Indiana's Comparative Fault Law: A Legislator's View

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The Indiana General Assembly passed a comparative fault act during the 1983 session. Senate Enrolled Act 287 passed the House 78-12 and passed the Senate 41-6. The Act will become effective January 1, 1985.

In the past several sessions of the Indiana General Assembly, some form of comparative fault legislation has been considered. Some proposed the pure comparative fault concept, which met with little or no success, while others attempted modified forms. The trial bar and defense bar were generally the proponents and opponents of the legislation with considerable interest being exhibited by the insurance industry. The General Assembly listened to the debate each year, but not until the 1983 session did it decide it was time to make a fundamental change in the law with respect to determining fault.

There are a number of factors that made it possible for a comparative fault act to pass. First of all, the Act is a modified form of comparative fault, not the pure form of comparative fault. Under the modified form adopted by Indiana, a plaintiff who is more than fifty percent at fault is barred from recovery. It is highly unlikely that a pure form of comparative fault, which allows recovery for a ninety-nine percent-fault plaintiff, would have been regarded as fair by the members of the Indiana General Assembly.

Secondly, comparative fault was regarded by legislators as more equitable to the slightly-at-fault plaintiff than the contributory negligence rule. Comparative fault avoids the inequity under the contributory negligence rule of totally barring recovery to a plaintiff who is slightly at fault. Many legislators felt that juries ignored the contributory negligence rule or used devices such as the doctrine of last clear chance to avoid its harsh effects. By abolishing contributory negligence, legislators felt that juries would no longer be forced to contrive ways to circumvent the harsh treatment of the slightly-at-fault plaintiff. Furthermore, legislators felt that under comparative fault, judgments would be more predictable, equitable, and less likely to breed disrespect for the law.

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*Representative Becker, from Logansport, was one of the sponsors of the comparative fault bill in the Indiana General Assembly. The following Article has been reproduced with only slight modifications from the manuscript that Representative Becker submitted to the *Indiana Law Review*. It was felt that an Article from one of the sponsors of this historic legislation would be an asset to this Symposium and would provide a helpful insight into the passage of the Act.

The third reason the Comparative Fault Act passed was that opponents withdrew their active opposition. The opponents are considered knowledgeable and generally concerned with the interests of the state. Consequently, when they withdrew opposition to the Act, a number of legislators who formerly opposed comparative fault changed their position.

The opposition withdrew for several reasons. One reason was that thirty-eight states had adopted comparative fault either through legislative act or judicial mandate. A second reason was that the Indiana Court of Appeals had indicated a willingness to adopt comparative fault. The opponents realized they would have more input in a legislative enactment of comparative fault than in a judicial recognition of comparative fault. As a result, the opponents felt their best strategy was to withdraw opposition to comparative fault and work with the legislature on a bill that would address their objections to comparative fault. Finally, opposition to comparative fault was withdrawn in order to concentrate efforts on other legislation that was opposed, i.e., repeal of the guest statute, expansion of wrongful death, and pre-judgment interest.

The occurrence of a series of compromises was the fourth reason why comparative fault passed in the 1983 session. For example, the Attorney General's objections were resolved by excluding governmental units and public employees. A January 1, 1985 effective date was inserted to give the Indiana bar, the courts, and other interested parties time to fine tune the Act. The "empty chair" problem was resolved by allowing the trier of fact to assess a percentage of fault to an at-fault nonparty. And finally, the Indiana Comparative Fault Act will not discourage settlements because it does not provide the right of contribution among tortfeasors.

There were some problems with the Comparative Fault Act passed in 1983. For example, the "empty chair" problem was not completely resolved. The Act required disclosure of the name of the nonparty in order to prevent the possibility of the "phantom defendant." However, the disclosure requirement was unfair to defendants who could not identify an at-fault nonparty who had left the scene or was unaware of his fault. The 1984 amendment dropped the disclosure requirement for at-fault nonparties, as well as cleaned up some other potential problems facing the implementation of the Act.

I personally feel the Comparative Fault Act as passed in 1983 and amended by the 1984 General Assembly is a good law and a fair compromise between the opponents and proponents of the Act. Both groups have worked long and hard to make the Act workable and effective, and both groups, as well as those involved in the legislature, recognize there will be a continuing need to adjust and modify the Act as we gain experience. Only time will tell how successful the legislative system worked in establishing this new and historic concept in Indiana law.