Comparative Fault and the Nonparty Tortfeasor

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I. Introduction

The cornerstone principle of a comparative fault system is that each person who contributes to cause an injury must bear the burden of reparation for that injury in exact proportion to his share of the total fault which contributed to cause the injury. However, as the trial lawyer is often reminded, all the tortfeasors are not always in court. That is, for the variety of reasons discussed below, often not all of the tortfeasors are joined as parties to the suit for damages for the injury. Nevertheless, in order to achieve a fair distribution of the financial burden in a true comparative fault system, it is imperative that the fault of all culpable actors, whether or not they are parties to the legal action, be measured and assigned. To the extent that a given legal system ignores the fault of any tortfeasor, and shifts the financial burden from one culpable person to another, the fundamental principle of comparative fault is compromised. Thus, the manner in which a given comparative fault system addresses the issue of allocation of fault and responsibility for damages to the nonparty tortfeasor[1] provides the measure of fairness of that system of loss distribution.

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[1]A caveat is in order with respect to the use of the term "tortfeasor" in describing defendants and nonparties. The Indiana Comparative Fault Act does not use this term. In describing and evaluating a system of loss distribution which allocates a percentage of fault to a nonparty, with a commensurate reduction of plaintiff's recovery, one risks a clouding of the issues under consideration to refer to such nonparty as a tortfeasor. The term suggests a comparison between the conduct of an innocent plaintiff and a party tainted by the image of moral wrongdoing. It must be remembered that under comparative fault, the plaintiff also may be a tortfeasor, but may still have the right to recover. As one writer reminds us, the parties may be in pari delicto, and one simply is called a plaintiff because he won the race to the courthouse. Goldenberg & Nicholas, *Comparative Liability Among Joint Tortfeasors: The Aftermath of* Li v. Yellow Cab Co., 8 U. West L.A. L. Rev. 23, 29 (1976). Thus, the analytical process must not favor one party to the legal action over another simply by reason of the label which the party or nonparty bears. All tortfeasors, be they plaintiffs, defendants, or nonparties, are entitled to equal consideration. However, the Supreme Court of California still insists on attaching the characteristic of moral breach to a defendant's actions:

> Moreover, even when a plaintiff is partially at fault for his own injury, a plaintiff's culpability is not equivalent to that of a defendant. In this setting, a plaintiff's negligence relates only to a failure to use due care for his own

It is readily seen that the Indiana nonparty provision[2] has significantly altered the distribution of the burden of plaintiff's injury and damages and has shifted a substantial risk of non-recovery to the plaintiff.

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protection, while a defendant's negligence relates to a lack of due care for the safety of others.

American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 589, 578 P.2d 899, 906, 146 Cal. Rptr. 182, 189 (1978).

[2]The operative provisions of the Indiana Comparative Fault Act unequivocally provide that the fault of nonparties is to be apportioned along with the defendants, and that the plaintiff may recover so long as his fault is not greater than the total fault of all actors in the incident. Each defendant shall be liable only for the proportion of total damages which corresponds to his respective percentage of total fault. The Act provides:

> (1) The jury shall determine the percentage of fault of the claimant, of the defendant, and of any person who is a nonparty. The percentage of fault figures of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from a nonparty or nonparties.
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> (2) If the percentage of fault of the claimant is greater than fifty percent (50%) of the total fault involved in the incident which caused the claimant's death, injury, or property damage, the jury shall return a verdict for the defendant and no further deliberation of the jury is required.
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> (3) If the percentage of fault of the claimant is not greater than fifty percent (50%) of the total fault, the jury then shall determine the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded.
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> (4) The jury next shall multiply the percentage of fault of each defendant by the amount of damages determined under subdivision (3) and shall enter a verdict against each such defendant. . . .

IND. CODE § 34-4-33-5 (Supp. 1984).

The Act then goes on to define "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." *Id.* § 34-4-33-2(a). The Act is unlike the provisions of some states in that the apportionment scheme does not require joinder in order to determine the fault of the nonparty.

In its originally enacted form, the Act embraced the principle of fair allocation nearly absolutely. It boldly provided that the trier of fact was to consider the fault of all tortfeasors:

> (1) The jury shall determine the percentage of fault of the claimant, of the primary defendant, and *of any person who is not a party to the litigation* and whose fault approximately contributed to cause the death, injury or property damages for which suit is brought. The percentage of fault figures of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from persons *who are not parties to the action.*

IND. CODE § 34-4-33-5(b)(1) (Supp. 1983) (emphasis added) (amended 1984). However, before the prospective date on which the Act was to become effective, the legislature substantially diluted the nonparty provision by a new section which stated that "[t]he jury shall determine the percentage of fault of the claimant, of the defendant, and of any person who is a *nonparty*." IND. CODE § 34-4-33-5(a)(1) (Supp. 1984) (emphasis added). The thrust of the amendment is that in order for a culpable nonparty to be assigned fault by the trier of fact, such person must be subject to liability by civil action

in some forum.

It serves no purpose to speculate as to the motivation for the amendment, but the effect is clear. The inequities of the traditional tort system are perpetuated in some instances. An unequal financial burden may be borne by certain culpable parties, while others, such as immune tortfeasors and employers, are excused from reparation for their wrongs.

In fairness to the legislature, it must be recognized that the Indiana Act is unique in that it is the first comparative fault legislation among the states which addresses statutorily the involvement of the nonparty tortfeasor in the apportionment scheme. As recently as 1974, one commentator observed:

> Where one or more joint tortfeasors are not parties to a negligence action under comparative negligence, it is important to determine whether the comparison will include the negligence of the absent tortfeasors or will be made solely with regard to the parties to the actions. None of the comparative negligence statutes answers this question with precision.

V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.5 (3d ed. 1974).

That is not to say that the comparison of the nonparty's fault had not been permitted by judicial decision in some jurisdictions which had adopted a system of comparative fault. For example, Wisconsin, as early as 1934, held it to be error to instruct the jury to compare the plaintiff's negligence with that of the in-court defendant only. Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934). But no state had adopted such provision by statute before the Indiana enactment of 1983. Instead, the courts of a number of states had struggled with the question, with diverse results. Illustrative is the experience of the Kansas judicial process in dealing with its 1974 comparative negligence act, KAN. STAT. ANN. § 60-258a (1976), which is silent as to the role of the nonparty tortfeasor. Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978), involved a suit for property damage arising out of an auto collision. The plaintiff-father, as bailor of his Jaguar automobile to his nonparty son, sued only Keill for damage to the car as a result of a collision between the Jaguar, driven by plaintiff's son, and the auto driven by Keill. *Id.* at 196, 580 P.2d at 869. It is important to note that Kansas had traditionally followed the rule of joint and several liability, so that any one of multiple tortfeasors would be severally liable for all the plaintiff's damages. *Id.* at 203, 580 P.2d at 874. In a bench trial, the lower court boldly considered the fault of the bailee-son and ruled that he was responsible for ninety percent (90%) of the causal negligence and the defendant for only ten percent (10%) of the causal negligence, and awarded plaintiff only ten percent (10%) of his total damages. *Id.* at 196-97, 580 P.2d at 869. From such an inauspicious factual setting, a major legal battle erupted. Plaintiff appealed, and the Kansas Trial Lawyers Association filed its brief as amicus curiae. The defendant answered, and the Kansas Association of Defense Counsel also briefed the issues as amicus curiae. By its unanimous decision, the Kansas Supreme Court affirmed the abolition of the doctrine of joint and several liability from its comparative negligence scheme, and adopted the rule that the causal negligence of the nonparty is, indeed, to be compared. *Id.* at 206, 580 P.2d at 875.

Other states have reached the same result. The oft-cited Wisconsin Supreme Court earlier had recognized unequivocally the importance of the all-inclusory rule:

> It is established without doubt that, when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tortfeasors either by operation of law or because of a prior release.

Connar v. West Shore Equip., 68 Wis. 2d 42, 44-45, 227 N.W.2d 660, 662 (1975). It is self-evident that true apportionment cannot be achieved unless the fault of all tortfeasors

II. Doctrine of Joint and Several Liability Abolished

The principal difference between the Indiana system and that of other comparative fault states is that most states have retained the doctrine of joint and several liability, and permit an action for *comparative* contribution by a judgment debtor against the tortfeasor who has not been sued.[3] In these jurisdictions, the plaintiff is assured of recovery of all his damages, since he will be awarded a judgment which is fully

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is included, an objective equated by the Court of Appeals of New Mexico with a basic premise of our judicial system: "Fairness dictates that the blameworthiness of all actors in an incident be treated on a consistent basis." Bartlett v. New Mexico Welding Supply, 98 N.M. 152, 158, 646 P.2d 579, 585 (1982).

Similarly, the Oklahoma Supreme Court, in holding that nonparty tortfeasors were essential to the apportionment scheme, identified the shortcoming of a loss apportionment system which ignores nonparty tortfeasors:

> To limit the jury to viewing the negligence of only one tortfeasor and then ask it to apportion that negligence to the overall wrong is to ask it to judge a forest by observing just one tree. It cannot, and more importantly should not, be done. It simply is not fair to the tortfeasor which plaintiff chooses to name in his lawsuit.

Paul v. N.L. Industries, 624 P.2d 68, 70 (Okla. 1980). Thus, while the Indiana system is unique in that the *legislature* has provided for the inclusion of nonparties in the apportionment scheme, the scheme is consistent with that of most other states which have a comparative fault rule. It has now become the accepted practice to include all tortfeasors in the apportionment question, although the practice is not unanimous. C.R. Heft & C.J. Heft, Comparative Negligence Manual § 8.131 (1978 Rev.) [hereinafter cited as Heft & Heft].

The Uniform Comparative Fault Act simply ignores nonparties. The commissioners' comment explains the rationale:

> The limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. This is a deliberate decision. It cannot be told with certainty whether that person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued, or whether the statute of limitations will run on him, etc. An attempt to settle these matters in a suit to which he is not a party would not be binding on him. Both plaintiff and defendants will have significant incentive for joining available defendants who may be liable. The more parties joined whose fault contributed to the injury, the smaller the percentage of fault allocated to each of the other parties, whether plaintiff or defendant.

Uniform Comparative Fault Act § 2 Commissioners' Comment, 12 U.L.A. 39 (Supp. 1984). Such an explanation is inconsistent with the existing Indiana procedural scheme, in which a defendant has no right to join other liable parties and cannot seek contribution from them, whether or not they are parties. Indiana defendants can seek indemnity from the party truly at fault only when the party seeking indemnity is wholly without fault and subject only to vicarious liability.

[3]V. Schwartz, *supra* note 2, at § 16.7. *See, e.g.*, Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962); *see also,* American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). Indiana has recently reconsidered and rejected the adoption of the doctrine of contribution among tortfeasors, noting that the Indiana Comparative Fault Act expressly prohibits such rule. Coca Cola Bottling Co. v. Vendo Co., 455 N.E.2d 370, 372 (Ind. Ct. App. 1983).

enforceable against the in-court defendant. That party is then left to his devices to collect contribution from his joint tortfeasors.

But in adopting the Indiana Act, a significant trade-off occurred, the merits of which will likely be debated at the bar for a long time to come. In the amelioration of the harshness of the contributory negligence defense, the doctrine of joint and several liability has been abolished by unequivocal inference of the Indiana Act.[4] Since the doctrine is antithetical to the basic premise of the comparative fault concept—that liability for damage will be borne by those whose fault caused it in proportion to their respective fault—logic compelled its abolition.

The result is that the Indiana plaintiff may recover only that part of his damages actually caused by the in-court tortfeasor, and may or may not recover the remainder against the nonparty tortfeasor.[5]

Without the doctrine of joint and several liability, the plaintiff may not always be compensated for that portion of his damages attributable to certain kinds of tortfeasors, such as the insolvent tortfeasor, as addressed in the following section. This harsh result does not prevail in those jurisdictions where the doctrine of joint and several liability

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[4]The inference arises out of the method of calculating the verdict, which holds a defendant liable only for his own percentage of fault. The statute states that "the jury next shall multiply the percentage of fault of each defendant by the amount of [total] damages . . . and shall 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 [total] damages . . . ." IND. CODE § 34-4-33-5(b)(4) (Supp. 1984).

However, it is possible that the plaintiff's bar may not concede that the doctrine of joint and several liability has been abolished by the Act.

> I assume that Indiana, like most states, says that statutes enacted in derogation of common law are to be strictly construed. And, if that's the case, it seems to me that you on the plaintiff's side should be arguing to your Supreme Court that they must strictly construe this statute against the elimination of joint and several liability, and for the retention of joint and several liability, because that was the common law that existed prior to the adoption of comparative negligence. If you've got a statute that does not specifically spell out that we're eliminating joint and several liability, then it seems to me that you've got a good argument for the proposition that you have not lost it. Because, gentlemen, *if you've lost joint and several liability, that was too much to give up for what you got.*

Address by Donald W. Vasos, Esq., of Kansas City, Kansas, to the Indiana Trial Lawyers Association, September 16, 1983, Indianapolis, Indiana.

[5]IND. CODE § 34-4-33-5 (b)(4) (Supp. 1984). The Indiana Act specifies that in arriving at its verdict the jury shall first determine the percentage of fault of the claimant, each primary defendant, and of "any person who is a nonparty." *Id.* § 34-4-33-5 (b)(2). Then, if the fault of the plaintiff is not greater than fifty percent (50%) of the total fault, the jury shall determine the plaintiff's total damages. *Id.* § 34-4-33-5 (b)(3). Finally, it shall multiply the percentage of fault of each primary defendant by the total amount of the damages, and enter a verdict against each such defendant in the amount computed for that defendant. *Id.* § 34-4-33-5 (b)(4).

has been retained, along with comparative fault.[6]

III. Culpable Nonparties

In order to evaluate the soundness of that provision of the Indiana Act which permits the jury to apportion a percentage of causal fault to each nonparty whose conduct has contributed to plaintiff's injury, an identification of each type of nonparty is useful. With respect to certain types of culpable nonparties, the plaintiff has recovered, or will recover, damages. However, in some instances the plaintiff simply loses compensation to the extent of the nonparty's assigned percentage of fault. In other instances, some compensation may be realized from sources other than the civil action.

The sometimes competing objectives of simplicity and fairness must be balanced in providing for a practical scheme for litigation of losses. An attractive feature of the Indiana Act is its simplicity of application. All nonparties are subject to apportionment of fault. But since the Act does not provide any relief whatever to the plaintiff as to certain of those nonparties, an analysis of the nonparty provision of the Act by type of nonparty is appropriate in order to determine whether a *fair* system of loss adjustment has been adopted.[7]

A. The Settling Tortfeasor

The nonparty likely to be encountered by the jury most frequently

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[6]Many states which have adopted a comparative fault scheme have also retained the doctrine of comparative contribution among tortfeasors. *See, e.g.,* Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962), in which the rule of *comparative* contribution was first adopted. That the rule disregards the collectibility against the joint tortfeasor has been criticized as "a glaring example" of an "injustice." Heft & Heft, *supra* note 2, at § 1.350. Under this doctrine, any liable defendant may be called upon to pay the entire judgment. It is then up to that defendant to seek comparative contribution against the other tortfeasors, who may be either defendants, nonparties, or even a co-plaintiff. *Id.* A few states have required that the nonparty be joined as a defendant, at least for purposes of apportionment before his causal fault may be apportioned. *See, e.g.,* McCrary v. Taylor, 579 S.W.2d 347 (Tex. Civ. App. 1979); *see also,* Greenwood v. McDonaugh Power Equip., 437 F. Supp. 707 (D. Kan. 1977). These states go one critical step further than the Indiana Act in enhancing the plaintiff's liklihood of full recovery of his damages. However, Indiana and some other states place a lower priority upon enhancing plaintiff's opportunity for full recovery of his damages than upon retaining the concept of liability for damages in proportion to fault. For a discussion of the subject of contribution, see Annot., 53 A.L.R.3d 184 (1973).

[7]For purposes of such an evaluation, it is useful to the analysis to distinguish between those nonparties against whom the plaintiff has a *right* of recovery, and the nonparty against whom recovery is *allowed.* Some courts have made this distinction and have refused to permit the apportionment of fault to a person against whom the plaintiff has no right of recovery. *See* Beach v. M & N Modern Hydraulic Press Co., 428 F. Supp. 956 (D. Kan. 1977); *see also*, Greenwood v. McDonaugh Power Equip., 437 F. Supp. 707 (D. Kan. 1977). The Table below lists each of the enumerated categories and contains this distinction.

is that tortfeasor with whom plaintiff has reached a settlement before submission for decision.[8] It does not matter to the defendants whether such a settlement has been consummated, or for how much, or even if the settling tortfeasor is excused from participating at trial, since the terms of such settlement are not determinative of the extent of any defendant's liability for damages. However, the defendant is vitally concerned about the percentage of fault to be assigned to the settling nonparty and will actively seek to shift as great a percentage as possible to the settling tortfeasor. Of course, such an attempt to shift fault will be resisted by the plaintiff.

TABLE

Non-party	Right of Recovery	Recovery Allowed
1. Settled	yes	yes
2. Inadvertently omitted	yes	no
3. Intentionally omitted	yes	yes
4. Uninsured and insolvent	yes	no
5. Immune	no	no
6. Employer	no	yes*
7. Lack of Jurisdiction	yes	yes**

*A form of recovery is allowed under the Workmen's Compensation Act.

**Recovery may be possible in another jurisdiction, but perhaps by an inconsistent judgment.

It is readily seen from the Table that there are three categories of nonparties against whom a percentage of fault may be assessed, but against whom the plaintiff cannot realize any recovery, disregarding that tortfeasor whom the plaintiff has chosen not to sue. The most bothersome on philosophical grounds is the immune tortfeasor against whom the plaintiff lacks the right to recover and against whom recovery is not allowed. The plaintiff simply remains uncompensated for those damages attributable to the immune tortfeasor. Of equal importance, from the plaintiff's practical perspective, is the judgment-proof tortfeasor, although there may be other sources of recovery under certain circumstances. A resolution of the issue of whether it is appropriate to have a system of loss adjustment which denies to a plaintiff recovery of part of his damages requires an arrangement of priorities.

[8]Whether the adoption of comparative fault will encourage settlements is unknown. In the case in which the Supreme Court of Wisconsin adopted the rule of comparative contribution among joint tortfeasors, as contrasted with the existing rule of equal contribution, the effect of the change was predicted to increase settlements. The considerations may be similar to those which accompany the adoption of comparative fault.

> Under the new rule, a defendant whose potential causal negligence is greater than 50% should be more willing to contribute a greater amount to a settlement than formerly. The defendant only slightly negligent should still settle for a sum in proportion to his fault in order to avoid the cost of litigation. In making settlements under the present rule, defendants generally contribute to the settlement in some rough proportion to what they think their negligence is, and if such proportion cannot be agreed upon under the inequities of the present rule, the settlement breaks down. The logic of conforming the rule of contribution

It may or may not matter to the settling tortfeasor what percentage of fault is assigned to him. Whether this matters will depend upon the terms of his settlement, either outright or contingent upon the jury's determination of his percentage of fault. It is expected that the use of loan receipt agreements[9] will continue to flourish, although they will no longer be effective to shift liability for damages, as they were under the doctrine of joint and several liability.[10]

In both the former practice and under comparative fault, the plaintiff may select from among the several tortfeasors those with whom a favorable settlement is possible and those whom are to be sued. Under the former doctrine of joint and several liability, so long as the *faultless* plaintiff recovered a judgment against one solvent defendant, plaintiff's damages were recovered in full. The judgment would have been reduced only by the sums received in settlement from the other tortfeasors.

In contrast, full satisfaction may not always be achieved under the comparative fault scheme, even if all actors are collectible and amenable to suit. Depending upon the accuracy of plaintiff's forecast as to the amount of total damages to be awarded, and the percentage of causal fault assigned by the jury to the settling tortfeasor, the plaintiff may

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> to the practice of settlements is apparent. We recognize there is a difference of opinion among members of the bar concerning the effect of the proposed rule on settlements. Our own view is, substantially more settlements will result.

Bielski v. Schulze, 16 Wis. 2d 1, 12-13, 114 N.W.2d 105, 111 (1962). Nevertheless, the effect upon settlements in Indiana is difficult to predict. Where the transition is from the rule of contributory negligence to a system of comparative negligence, one must recognize that the pressure of the former "all or none" practice tended to promote settlements, while the Comparative Fault Act may offer the less harsh "half-loaf" result at trial. This might tend to make the trail outcome more palatable to both sides, and decrease the likelihood of settlements. On the other hand, the percentage of causal fault of a given tortfeasoir may be more easy to predict in advance of trial than was the effect of the contributory negligence defense under the former practice. Thus, in some cases, settlement possibility may be enhanced.

[9]A loan receipt agreement is an agreement under which one joint tortfeasor lends funds to an injured plaintiff in exchange for the plaintiff's promise not to enforce a judgment against that tortfeasor. The loan will be repaid from the proceeds of a recovery from the other tortfeasor. *See, e.g.,* City of Bloomington v. Holt, 172 Ind. App. 650, 361 N.E.2d 1211 (1977).

[10]The former Indiana practice, which included the doctrine of joint and several liability, encouraged the use of loan receipt agreements in effecting settlements. Ohio Valley Gas v. Blackburn, 445 N.E.2d 1378 (Ind. Ct. App. 1983); Northern Indiana Public Service Co. v. Otis, 145 Ind. App. 159, 250 N.E.2d 378 (1969). The threat of the employment of such agreements in multiple tortfeasor cases to place the burden of liability for all damages upon a single defendant tended to promote settlements. Under the Comparative Fault Act, such threat will not exist. However, it is noted that the use of such agreements, commonly known as "Mary Carter" agreements, have had widespread use in comparative negligence states. Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. Dist. Ct. App. 1967). *See* Annot., 65 A.L.R.3d 602 (1975).

gain a windfall or suffer a penalty. For example, suppose that a jury were to find total damages of $10,000, and apportioned 40% causal fault to the settling tortfeasor. If the plaintiff has effected a $5,000 settlement from that person, the plaintiff will have realized a windfall of $1,000. On the other hand, if the jury were to find damages of more than $12,000, or assign more than 50% causal fault to that tortfeasor, the plaintiff would have suffered a penalty for his incorrect assessment of his prospects at trial.

This windfall/penalty settlement rule of Indiana seems to satisfy the "fairness" objective better than a rule that allows neither a windfall nor a penalty.[11] The latter rule results in the non-settling defendant bearing a greater burden of the damages than his apportioned fault would otherwise require, where the settling defendant has settled for a sum less than that for which he would have been liable under the jury's assessment. While the encouragement of settlements is a laudable goal, courts should be most reluctant to adopt a rule which penalizes any party, either plaintiff or defendant, from exercising the right to have his day in court and to have his conduct judged by his peers.

In judging the fairness of Indiana's new system, it seems not to matter that where the plaintiff realizes a windfall by a settlement, the plaintiff actually recovers *more than his adjudicated damages.* Theoretically, this result could never have occurred under the traditional tort system since the settlement sum was admissible under the accord and satisfaction defense, it being said that "a plaintiff is entitled to only one recovery for a wrong."[12] However, the realist of the trial bar understands that the traditional system has not worked with such perfection as to insure the absolutely just result. The maximization of compensation to an injured plaintiff is the goal of the plaintiff's bar, and the windfall/penalty rule presents an acceptable risk voluntarily undertaken by both sides to the settlement. One should conclude that it is both fair and logical to apportion a percentage of fault to the nonparty who has settled, and that neither the amount of such settlement, nor the fact that there was a settlement, is of concern to the jury.[13]

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[11]Not all jurisdictions have accepted the windfall/penalty rule of settlements. In California, there can be neither a penalty nor a windfall. The plaintiff's recovery is diminished only by the *amount* that plaintiff has actually received in a good-faith settlement, rather than an amount determined by the settling tortfeasor's apportioned fault. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 604, 578 P.2d 899, 916, 146 Cal. Rptr. 182, 199 (1978). Conversely, the total recovery from all tortfeasors cannot exceed the amount of damages determined by the jury. In Jaramillo v. State, 81 Cal. App. 3d 968, 146 Cal. Rptr. 823 (1978), the plaintiff was not allowed to recover by a combination of settlement and suit a sum greater than the damages which the jury had determined to be due him. *Id.* at 970, 146 Cal. Rptr. at 825. The court reasoned that such a rule would encourage settlements. *Id.*

[12]Barker v. Cole, 396 N.E.2d 964, 970 (Ind. Ct. App. 1979).

[13]However, Professor Davis argues that "the jury might as well be told all the facts

B. The Inadvertently Omitted Tortfeasor

The nonparty tortfeasor against whom the applicable period of limitations has expired presents the same consideration in a comparative negligence context as under the traditional tort system. The social purpose of statutes of limitations was confirmed by the Indiana Supreme Court long ago:

> Statutes of limitations are now generally looked upon as statutes of repose. They rest upon sound policy, and tend to the peace and welfare of society, and they are to be deemed just as essential to the general welfare and wholesome administration of justice as statutes upon any other subject.[14]

That a citizen may, with the passage of a specified period of time, enjoy the comfort of knowing that he can no longer be sued as an accused tortfeasor is a social purpose equally viable under both the comparative fault system and under the traditional tort system. In both contexts, the plaintiff must exercise diligence in identifying all the actors at fault in the incident and proceed seasonably. However, this diligence is even more important in the multiple tortfeasor cases under the comparative fault system. Under the traditional tort approach, including the doctrine of joint and several liability, the plaintiff was assured of recovery of his verdict sum if he proceeded seasonably against any one tortfeasor. Now he must proceed against all, or have his recovery diminished accordingly.

Although this may appear to be a harsh result, a defendant should not be penalized for a plaintiff's lack of diligence in identifying and suing each tortfeasor. If diligence is to be encouraged, so as to achieve true apportionment and liability according to fault, the burden of loss must fall on that party who determines who shall be defendants in the suit. The Indiana Act preserves the appropriate incentive for the plaintiff to exercise diligence.

C. The Intentionally Omitted Tortfeasor

Among the reasons offered by one writer for the intentional omission of a tortfeasor from suit are "whim, spite, collusion, or any possible tactical or personal consideration."[15] As an example, the injured plaintiff

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of a settlement short of the actual figures." Davis, *Comparative Negligence, Comparative Contribution, and Equal Protection in the Trial and Settlement of Multiple Defendant Product Cases,* 10 IND. L. REV. 831, 870 (1977). The author seems to be preoccupied with speculative conclusions about the jury's perception of why the case does not proceed against certain obviously culpable parties and with the court's role in presiding over settlements. It seems to make no more sense to identify for the jury tortfeasors who have settled than to identify uninsured tortfeasors.

[14]High v. Board of Commissioners, 92 Ind. 580, 589-90 (1883).

[15]Goldenberg & Nicholas, *supra* note 1, at 45.

would likely be reluctant to sue another family member, especially where the two were members of the same economic unit, insurance considerations aside.[16] Under the former Indiana practice, where each defendant in a tort action was jointly liable for all the damages to the faultless plaintiff, such a selective decision placed an obviously unfair burden upon the remaining tortfeasors.

Under the Comparative Fault Act, the plaintiff now will have a price to place on such a decision to favor one tortfeasor over another. If suit is withheld against a favored tortfeasor, the plaintiff's recovery is diminished accordingly. The process of balancing a plaintiff's social considerations with his economic considerations will dictate his choice of defendants, and will preserve the true goal of the comparative fault system of assessing liability in proportion to fault.

D. The Judgment-Proof Tortfeasor

Under the Indiana comparative fault plan, the plaintiff bears the entire burden of the fault apportioned to the uninsured and insolvent tortfeasor. This is so whether that tortfeasor is a party or a nonparty. Under the former practice, the solvent or insured defendant bore this burden. Neither result is fair.

Oklahoma has adopted a system of comparative negligence which, like Indiana, includes nonparty tortfeasors in the apportionment scheme, but does not recognize joint and several liability.[17] In dealing with the insolvent tortfeasor, the Oklahoma Supreme Court showed little concern for the plaintiff's inability to collect a portion of his damages:

> It is argued that this could work a hardship on a plaintiff if one co-defendant is insolvent. But the specter of the judgment-proof wrongdoer is always with us, whether there is one defendant or many. We decline to turn a policy decision upon an apparition. There is no solution that would not work an inequity on either the plaintiff or a defendant in some conceivable situation where one wrongdoer is insolvent.[18]

As in Indiana, Oklahoma assigns a higher priority to adherence to the

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[16]One might suspect that the plaintiff's failure to include his son as a party defendant in Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978), was the result of such a "personal consideration." *See supra* note 2.

[17]OKLA. STAT. ANN tit. 23, §§ 11-14 (West. Supp. 1984). Two features in the Oklahoma common law, the inclusion of nonparty tortfeasors in the apportionment scheme and the abolition of joint and several liability, arose in the construction of the comparative negligence statute of that state. Paul v. N. L. Industries, 624 P.2d 68 (Okla. 1980); Laubach v. Morgan, 588 P.2d 1071 (Okla. 1978). The Act itself is silent as to such features. Similarly, the Supreme Court of Kansas abolished the doctrine of joint and several liability in construing that state's act. Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978).

[18]Laubach v. Morgan, 588 P.2d 1071, 1075 (Okla. 1978).

principle of liability for damages in proportion to fault than to the maximization of recovery by the plaintiff.[19]

It is some consolation that in auto injury cases, the injured plaintiff may be afforded limited protection by the mandatory insurance law and by his own unisured and underinsured motorists coverage. In injuries arising out of other kinds of casualties, the injured party is protected to some extent by his voluntary health and accident insurance and disability insurance programs, although frequently the cost of medical care is only a relatively small part of the total loss from a bodily injury. Such collateral sources of funds are of greater importance in the absence of joint and several liability under the comparative fault scheme.

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[19]In California, a different hierarchy of interests has been adopted, the order being: "first is maximization of recovery to the injured party, the second is the encouragement of settlement of the injured party's claim and the third is equitable apportionment of liability among tortfeasors." Teacher's Ins. Co. v. Smith, 128 Cal. App. 3d 862, 865, 180 Cal. Rptr. 701, 703 (1982). Predictably, the doctrine of joint and several liability has been retained in that state. *Id.*

The drafters of the Uniform Comparative Fault Act were so concerned about the inability of the plaintiff to collect his damages from a judgment debtor that they provided a very cumbersome system of "reallocation." UNIF. COMPARATIVE FAULT ACT § 2, 12 U.L.A. 39 (Supp. 1984). Section 2(d) provides:

> Upon motion made not later than [one year] after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

The commisioners' comment argues the justification for the scheme of reallocation:

> *Reallocation.* Reallocation of the equitable share of the obligation of a party takes place when his share is uncollectible.
>
> Reallocation takes place among all parties at fault. This includes a claimant who is contributorily at fault. It avoids the unfairness both of the common law rule of joint-and-several liability, which would cast the total risk of uncollectibility upon the solvent defendants, and of a rule abolishing joint-and-several liability, which would cast the total risk of uncollectibility upon the claimant.

UNIF. COMPARATIVE FAULT ACT § 2, Commissioners' Comment, 12 U.L.A. 40 (Supp. 1984). Such a procedure must fail when judged by the standard of simplicity of application, and by the need of the practicing attorney and the casualty insurance industry for finality of judgment.

One writer suggests that the best solution is to distribute the burden of insolvency between the solvent tortfeasor or tortfeasors and the plaintiff, according to their respective degrees of fault. Goldenberg & Nicholas, *supra* note 1, at 53. While serving the objective of full compensation to injured plaintiffs, such a solution admittedly compromises the goal of liability in proportion to fault. No jurisdiction has adopted such a rule.

However, Indiana and some other states place a lower priority upon enhancing plaintiff's opportunity for full recovery of his damages than upon retaining the concept of liability for damages proportionately to fault. For a discussion of the subject of contribution, see Annot., 53 A.L.R. 3d 184 (1973).

Notwithstanding such collateral sources in some cases, there is no provision for the plaintiff's recovery of damages caused through the fault of an uninsured tortfeasor in a substantial portion of injury litigation. Further, no solution is possible under the system of loss apportionment which is founded upon the principal of liability in proportion to fault.

Most states have avoided the problem of the insolvent tortfeasor by holding that the comparative negligence statute does not change the common law rule that every joint tortfeasor who is liable at all is liable for the total damages the plaintiff is entitled to recover.[20] Whether the Indiana Act, which leaves some losses uncompensated, is fair depends upon the priorities one assigns to the objectives of true loss apportionment according to fault relative to that maximization of recovery by the injured party. Indiana's new Act favors the former over the latter.[21]

E. The Unavailable Tortfeasor Beyond Jurisdiction

There will be instances in which a nonparty tortfeasor is not available for suit, either because he is not amenable to process or because of some jurisdictional prohibition. That the plaintiff may be required to pursue the liable parties in two separate actions is not peculiar to the comparative fault system, as this problem existed under the former practice. However, with the rule of joint and several liability, it was necessary only for the plaintiff to prosecute one action to a favorable judgment in order to recover all of his damages. In contrast, under the comparative fault system adopted by Indiana in which there is no joint and several liability, the plaintiff is required to pursue each tortfeasor to judgment in order to realize full recovery. Thus, the plaintiff bears the risk of inconsistent results between judgments,[22] since the second jury may assign different percentages than the jury in the first trial.

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[20]HEFT & HEFT, SUPRA note 2 at appendix II. For a discussion by the Appellate Court of Illinois of the rationale for the retention of the doctrine of joint and several liability in the comparative negligence scheme, see Conney v. J.L.G. Indus., 97 Ill. 2d 104, 454 N.E.2d 197 (1983).

[21]*See supra* note 19 and accompanying text.

[22]This is, in the first trial against defendant *A*, the jury may apportion a given percentage of causal fault to *B*, a nonparty. Of course, *B* would not be bound by such determination in a later trial against *B*. In the trial against *B*, where *B* is permitted to litigate his liability anew, the result of the trial against *A* should not be admissible. In Li v. Yellow Cab Co., 13 Cal. 3d 804, 523 P.2d 1226, 119 Cal. Rptr. 858 (1975), the California Supreme Court recognized that

> [o]ne such problem may arise when all responsible parties are not brought before the court: it may be difficult for the jury to evaulate relative negligence in such circumstances, and to compound this difficulty such an evaluation would not be *res judicata* in a subsequent suit against the absent wrongdoer.

Id. at 823, 523 P.2d at 1240, 119 Cal Rptr. at 872.

The results include the possibility that the plaintiff will not recover all of the damages allocated by either jury to the tortfeasors, or that he may recover more total damages than to which either jury found him entitled. Of course, the ultimate inconsistency would be where the plaintiff's recovery in the first suit is diminished by an apportionment of fault to the nonparty, and in the second suit against the same alleged tortfeasor the jury finds for the defendant.

One writer observes that these inconsistencies ought not discourage the uniform application of the comparative fault doctrine: "It would be unfortunate to permit the fear of occasional inconsistencies in loss distribution to prevent the adoption of a system of spreading loss which would in most cases abolish the archaisms of our present common law rules of negligence."[23]

IV. Tortfeasors Who Cannot Be Nonparties

A. The Immune Tortfeasor

The Indiana Act, as originally enacted, carried the apportionment scheme further toward the objective of liability in proportion to fault than the statutes of any other state and further than even the common law had permitted in most states, as shown by the Act's total disregard of the injured plaintiff's inability to collect his damages from a nonparty. The immune tortfeasor was included in the allocation of fault, and was the only type of nonparty tortfeasor against whom the plaintiff had no *right* of recovery.[24] To the extent that such an immune person contributed to cause injuries to the plaintiff, those injuries were to remain uncompensated. This inequity was eliminated by the 1984 amendment,[25] which required that "nonparties" need be of a class which are, or may be, liable.[26] Some states are like Indiana and have provided that all the parties shall share the burden of the immune tortfeasor in proportion to their respective fault by ignoring those against whom recovery is not allowed.[27]

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[23]Goldenberg & Nicholas, *supra* note 1, at 52-53 (quoting Gregory, Legislative Loss Distribution in Negligence Actions 118 (1936)).

[24]A distinction is made here between the tortfeasor who enjoys a traditional immunity, such as sovereign immunity, and the so-called "immune" employer, as to whom the Workmen's Compensation Act provides an exclusive remedy. *See* Ind. Code §§ 22-3-1-1 to -10-3 (1982).

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

[26]*Id.*

[27]Kan. Stat. Ann. § 60-258a(d) (1976) speaks of "all parties against whom such recovery is allowed." For a reconciliation of such language with the holding in Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978), see Comment, Brown *and* Miles: *At Last, and End to Ambiguity in the Kansas Law of Comparative Negligence,* 27 U. Kans. L. Rev. 111 (1978).

Other states, in a similar effort to alleviate this hardship, have also sacrificed the fundamental principle of liability in proportion to fault by adopting various methods to assist the plaintiff in realizing a recovery of damages. Where the doctrine of joint and several liability has been retained, the liable defendant bears the entire burden of the culpable, but immune, tortfeasor. Yet others adhere to the basic principle that no defendant is liable for a greater share of the damages than his proportionate share of the fault, and permit an apportionment of fault to the immune nonparty.[28]

There has been some noticeable withering of the various immunities in Indiana.[29] However, some vestiges remain, the most prominent being that form of governmental immunity which is provided in the Indiana Tort Claims Act.[30] It is apparent that the immunity for certain acts of governmental officials would have resulted in the denial of recovery for a significant portion of damages of injured plaintiffs had immune tortfeasors been retained in the scheme. It seems appropriate that the legislature examined the original Act, sacrificed the fundamental principle of liability for damages according to fault, and removed immune tortfeasors from the fault apportionment scheme.

B. The Employer

In the industrial injury action, the fault of the employer is often prominent. A typical scenario involves an injury to the operator of a machine, such as a power press. In such a case, the injury may be caused in part by the employer's negligence in the alteration or maladjustment of a point-of-operation safety device, and in part by a manufacturing or design defect. The employer is insulated from all civil liability by the applicable worker's compensation act.[31] The injured employee typically exercises his legal remedy solely against the machine's manufacturer, who shoulders the burden of both his fault and that of the employer. Under Indiana law, there is no contribution among joint tortfeasors.[32] Nor is there a right of indemnity or contribution by the culpable manufacturer against such employer.[33]

In the scenario posed, the employer would pay statutory worker's compensation benefits, for which it would then have a lien on the

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[28]*See* Connar v. West Shore Equip., 68 Wis. 2d 42, 227 N.W.2d 660 (1975).

[29]Interspousal tort immunity has been abolished in Indiana. Brooks v. Robinson, 259 Ind. 16, 284 N.E.2d 794 (1972). The parent-child immunity is still intact. Vaughn v. Vaughn, 161 Ind. App. 497, 316 N.E.2d 455 (1974).

[30]IND. CODE § 34-4-16.5-1 to -16.5-19 (1982).

[31]*See* IND. CODE § 22-3-2-6 (1982).

[32]Barker v. Cole, 396 N.E.2d 964 (Ind. Ct. App. 1979).

[33]McClish v. Niagara Mach. & Tool Works, 266 F. Supp. 987 (S.D. Ind. 1967).

recovery against the manufacturer to the extent of benefits paid.[34] The employer's fault, even if gross misconduct, is irrelevant to his absolute right to satisfaction of his lien.[35]

Under the original Indiana Comparative Fault Act, it was clear that the employer is a type of nonparty whose fault must be apportioned by the jury.[36] Yet, there was no statutory provision requiring the employer to contribute to plaintiff's damages, even though the employer's fault was to be affirmatively apportioned and the employer was to be named on the verdict form. Moreover, the apportionment of fault to the employer did not serve to reduce the amount of the employer's lien for compensation benefits paid. Because the doctrine of joint and several liability is abolished, the statutory obligation to pay the employer's lien from the "partial" recovery against the manufacturer would have left the plaintiff entirely uncompensated from *either* source for a portion of his damages. This injustice cried out for remedial legislation to modify the lien recovery rights of the employer who is at fault.[37]

The basic compromise in the adoption of the Workmen's Compensation Act was that the employer was made liable without fault for benefits to the injured employee, irrespective of the contributory fault

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[34]IND. CODE § 22-3-2-13 (1982).

[35]Blade v. Anaconda Aluminum Co., 452 N.E.2d 1036 (Ind. Ct. App. 1983).

[36]The original Act was amended significantly by the express exclusion of the employer from the apportionment of causal fault. Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2, 1984 Ind. Acts 1468, 1468-69 (amending Act. of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 2). Other states permit the inclusion of the employer in the apportionment scheme. *See* Connar v. West Shore Equip. 68 Wis. 2d 42, 227 N.W.2d 660 (1975); *see also*, Pocatello Indus. Park Co. v. Steel West, Inc., 101 Idaho 783, 621 P.2d 399 (1980).

[37]The problem is addressed in commissioners' comments to Section 6 of the Uniform Comparative Fault Act:

> *Worker's compensation.* An injured employee who has received or is entitled to worker's compensation benefits from his employer may ordinarily bring a tort action against a third party, such as the manufacturer of the machine that injured him, and recover for his injury in full. Under the rule in most states, the defendant is not entitled to contribution from the employer, even though the employer was negligent in maintaining the machine or instructing the employee in its use. This casting of the whole loss on the tort defendant may be unfair and greatly in need of legislative adjustment. It is so affected by the policies underlying the worker's compensation systems, however, and these policies vary so substantially in the several states that it was felt inappropriate to include a section on the problem in a uniform act.
>
> Several solutions are possible. Thus, the contribution against the employer may be provided for. Or the recovery by the employee may be reduced by the proportionate share of the employer. Or the amount of that proportionate share may be divided evenly between the employer and employee, so that the compensation system bears responsibility for it. Provision also needs to be made for the relation of the tort defendant to the compensation benefits. In any event, contributory negligence on the part of the employee will come within the scope of this Act and will affect the amount of recovery.

UNIF. COMPARATIVE FAULT ACT § 6 Commissioners' Comments 12 U.L.A. 45 (Supp. 1984).

of the employee. But, such liability is limited to statutory benefits.[38] These benefits are usually less than the damages which the faultless employee could have recovered in a civil suit. In consideration of the employee's absolute right to compensation from the employer, it is fair that the employee's compensation attributable to the employer's fault be less than that which the employee might recover in the more generous civil forum. But to have deprived the injured employee of all compensation for that portion of his damages attributable to the employer's fault defies both logic and equity.

The California courts, which created that state's comparative fault scheme without the assistance of its legislative body, have adopted a rule which permits the employee to regain his worker's compensation benefits under these circumstances. The rule allows the employer to recover for compensation benefits *only* to the extent that those benefits exceed the share of damages proportionate to the employer's negligence.[39] The adoption of such a rule by an amendment of the Indiana Workmen's Compensation Act would have been absolutely essential to a fair system of loss distribution, and would not have violated any equitable principle inherent in the worker's compensation system. Instead, the legislative succumed to the easy remedy, and simply removed the employer from the definition of "nonparty."

It should be noted that not all courts have permitted the inclusion of the employer in the apportionment process. A federal court in applying the Kansas law held that since the plaintiff had no *right* to recover against his employer, the fault of the employer must be ignored. The court observed: "The liability [for worker's compensation benefits] is in no sense founded upon tort, but is based upon the contract of employment and the statute, the terms of which are embodied in the contract."[40] Conversely, Wisconsin courts have permitted the employer's negligence to be considered.[41] Since the employer at common law was liable for negligent injury to his employee, the standard by which the employer's conduct is to be judged is well established. Thus, the argument against inclusion of the employer in the apportionment scheme is not persuasive. However, both logic and fairness suggest that the negligent

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One federal court believes it appropriate for courts to fashion a remedy to prevent such inequity. Barron v. United States, 473 F. Supp. 1077, 1088-89 (D. Hawaii 1979).

[38]*See,* Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 469 (1953).

[39]Arbaugh v. Proctor & Gamble Mfg. Co., 80 Cal. App. 3d 500, 145 Cal. Rptr. 608 (1978). In Rodriguez v. McDonnell Douglas Corp., 87 Cal. App. 3d 626, 151 Cal. Rptr. 399 (1979), the employer's negligence was 10%, and 10% of the total damages exceeded the amount of the benefits paid. The employer was held entitled to no reimbursement. *Id.* at 670, 151 Cal. Rptr. at 424.

[40]Beach v. M & N Modern Hydraulic Press Co., 428 F. Supp. 956, 960 (D. Kan. 1977) (quoting Houk v. Arrow Drilling Co., 201 Kan. 81, 439 P.2d 146 (1968)). *But see* LeMaster V. Amstead Indus., 110 Ill. App. 3d 729, 734, 442 N.E.2d 1367, 1371 (1982), (where the employer is easily characterized as a "tortfeasor" for purposes of indemnity).

employer's right to recover his compensation lien should be diminished in proportion to his fault, as under the California rule.

V. The "Name" Requirement

The Indiana Act pursues the objective that the blameworthiness of all actors should be considered by the inclusion of nonparties in the apportionment question. However, its effort is diminished by the provision that, in order for the trier of fact to apportion negligence to a nonparty, it must state on its verdict form the actual *name* of each nonparty to whom fault is assigned.[42] The drafters of the Indiana Act chose not to permit the defendant to prove the causal faults of such nonparties as "the unknown driver of the red car."[43]

Upon first analysis, one is tempted to explain the provision by a plaintiff-bias on the part of suspicious drafters, who anticipated that defendants will conjure up true phantoms.[44] On further consideration, it seems fair that if the defendant seeks to diminish his own contribution to damages by the proof of fault of the nonparty, the defendant should "offer" the nonparty by name for joinder by plaintiff. The drafters of the Indiana Act were left to reconcile two competing considerations. The first was the achievement of full comparative recovery for the plaintiff by ignoring existing but unidentifiable tortfeasors. However, the drafter also had to consider a philosophy which emphasized a true apportionment of damages among *all* tortfeasors in porportion to their fault, irrespective of their amenability to suit and their solvency.

The Indiana Act is mildly tarnished by the sacrifice of the latter, more idealistic, goal in favor of maximizing recovery by the injured plaintiff when the nonparty cannot be identified. This seems to be the most blatent instance in the Act of a shifting of priorities.

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[41]Connar v. West Short Equip., 68 Wis. 2d 42, 227 N.W.2d 660 (1975).

[42]This requirement is clearly expressed in the Act:

> The court shall furnish to the jury forms of verdict that require the disclosure of:
>
> (1) the percentage of fault charged against each party;
>
> (2) the calculations made by the jury to arrive at their final verdict.
>
> If the evidence in the action is sufficient to support the charging of fault to a nonparty, the form of verdict also shall require a disclosure of the name of the non-party and the percentage of fault charged to the nonparty.

Ind. Code § 34-4-33-6 (Supp. 1983).

[43]*See* Jacobs v. Milwaukee & Suburban Transport Corp., 41 Wis. 2d 661, 663, 165 N.W.2d 162, 163 (1969). Wherein a suit by a passenger against the defendant bus company for injuries sustained in a fall as the bus lurched, the jury apportioned 12% of the causal negligence to the bus driver, 19% to plaintiff, and 69% to "the unknown driver of the red car."

[44]The term "phantom" is commonly used to describe any kind of involved nonparty, whether or not they are identifiable. *See* Heft & Heft, *supra* note 2, at appendix II; *see also*, Hardin v. Manitowoc-Forsythe Corp., 691 F.2d 449, 453-54 (10th Cir. 1982).

VI. Pleading, Amendment, and Discovery

The Indiana Comparative Fault Act, as originally drafted, did not expressly assign the burden of pleading or proving the fault of the nonparty. Further, it did not limit the time during which the pleadings could be amended to include the fault of the nonparty in the assignment of fault by the trier of fact.

Fairness, but perhaps not idealism, dictates that the objective of apportionment of damages among all tortfeasors in proportion to their fault must yield to the need for full disclosure of defenses and the *timely* identification of all culpable persons. Thus, the 1984 legislature amended the Act by including a provision which deals with pleading and proof, as well as with the timeliness of disclosure of the nonparty defense. The Act provides that the pleading and proof of the "nonparty defense" is on the defendant,[45] and also provides a specific timetable for the assertion of such a defense.[46] The plaintiff is well advised to file the suit more than the specified 150 days before the expiration of the applicable period of limitations in order to allow sufficient time to join as defendants other parties whose culpability may be asserted by the defendant. However, it must be remembered that newly joined defendants also have the right to assert the defense of the fault of other nonparties. This defense may be asserted after the limitation period has expired. Thus, merely filing suit more than 150 days before the expiration of the period of limitations will not assure a plaintiff of full protection against the unavailability of tortfeasors whose fault will serve to diminish plaintiff's damages.

The adoption of the provision for pleading and proof of the nonparty defense was necessary for the achievement of full recovery by a plaintiff of all damages found against all available tortfeasors. Similarly, the

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[45]Ind. Code § 34-4-33-10(b) (Supp. 1984).

[46]A nonparty defense that is known by the defendant when he filed his first answer shall be pleaded as a parat of the first answer. A defendant who gains actual knowledge of a nonparty defense after the filing of an answer may plead the defense with reasonable promptness. However, if the defendant was served with a complaint and summons more than one hundred fifty (150) days before the expiration of the limitation of action applicable to the claimant's claim against the nonparty, the defendant shall plead any nonparty defense not later than forty-five (45) days before the expiration of that limitation of action. The trial court may alter these time limitations or make other suitable time limitations in any manner that is consistent with:

(1) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense; and

(2) giving the claimant a reasonable opportunity to add the nonparty as an additional defendant to the action before the expiration of the period of limitation applicable to the claim.

Ind. Code § 34-4-33-10(c) (Supp. 1984).

requirement of pleading the defense serves to limit precisely the jury's role in the selection of persons against whom fault may be assigned. For example, suppose that no party advances at trial, by appropriate pleading or argument, the position that the fault of a certain nonparty was a proximate cause of plaintiff's injury. The often-heard instruction to the jury charges that while the jury must accept the instructions of law as given by the court, the jury is the exclusive judge of the facts. May the jury then in the exercise of conscientious whim determine that John Doe, about whose *conduct* it heard evidence, but whose causal fault was not pleaded, was also guilty of causal fault and apportion such fault to John Doe in its verdict? The compelling answer must be negative and the jury must be so instructed as a precaution, perhaps to avoid a mistrial. While there may be several reasons to support such a conclusion, the most obvious is that the jury will not have been instructed as to the legal duty of John Doe to the plaintiff. For example, assume that a plaintiff was injured as an automobile passenger of John Doe in a head-on collision with the auto of defendant, and the evidence is clear that the combined *negligence* of Doe and the defendant caused the collision. If plaintiff were a *guest* passenger of Doe, there may not be a recovery from him in the absence of his wanton or willful misconduct, of which Doe was not guilty. If the fault of John Doe were pleaded by the defendant, then the jury would be instructed that fault may be assigned to Doe *only* if he had acted with wanton or willful misconduct. If the defendant does not plead the fault of Doe, the jury should be instructed, as a precaution, that causal fault may be apportioned only among the parties at trial. To fail to so advise the jury would be to invite a mistrial.

VII. Conclusion

An eminent author and respected federal jurist, Henry Woods, observed that the "attractiveness of comparative fault is its simplicity," although he noted that it works best in a "pure" comparative jurisdiction.[47] To be sure, the Indiana Act will avoid the agonies experienced in other jurisdictions in addressing, seemingly without end, such questions as whether the traditional products liability theories are to be included, how contribution among tortfeasors is to be implemented, and whose fault is to be compared. The drafters of the Indiana Act viewed the accounts of those litigation struggles in other states and wrote the best solutions into the Act. Thus, Indiana has a headstart in the development of its corpus of common law in the comparative fault field. However,

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[47]H. Woods, *Products Liability: Is Comparative Fault Winning the Day?*, 36 Ark. L. Rev. 360, 382 (1982).

it is naive to describe the comparative fault Act of Indiana in terms of "simplicty." There will be growing pains. In providing for sound and orderly growth, the courts and the trial bar must always weigh the utility of the basic premise of the comparative fault concept that "fairness dictates that the blameworthiness of all actors in an incident be treated on a consistent basis."[48]

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[48]Adler, *Allocation of Responsibility After* American Motorcycle Association v. Superior Court, 6 PEPPERDINE L. REV. 1, 15 (1978) *quoted in*, Bartlett v. New Mexico Welding Supply, 98 N.M. 152, 158, 646 P.2d 579, 585 (1982).