompanying text.

⁸⁶See, e.g., ARK. STAT. ANN. § 27-1763 (1979); MINN. STAT. ANN. § 604.01 (West Supp. 1984).

⁸⁷IND. CODE § 34-4-33-2(a) (Supp. 1984). This section defines “fault” as follows: “Fault” includes any act or omission that is negligent, willful, wanton, or reckless toward the person or property of the actor or others, but does not include an intentional act. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages.

⁸⁸UNIF. COMPARATIVE FAULT ACT § 1(b), 12 U.L.A. 36 (Supp. 1983).

⁸⁹IND. CODE § 34-4-33-2(a); see *supra* note 87.

⁹⁰IND. CODE § 34-4-33-2(a). For a discussion of how this section of the Indiana Comparative Fault Act affects the “open and obvious danger rule” in Indiana, see *supra* note 41.

⁹¹W. PROSSER, THE LAW OF TORTS, § 47 (4th ed. 1971).

⁹²See *Royal Indem. Co. v. Aetna Cas. & Sur. Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975).

comparative negligence which seeks to apportion damages and responsibility among the appropriate parties.

A. Joint and Several Liability

Many state courts have held that, after the adoption of comparative negligence, the doctrine of comparative negligence does not warrant abolition of joint and several liability of concurrent tortfeasors.⁹³ In *American Motorcycle Association v. Superior Court of Los Angeles County*,⁹⁴ the California Supreme Court cited several reasons for such a conclusion. First, joint and several liability does not conflict with the comparative negligence system. Second, the ability to apportion fault on a comparative basis does not render an indivisible injury divisible for purposes of the joint and several liability rule. Third, the fact that one defendant is insolvent should not operate to relieve another defendant of liability for damages that he proximately caused. Finally, because a plaintiff's negligence relates to his failure to use due care for his own protection and a defendant's negligence relates to a lack of due care for the safety of others, a plaintiff's culpability is not equivalent to that of a defendant and public policy dictates that he should not be deprived of his right to damages.⁹⁵

In fact, consistent with the views expressed by the California court, many state statutes expressly provide that each defendant will be jointly and severally liable for the plaintiff's entire award.⁹⁶ Also, the courts of most comparative negligence jurisdictions whose statutes are silent regarding the issue have retained joint and several liability principles.⁹⁷ Nevertheless, a few states have abolished joint and several liability in

⁹³*American Motorcycle Ass'n. v. Superior Court of Los Angeles County*, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978).

⁹⁴20 Cal.3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978).

⁹⁵*Id.* at 582, 586, 588, 146 Cal. Rptr. at 184, 188-189, 578 P.2d at 901, 905-906. See also *Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426 (Alaska 1979); *Weeks v. Feltner*, 99 Mich. App. 392, 297 N.W.2d 678 (1980).

⁹⁶IDAHO CODE §§ 6-803(3), 6-804 (1979). See also *Tucker v. Union Oil Co. of California*, 100 Idaho 590, 603 P.2d 156 (1979). The court, noting that Idaho Code sections 6-803(3) and 6-804 make clear that joint and several liability is retained under comparative negligence, rejected a tortfeasor's contention that its liability for damages should be based on its proportionate share of fault. See also ME. REV. STAT. ANN. tit. 14, § 156 (1980); MONT. CODE ANN. § 58-607.2 (Supp. 1977); N.J. STAT. ANN. § 2A:15-5.3 (West Supp. 1983); N.D. CENT. CODE § 9-10-07 (1975); PA. STAT. ANN. tit. 42, § 7102 (Purdon 1982); UTAH CODE ANN. § 78-27-40 (1977); WYO. STAT. § 1-1-110 (1977).

While the statutes of Louisiana, Oregon, and Texas provide for joint and several liability, they also limit the liability of a defendant whose fault is less than the plaintiff's to that position attributable to that defendant. LA. CIV. CODE ANN. art 2324 (West Supp. 1984); OR. REV. STAT. § 18.458(2) (1983); TEX. REV. CIV. STAT. ANN. art 2212a (Vernon Supp. 1984).

⁹⁷*Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426 (Alaska 1979); *Wheeling Pipe Line, Inc. v. Edrington*, 259 Ark. 600, 535 S.W.2d 225 (1976); *American Motorcycle Ass'n v. Superior Court of Los Angeles County*, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978); *Martiney v. Stefanich*, 195 Colo. 341, 577 P.2d 1099 (1978); *Lincenberg*

comparative negligence actions, ruling that each defendant is severally liable to the plaintiff only for that percentage of the award which is equivalent to the percentage of his causal negligence.⁹⁸ The Supreme Court of Oklahoma also abandoned joint and several liability, holding that where a jury apportioned fault among co-defendants, each was liable only for that portion of the award attributable to him. The court concluded that several liability more accurately conformed to the underlying principle of comparative negligence by assigning responsibility and liability for damages in direct proportion to the respective fault of each person whose negligence caused the damage.⁹⁹

The Indiana statute does not expressly consider the operation of joint and several liability principles. Arguably, though, the statute does effectively eliminate joint and several liability. Section 5(b)(4) directs the jury to multiply the percentage of fault of *each* defendant by the amount of damages and 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."¹⁰⁰ Directing the jury to assess verdicts against each defendant's individual percentage of fault, rather than directing the jury to enter a single verdict in favor of the plaintiff less the plaintiff's proportionate share of fault, would seem to preclude the operation of the joint and several liability doctrine.¹⁰¹

v. Issen, 318 So. 2d 386 (Fla. 1975); Church's Fried Chicken, Inc. v. Lewis, 150 Ga. App. 154, 256 S.E.2d 916 (1979); Weeks v. Feltner, 99 Mich. App. 392, 297 N.W.2d 678 (1980); Saucier v. Walker, 203 So.2d 299 (Miss. 1967); Royal Indem. Co. v. Aetna Cas. & Sur. Co., 193 Neb. 752, 229 N.W.2d 183 (1975); Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972); Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wash. 2d 230, 588 P.2d 1308 (1978); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979); Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp., 96 Wis. 2d 314, 291 N.W.2d 825 (1980).

⁹⁸NEV. REV. STAT. § 41.141(3) (1979); N.H. REV. STAT. ANN. § 507:7-a (Supp. 1983); OHIO REV. CODE ANN. § 2315.19(A)(2) (Page 1981); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1983).

⁹⁹Laubach v. Morgan, 588 P.2d 1071, 1075 (Okla. 1978). The Oklahoma Supreme Court later clarified its decision, stating that this ruling was completely limited to cases in which the plaintiff was also partially at fault. Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613 (Okla. 1980). Some of the reasons given in the *Laubach* decision for eliminating joint liability were: (1) it eliminates the need for the additional litigation involved in contribution suits; (2) it simplifies the trial of comparative negligence suits, apparently by allowing "a simple general verdict between plaintiff and each defendant"; (3) it better satisfies the objective of plaintiff collecting his damages from the defendant who is responsible for them; (4) it satisfies the need for apportionment without invading the legislature's prerogative to decide about contribution.

¹⁰⁰IND. CODE § 34-4-33-5(b)(4) (Supp. 1984).

¹⁰¹This conclusion would be consistent with the apportionment purpose of comparative negligence, especially in light of the Act's express preclusion of contribution among joint tortfeasors. If the doctrine of joint and several liability were followed, one defendant could be required to pay more than his proportionate share without the ability to seek contribution from his joint tortfeasors. Such a result would contradict the goals of comparative negligence.

B. Contribution

Many states adopting comparative negligence systems have also retained contribution rules. Traditionally, contribution has been based on a pro rata system—that is, the fact that the negligence of one tortfeasor may be greater than that of another does not change the method of apportioning contribution and, thus, all tortfeasors who are jointly and severally liable to the plaintiff share equally in liability for damages.¹⁰² The significance of a jurisdiction's retention of this method of contribution is more telling when it is considered in conjunction with the rule of joint and several liability. Under that rule, generally followed in most comparative negligence states, each tortfeasor will be liable to the plaintiff for the plaintiff's entire loss. Under pro rata contribution, though, damages are apportioned equally among the tortfeasors and, accordingly, a less culpable tortfeasor may be considered equally liable with a tortfeasor who is actually found to be more culpable. The inconsistency of this result with the apportionment policies of comparative negligence is obvious.

As a result, some jurisdictions have adopted a comparative contribution approach, either by statute¹⁰³ or by judicial decision,¹⁰⁴ in which damages are apportioned among tortfeasors according to their relative degrees of fault. A few states, though, have taken a different approach and have replaced the rule of joint and several liability with a rule that each multiple tortfeasor will be liable to the plaintiff only for the relative degree of fault attributable to that tortfeasor,¹⁰⁵ thereby eliminating the need for contribution in comparative negligence cases.

It appears that the Indiana statute follows the latter approach. Section 7 of the Act provides that, although rights of indemnity are not affected, there is no right of contribution among tortfeasors in comparative negligence cases.¹⁰⁶ Further, the Act requires the finder of fact to determine

¹⁰²See, e.g., ALASKA STAT. §§ 09.16.010(a), (b), 09.16.020(1) (1983); GA. CODE ANN. §§ 105-2011, 2012 (Supp. 1982); MASS. GEN. LAWS ANN., ch. 231B, § 2 (West Supp. 1984); MISS. CODE ANN. § 85-5-5 (1972).

¹⁰³See e.g., MONT. CODE ANN. § 27-1-703 (1983); N.J. STAT. ANN. §§ 2A:15-5.2, 5.3 (West Supp. 1984); N.Y. CIV. PRAC. LAW R. §§ 1401-1403 (McKinney 1976); N.D. CENT. CODE § 9-10-07 (1975); PA. STAT. ANN. tit. 42, § 7102(b) (Purdon 1982); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1984).

¹⁰⁴See, e.g., *Packard v. Whitten*, 274 A.2d 169 (Me. 1971); *Bartels v. City of Williston*, 276 N.W.2d 113 (N.D. 1979); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979). Other states have used a modified indemnity approach to avoid traditional contribution rules. See *American Motorcycle Ass'n v. Superior Court of Los Angeles County*, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978); *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972); *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

¹⁰⁵See KAN. STAT. ANN. § 60-258a(d) (Supp. 1984); N.H. REV. STAT. ANN. § 507:7-a (1983); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1983).

¹⁰⁶IND. CODE § 34-4-33-7.

and enter individual verdicts against each defendant,¹⁰⁷ indicating several liability of each defendant only for the percentage of damages attributable to him. Therefore, not only does the Indiana Act not permit contribution among joint tortfeasors, the Act has eliminated the need for it.

V. CONCLUSION

The Indiana legislature made it clear in the language of the Indiana Comparative Fault Act that the Act does not apply to governmental entities¹⁰⁸ nor does it apply to any civil action that accrues prior to January 1, 1985.¹⁰⁹ Most of the other sections of the Act will be subject to judicial interpretation of legislative intent.

This Article has presented an overview of several key aspects of the Indiana Comparative Fault Act and how other jurisdictions have interpreted similar provisions in their comparative negligence laws. While it is difficult to predict which side of a particular issue the Indiana courts will take in interpreting the Indiana Act, it is well established in the rules of statutory construction that the judicial interpretation of a similar statute of another jurisdiction can be used to ascertain the meaning of an Indiana statute.¹¹⁰ Therefore, this overview and comparison should lend some guidance in determining the precise impact of the Indiana Comparative Fault Act.

¹⁰⁷*Id.* § 34-4-33-5(b)(4), (c).

¹⁰⁸*Id.* § 34-4-33-8.

¹⁰⁹*Id.* § 34-4-33-13. In several jurisdictions the comparative negligence statute was silent as to precisely what actions were affected. The majority of these jurisdictions held that the statute did not apply retroactively. *See, e.g.,* Reddell v. Norton, 225 Ark. 643, 285 S.W.2d 328 (1955); Dunham v. Southside Nat'l Bank, 169 Mont 466, 548 P.2d 1383 (1976). At least one jurisdiction held that the statute did apply retroactively. *See* Godfrey v. State, 84 Wash. 2d 959, 530 P.2d 630 (1975). At least one jurisdiction has allowed retroactivity in interpreting a set effective date. *See* Peterson v. Minneapolis, 285 Minn. 282, 173 N.W.2d 353 (1969).

¹¹⁰*See* Witherspoon v. Salm, 251 Ind. 575, 243 N.E.2d 876 (1969); Ross v. Schubert, 180 Ind. App. 402, 388 N.E.2d 623 (1979). "It is also permissible to consider the notes of the Commissioners of Uniform Laws when construing a uniform statute." Eads v. J. & J. Sales Corp., 257 Ind. 485, 491, 275 N.E.2d 802, 806 (1971) (citation omitted).

