

The Impact of Comparative Fault in Indiana

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I. INTRODUCTION

Indiana has long adhered to the rule that a contributorily negligent plaintiff is not entitled to recover any damages in tort actions.¹ This "all or nothing approach" will be altered in 1985 when Indiana's Comparative Fault Act takes effect.² In most states, the elimination of the "all or nothing" rule of common law contributory negligence is the major impact of a comparative fault law. However, this change may not be the most significant alteration. The cumulative effect of a nonparty defense,³ the possible elimination of joint and several liability,⁴ and legislative restrictions on fault comparison⁵ may overshadow the elimination of the "all or nothing" approach.

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¹See, e.g., *Hundt v. La Crosse Grain Co., Inc.*, 446 N.E.2d 327 (Ind. 1983); *Kingan & Co. v. Gleason*, 55 Ind. App. 684, 101 N.E. 1027 (1913); *Hall v. Terre Haute Elec. Co.*, 38 Ind. App. 43, 76 N.E. 334 (1905).

²Act of Apr. 21, 1983, Pub. L. No. 317-1983, 1983 Ind. Acts 1930 (codified as amended at IND. CODE §§ 34-4-33-1 to -13 (Supp. 1984) (effective Jan. 1, 1985) [hereinafter 1983 Act]. Indiana became the 40th state to adopt some form of comparative fault when S.B. 287 was passed. Bayliff, *Comparative Fault Act*, VERDICT 13-15 (post leg. ed. 1983).

³See Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 5, § 10, 1984 Ind. Acts 1468, 1471-72 (codified at IND. CODE § 34-4-33-10 (Supp. 1984)).

⁴While the statute does not expressly eliminate joint and several liability, it can be interpreted as abolishing joint and several liability. See *infra* notes 51-84 and accompanying text. See also Wilkins, *The Indiana Comparative Fault Act At First (Lingering) Glance*, 17 IND. L. REV. 687, 718 (1984).

⁵The Indiana Act not only creates comparative fault but also creates a number of restrictions to its application. First, comparative fault will apply and allow recovery only when the claimant's fault is less than "the fault of all persons whose fault proximately contributed to the claimant's damages." IND. CODE § 34-4-33-4(a), (b) (Supp. 1984). Second, the Act also bars the claimant's recovery if the claimant's fault is "greater than fifty percent (50%) of the total fault." *Id.* § 34-4-33-5(a)(2) and (b)(2).

In addition to limiting the claimant's recovery under certain circumstances, the Act sets forth certain types of actions that will not be covered by comparative fault. The definition of fault states that actions based on intentional conduct do not fall under the scope of the Act. *Id.* § 34-4-33-2(a) (Supp. 1984). The Act also does not apply to any strict liability actions brought under the Products Liability Act. *Id.* § 34-4-33-13. For an interesting discussion regarding the benefits and detriments of this exclusion on manufacturers, see Fisher, *Products Liability & Overview of Act*, in *Indiana's Comparative Fault Act* VI-1, VI-22 (Indiana Continuing Legal Education Forum 1984). Finally, Indiana Code section 34-4-33-8 states that comparative fault "does not apply in any manner to tort claims against governmental entities or public employees under I.C. 34-4-16.5." The expansiveness of the governmental exclusion is understood only when the definitions of public employee and governmental entity are examined.

Indiana Code section 34-4-16.5-2(1) defines public employee:

“[E]mployee” and “public employee” means a person presently or formerly acting on behalf of a governmental entity whether temporarily or permanently or with or without compensation, including members of boards, committees, commissions, authorities and other instrumentalities of governmental entities, and elected public officials, but does not include an independent contractor or an agent or employee of an independent contractor.

Indiana Code section 34-4-16.5-2 states that

(2) “governmental entity” means the state or a political subdivision of the state;

* * *

(5) “political subdivision” means a:

- (i) county,
- (ii) township,
- (iii) city,
- (iv) town,
- (v) separate municipal corporation,
- (vi) special taxing district,
- (vii) state college or university,
- (viii) city or county hospital,
- (ix) school corporation, or
- (x) board or commission of one (1) of the entities listed in clauses (i) through (ix), inclusive of this subdivision;

(6) “state” means Indiana and its state agencies; and

(7) “state agency” means a board, commission, department, division, governmental subdivision including a soil and water conservation district, bureau, committee, authority, military body, or other instrumentality of the state, but does not include a political subdivision.

IND. CODE § 34-4-16.5-2(2) & (5) to (7) (1982). For discussions of this exemption, see Fisher, *supra*, at VI-19 and Wilkins, *supra* note 4, at 692.

It is also questionable whether comparative fault will apply to actions involving a guest statute. Some jurisdictions have entertained the idea that comparative fault impliedly repeals automobile guest statutes. *Davis v. Cox*, 593 S.W.2d 180 (Ark. 1980); *Huydts v. Dixon*, 606 P.2d 1303 (Colo. 1980). In *Davis v. Cox*, the court first declared the guest statute constitutional and then determined that the guest statute was not repealed by the passage of the comparative fault statute. The court noted that for one statute to repeal another, the implication had to be “clear, necessary and irresistible.” 593 S.W.2d at 183. The court acknowledged that the guest statute may entirely eliminate a cause of action but stated that the concept of comparative fault and the guest statute’s elimination of a cause of action were compatible. Therefore the guest statute was not deemed repealed.

The *Huydts* decision addressed the argument that an implied repeal of assumption of risk by adoption of comparative fault was the same as an implied repeal of the guest statute. The court rejected this argument stating that unlike assumption of risk, the guest statute was “not derived from the common law doctrine of contributory negligence; but stems from a legislative decision that one who rides as a guest in another person’s vehicle should not be allowed to recover for injuries caused by the operator’s simple and ordinary negligence.” 606 P.2d at 1306. The court’s argument that the issue was one for the legislature was strengthened by the fact that the legislature had expressly repealed the guest statute five years after the adoption of the comparative fault statute. However, because the guest statute was in effect on the date of the accident in question, the trial court was obligated to apply its provisions. *Id.*

Indiana’s legislature recently amended Indiana’s guest statute to allow recovery by passengers who are not the driver’s parent, spouse, child or stepchild, brother, sister or a hitchhiker. IND. CODE § 9-3-3-1(b) (Supp. 1984) (amending IND. CODE §9-3-3-1 (1982)).

Determining what type of actions are covered by their comparative fault act has created problems in many jurisdictions.⁶ While Indiana's statute anticipated many of these problems,⁷ it remains silent as to a number of situations and doctrines, making it unclear where these doctrines are included within the Act's coverage or, in some cases, abrogated by the Act.

This article, while noting the cumulative impact of the Comparative Fault Act, discusses areas of Indiana law affected by the statute, including proximate cause, last clear chance, joint and several liability, and no-duty rules. An examination of these areas illustrates the expansive impact comparative fault will have on Indiana law.

II. THE SCOPE OF INDIANA'S COMPARATIVE FAULT ACT

Not all statutes on this topic are "comparative fault" statutes. Some acts are termed "comparative negligence."⁸ The scope of a state's comparative fault act depends on the language utilized in the act. When an act such as Indiana's is referred to as a comparative fault act, the scope of the statute is often interpreted to be more expansive than a comparative negligence statute.⁹ This is because the term "fault" is read as encompassing a greater variety of conduct than the term "negligence."¹⁰ Indiana's definition of fault indicates that the statute will cover conduct beyond mere negligence, yet the statute does place limits on the scope of its coverage.¹¹

The 1983 Indiana Comparative Fault Act covered a much broader scope of conduct than the 1984 Act, and gave credence to the idea that "fault" encompassed much more than negligent conduct. The 1983 Act defined fault as including strict tort liability, breach of warranty, and

This amendment will allow certain individuals to bring negligence actions against the driver. Thus, comparative fault will play a role in those cases. The legislature's active role in this area will probably deter the courts from finding that comparative fault impliedly repeals the guest statute. The courts are more apt to adopt the reasoning of the *Huydts* and *Davis* decisions and defer to the legislature should such an attack on the guest statute be made.

⁶See V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 31-42 (1974) (discussing the broad range of problems and effects which can arise under comparative fault); Annot., 10 *A.L.R.4th* 946 (1981) (discussing whether comparative fault should apply to actions based on gross negligence or recklessness).

⁷See IND. CODE § 34-4-33-2(a) (Supp. 1984).

⁸Not every jurisdiction utilizing comparative fault has a statute; some states have judicially adopted comparative fault. However, the majority of jurisdictions adopting comparative fault have done so legislatively rather than judicially. See New Topic Serv. AM. JUR. 2D, *Comparative Negligence* § 7 (1977).

⁹See Comment, *The Role of Recklessness in American Systems of Comparative Fault*, 43 OHIO ST. L.J. 399 n.1 (1982).

¹⁰*Id.* This article will use the terms "comparative fault" and "comparative negligence" interchangeably unless indicated otherwise.

¹¹See IND. CODE § 34-4-33-10 (Supp. 1984).

misuse of a product.¹² Each of these theories encompasses concepts that are not generally associated with pure negligence actions. The 1984 Act narrowed the definition of fault. Under the 1984 Act,

“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.¹³

This definition of fault no longer covers actions based on a strict liability or warranty theory.¹⁴ but retains actions based on conduct beyond ordinary negligence.¹⁵ Thus, actions based on a defendant’s willful, wanton, or reckless conduct will be decided under comparative fault principles.¹⁶ However, where the conduct is intentional, no comparison

¹²IND. CODE Sec. 34-4-33-2(a) (Supp. 1983) (amended 1984). The 1983 Act stated:

“Fault” includes any act or omission that is negligent, willful, wanton, or reckless toward the person or property of the actor or others, *or that subjects a person to strict tort liability*, but does not include an intentional act. The term also includes *breach of warranty*, unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, *misuse of a product for which the defendant otherwise would be liable*, and unreasonable failure to avoid an injury or to mitigate damages.

Id. (emphasis added). The emphasized portions of the above definition were deleted by the 1984 Act. Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2(a), 1984 Ind. Acts 1468, 1468 (codified at IND. CODE Sec. 34-4-33-2(a) (Supp. 1984)). The original 1983 Act’s definition of fault closely resembled the language used in the Uniform Comparative Fault Act. The Uniform Act states:

“Fault” includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

UNIF. COMPARATIVE FAULT ACT Sec. 1(b), 12 U.L.A. 35 (Supp. 1983).

The similarity between the 1983 Act and the Uniform Act would have permitted Indiana courts construing the statute to look to the comments accompanying the Uniform Act for guidance. While the 1984 Act’s definition of fault eliminates some of the similarities between the Indiana Act and the Uniform Act, the Uniform Act and its comments should still be a valuable reference source where the two Acts utilize similar language.

¹³Act of Mar. 5, 1984 Pub. L. No. 174-1984, Sec. 1, § 2(a), 1984 Ind. Acts 1468, 1468 (codified at IND. CODE § 34-4-33-2(a) (Supp. 1984)).

¹⁴For a discussion of whether and how comparative fault should apply to strict liability actions, see V. SCHWARTZ, *supra* note 6, at 195-209 and H. WOODS, *COMPARATIVE FAULT* ch. 14 (1978) (containing a discussion of comparative fault and warranty actions at 263-74).

¹⁵See IND. CODE § 34-4-33-2(a) (Supp. 1984).

¹⁶See *id.* Indiana presently follows the common law rule that contributory negligence is no defense when injuries are willfully inflicted; in addition, conduct evincing a lesser degree of culpability also precludes the defense, such as conduct that has been labeled “con-

of fault will occur and traditional common law principles will be applied.¹⁷ Other types of conduct specifically included in the 1984 Act are unreasonable assumption of risk, incurred risk, and unreasonable failure to avoid injury or mitigate damages.¹⁸

While Indiana's 1984 Act attempts to clarify what type of actions are within the scope of the Act, it fails to mention a number of doctrines. Courts will eventually have to decide whether doctrines not mentioned in the 1984 Act are within its scope; the scope and application of the Act will also have to be determined in regard to those areas specifically mentioned. Although Indiana's definition of fault delineates to a degree what concepts fall under the Act, the definition does not deal with every situation that may arise, leaving the final word on the Act's scope and impact in the hands of the judiciary.

III. CAUSATION UNDER A COMPARATIVE FAULT SYSTEM

Court interpretation of how causation operates under the statute will be of central concern to any action governed by comparative fault. Before the impact comparative fault has on causation can be understood, Indiana's current law on causation must be examined.

A. *Current Status of the Law*

Indiana courts have stated that both cause in fact and proximate cause are indispensable elements of a negligence action.¹⁹ Cause in fact is determined under a "but for" test²⁰ which states that negligent conduct is not a cause in fact "if the harm would have occurred without it."²¹ Factual causation must be established before a finding of proximate cause can be made.²² Once factual causation is shown, proximate cause must be proved. For example, car *A* is pulling out of a private driveway while car *B* is driving on the road. Car *B* passes through an intersection with

structive willfulness," "wanton," or even "reckless." *McKeown v. Calusa*, 172 Ind. App. 1, 5, 359 N.E.2d 550, 553 (1977). Under the new Comparative Fault Act the need for such exceptions to common law contributory negligence is lost as the plaintiff's negligence no longer acts as a total bar to recovery.

¹⁷IND. CODE § 34-4-33-2(a) (Supp. 1984).

¹⁸*Id.* The unreasonable failure to avoid injury probably encompasses the avoidable consequences doctrine. This doctrine "denies recovery for any damages which could have been avoided by reasonable conduct on the part of the plaintiff. . . . The rule of avoidable consequences comes into play after a legal wrong has occurred, but while some damages may still be averted, and bars recovery only for such damages." W. PROSSER, LAW OF TORTS ch. 11, § 65, at 423 (4th ed. 1971).

¹⁹*See* *Havert v. Caldwell*, 452 N.E.2d 154, 158 (Ind. 1983); *City of Indianapolis v. Parker*, 427 N.E.2d 456, 461 (Ind. Ct. App. 1981); *Tabor v. Continental Baking Co.*, 110 Ind. App. 633, 643, 38 N.E.2d 257, 261 (1941).

²⁰*City of Indianapolis v. Parker*, 427 N.E.2d 456, 461 (Ind. Ct. App. 1981).

²¹*Id.* The party asserting negligent conduct on the part of another "has the burden of proving causation in fact by a preponderance of the evidence." *Id.*

²²*Tabor v. Continental Baking Co.*, 110 Ind. App. 633, 643, 38 N.W. 2d 257, 261 (1941).

a malfunctioning traffic light and collides with car *A*. The plaintiff, driver of car *A*, sues the city on the theory that the city should have maintained the traffic light in proper working order. To maintain the suit against the city, the plaintiff would have to prove that the malfunctioning traffic light did in fact cause the accident. Because the accident did not occur in the intersection, the malfunctioning light probably had nothing to do with the accident. Thus, although the city may have been negligent in not fixing the traffic light, the plaintiff cannot collect from the city because the traffic light played no part in causing the accident; in other words, no cause in fact exists. If the collision had occurred in the intersection, however, and the plaintiff introduced evidence proving the malfunctioning light to be a cause of the accident, cause in fact would exist, and the plaintiff would move on to prove proximate cause.²³

Proximate cause is defined as "that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of and without which the result would not have occurred."²⁴ The conduct or act of a party need not be the sole proximate cause of an injury for liability to attach.²⁵ The act need only be *a cause* of injury.²⁶ However, Indiana courts have stated that the act must be "a substantial factor in producing the injury complained of,"²⁷ not just a remote cause.²⁸ The major test of proximate cause centers around foreseeability.

Before an act can be deemed to be the proximate cause of an injury, it must be shown that the injury was one that "was foreseen, or reasonably should have been foreseen, as the natural and probable consequence of the act or omission."²⁹ This does not mean that the specific nature of the injury or the extent of injury must be foreseen.³⁰ It need only be reasonably foreseeable "that [the] conduct will cause injury in substantially the manner in which it occurs."³¹

Generally, proximate cause is an issue of fact to be determined by the jury;³² however, "where the facts are undisputed and lend themselves to a single inference or conclusion," proximate cause becomes a question of law for the court.³³ In Indiana it is therefore possible for proximate

²³*See id.*

²⁴*Johnson v. Bender*, 174 Ind. App. 638, 643, 369 N.E.2d 936, 939 (1977).

²⁵*Ortho Pharmaceutical Corp. v. Chapman*, 180 Ind. App. 33, 54, 388 N.E.2d 541, 555 (1979).

²⁶*Id.*

²⁷*Tabor v. Continental Baking Co.*, 110 Ind. App. 633, 644, 38 N.E.2d 257, 261 (1941).

²⁸*Ortho Pharmaceutical Corp. v. Chapman*, 180 Ind. App. 33, 54, 388 N.E.2d 541, 555 (1979).

²⁹*Havert v. Caldwell*, 452 N.E.2d 154, 158 (Ind. 1983).

³⁰*Johnson v. Bender*, 174 Ind. App. 638, 643, 369 N.E.2d 936, 939 (1977).

³¹*Id.*

³²*Ortho Pharmaceutical Corp. v. Chapman*, 180 Ind. App. 33, 54, 388 N.E.2d 541, 555 (1979).

³³*Petroski v. Northern Indiana Pub. Serv. Co.*, 171 Ind. App. 14, 24, 354 N.E.2d 736, 744 (1976).

cause issues to be decided by either the court or jury depending upon the facts of the case. When the facts are undisputed, the court may either find that no proximate cause exists and enter summary judgment or direct a verdict for the defendant, or determine that a plaintiff's conduct was not contributorily negligent.³⁴ If the jury determines that no proximate cause is shown, a plaintiff will not be permitted to recover from the defendant. If contributory negligence has been asserted, the lack of proximate cause between the plaintiff's negligence and injury will defeat the contributory negligence defense.

B. *The Impact of Comparative Fault on Causation*

It is clear that Indiana's Comparative Fault Act has retained the requirements of both cause in fact and proximate cause. Indiana Code section 34-4-33-1(b) states that "[i]n an action brought under this chapter, legal requirements of causal relation apply to: (1) fault as the basis for liability; and (2) contributory fault."³⁵ This section clearly indicates that causation will still be a determinative factor for any case based on fault

³⁴See *Havert v. Caldwell*, 452 N.E.2d 154 (Ind. 1983). The *Havert* case illustrates the somewhat bizarre results that may be achieved when the foreseeability element of proximate cause is applied. In *Havert*, a police officer, Havert, pulled to the side of a curb to investigate a house. Another car, driven by Hook, stopped abruptly behind the police car and was then struck from the rear by a third car, driven by Caldwell. After searching for a prowler, Havert returned to the scene of the accident. Havert and Hook walked between Hook's and Caldwell's cars to examine the damage. At that time, a fourth car, driven by Warren, hit the rear of Caldwell's car pushing it forward into Hook's car which then hit the police car. Mr. Hook and Officer Havert both suffered serious personal injuries as did Mrs. Hook who was standing to one side of the cars. At the time of the accident, all of the cars were in a lane designated as a parking lane for that time of the evening. Havert and Hook sued Caldwell and Warren for their injuries.

At trial, Caldwell moved for partial summary judgment on two alternative theories. First, that his act only created a condition, and it was not reasonably foreseeable that a fourth car would run into the back of his car causing it to hit the other cars again. Therefore, Caldwell claimed his act was not the proximate cause of Havert's personal injuries. Second, Caldwell claimed that Hook and Havert were contributorily negligent in standing between the vehicles, placing themselves in very hazardous positions. The trial court granted Caldwell's motion on the theory that Hook and Havert did act with contributory negligence. The appellate court reversed, and the supreme court vacated the appellate court's ruling and granted the motion, not on the theory of contributory negligence however, but because Caldwell's actions did not constitute a proximate cause.

The supreme court first noted that no material issue of fact existed and then stated that it was not reasonably foreseeable that a car would drive in the parking lane of the roadway and strike the cars in that lane. Therefore, the court found as a matter of law that none of the plaintiffs had been contributorily negligent and that no partial summary judgment was proper on that basis. Thus the same foreseeability factor was used to declare the plaintiffs not contributorily negligent and to allow the defendant's motion for partial summary judgment on the ground that proximate cause was lacking. One interesting sidelight is that the original accident occurred while the lane was designated a parking lane and each car had been driven in that lane.

³⁵IND. CODE § 34-4-33-1(b) (Supp. 1984).

or any case in which contributory fault is raised.³⁶ Presumably, any conduct that is not shown to be causally related to the claimant's damage will not fall under the Comparative Fault Act and therefore will not be considered when fault is apportioned.³⁷ This approach is compatible with Indiana's common law approach; both require conduct to be deemed a proximate cause of the injury before it is considered in a negligence action. The problem arising under comparative fault involves either a plaintiff or defendant whose conduct is deemed to be the sole proximate cause of an injury, or a finding of "no cause in fact".³⁸

Nothing in Indiana's Comparative Fault Act indicates that the common law rules of causation will be altered under the comparative fault system. Thus, it is reasonable to assume that the substantial factor test and the foreseeability test will continue to apply.³⁹ In addition, the issue will remain one for the jury unless the facts are undisputed and lead to but one conclusion.⁴⁰ Whether the question goes to the jury or to the court may be important, because what the jury and court do with the ultimate conclusion on a given set of facts may vary somewhat.

1. *The Plaintiff's Negligence as the Sole Proximate Cause.*—Indiana adopted a modified form of comparative fault, meaning that a comparison of fault will not always lead to recovery by the plaintiff. Rather, the plaintiff is entitled to recover only when his fault is "not greater than fifty percent (50%) of the total fault."⁴¹ While the efficacy of using a 50% rule versus a pure comparative fault rule may be strongly debated,⁴² it is certain that such an approach alleviates any problem that might arise when a jury finds the plaintiff's negligence to be the sole proximate cause of his injury. Under a pure system, a finding of sole proximate cause results in the plaintiff's negligence barring recovery as in contributory negligence.⁴³ In Indiana, a jury finding that the plaintiff was over 50%

³⁶The language utilized in this section is identical to the language used in the Uniform Comparative Fault Act, except for a few minor changes. The commissioners' comments to the Uniform Act state that this language includes both the concept of cause in fact and proximate cause. UNIF. COMPARATIVE FAULT ACT Commissioners' Comments, 12 U.L.A. 35, 38 (Supp. 1983).

³⁷See *id.*

³⁸Because of the similarities in these two issues and this problem, this article will focus on the proximate cause issue as cause in fact is a prerequisite to a finding of proximate cause. The reader should, however, keep in mind that the problem occurs both when cause in fact and sole proximate cause are involved.

³⁹See *supra* notes 27-31 and accompanying text.

⁴⁰See *supra* notes 32-34 and accompanying text.

⁴¹IND. CODE § 34-4-33-5(a)(3), (b)(3) (Supp. 1984).

⁴²A large debate centers on whether a pure form or modified form of comparative fault is the best approach. For general discussions regarding the various approaches available, see V. SCHWARTZ, *supra* note 6, at 43-82; H. WOODS, *supra* note 14, at 77-90.

⁴³See V. SCHWARTZ, *supra* note 6, at 89. Under a pure comparative negligence system, "the contributorily negligent plaintiff's damages are reduced by the jury in proportion to the amount of negligence attributable to him. The jury is instructed to take this step unless plaintiff's negligence was the sole proximate cause of the harm that befell him." *Id.* at 46.

at fault has the same effect as a sole proximate cause finding in a pure system; both findings result in the plaintiff being completely barred from recovery.⁴⁴

Sole proximate cause will more directly affect the Indiana plaintiff when the court determines that no issue of material fact exists and decides the issue of causation as a matter of law.⁴⁵ If the court decides that the plaintiff's conduct was the sole proximate cause of his injury, summary judgment may be granted for the defendant. The plaintiff, therefore, never reaches the jury and his contributory negligence acts as a complete bar to any chance of recovery. The possibility of such an occurrence in Indiana should, however, be limited by two factors.

First, Indiana generally recognizes that the issue of causation is one for the jury. Therefore, in most cases, the issue will go to the jury because of a factual dispute.⁴⁶ Second, pure comparative fault jurisdictions that allow the sole proximate cause issue to be sent to the jury have been reluctant to take the issue away from the jury.⁴⁷ The courts are also reluctant to allow the jury to make a finding of sole proximate cause which results in no comparison of fault.⁴⁸ Rather, the courts ask the jury to compare the fault and apportion it accordingly.⁴⁹ Because of these factors and Indiana's less than 50% rule, the impact of sole proximate cause should be minimal when directly applied to the plaintiff under the Indiana comparative fault system.

2. *The Innocent Plaintiff and Joint and Several Liability.*—A finding by either the court or jury that the defendant was the sole proximate cause of the plaintiff's injury will create special problems in Indiana. In this situation, the court is dealing with a non-negligent plaintiff or a plaintiff whose negligence was not a proximate cause of his injury.⁵⁰ One's inclination is to conclude that the negligent defendant will be liable. However, the issue is no longer whether the defendant is liable (assuming he has been found negligent), but whether he is liable under a comparative fault or common law analysis. The importance of this question becomes apparent when one considers that Indiana's statute may have eliminated

⁴⁴See IND. CODE § 34-4-33-5(a)(2), (b)(2) (Supp. 1984).

⁴⁵See *Havert v. Caldwell*, 452 N.E.2d 154, 156 (Ind. 1983).

⁴⁶*Ortho Pharmaceutical Corp. v. Chapman*, 180 Ind. App. 33, 54, 388 N.E.2d 541, 555 (1979). The benefit for a plaintiff in having the causation issue go to the jury is that the jury will be more apt than the judge to find the plaintiff less contributorily negligent. However, it is probable that if the judge considers the plaintiff's negligence to be the sole proximate cause of his injury, the jury, while not finding sole proximate cause, would find the plaintiff to be over 50% at fault. This again would result in the plaintiff being barred from recovery. It is therefore questionable how much of a benefit is derived in Indiana by having the issue go to the jury. There is, however, the possibility that the jury would find the plaintiff to be less than 50% at fault and permit recovery.

⁴⁷See H. Woods, *supra* note 14, at 96-101.

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰See *infra* notes 76-87 and accompanying text.

joint and several liability.⁵¹ If comparative fault is applied in situations involving a non-negligent plaintiff, the non-negligent plaintiff's recovery may be severely limited due to immune, insolvent, or nonparty defendants.⁵² There are two possible approaches to this problem. One approach is to *not* apply comparative fault to this type of situation and revert back to common law rules of joint and several liability. A second approach is to apply comparative fault and apportion the fault among the defendants. This latter approach disregards the fact that the plaintiff has no fault and presumably leaves the plaintiff to carry the burden of the unavailable or insolvent defendant.⁵³

a. Goals of a comparative fault statute.—The major rationale behind the development and adoption of comparative fault is the desire to do away with the harsh, arbitrary rule of contributory negligence.⁵⁴ Comparative fault is aimed at a comparison of the fault of the plaintiff with the fault of the defendant.⁵⁵ By comparing fault, the system permits a plaintiff to recover even when he has been contributorily negligent, but the recovery is reduced in relation to his share of fault. Thus, the fault comparison alleviates the harsh "all or nothing" effect of common law contributory negligence. The use of comparative fault where the plaintiff has no fault is questionable because comparative fault is aimed at a comparison between plaintiff and defendant, not defendant and defendant.⁵⁶

Indiana's statute states that "any action based on fault" will be covered by the statute.⁵⁷ Does this imply that the statute will apply even when the plaintiff has no fault? Considering this question, one must keep in mind that the statute is in derogation of the common law and must

⁵¹See IND. CODE §§ 34-4-33-4 to -5 & -7 (Supp. 1984). For a discussion of the possible repercussions of these sections of joint and several liability, see Wilkins, *supra* note 4, at 718.

⁵²See IND. CODE §§ 34-4-33-4 to -6 (Supp. 1984). These sections require apportionment of fault to all individuals at fault whether a party to the action or not. While the nonparty is not technically a defendant, he is referred to as such for convenience in this article. Because the nonparty is not a defendant in the action, an apportionment of fault is not binding on the nonparty and the plaintiff cannot actually collect that portion of damages from the nonparty.

⁵³An argument can be made that joint and several liability has not been abrogated by the statute. See Wilkins, *supra* note 4, at 718. However, even if Indiana courts determine that joint and several liability has been abrogated, the loss occasioned by an insolvent or unavailable defendant need not fall entirely on even a contributorily negligent plaintiff. Instead, the loss could be distributed by proportion of fault among the actual parties to the action. See S. SPEISER, KRAUSE & GANS, 1 THE AMERICAN LAW OF TORTS 418 (1983) [hereinafter cited as SPEISER, Wilkins, *supra* note 4, at 718.

⁵⁴See Wade, *Comparative Negligence—Its Development in the United States and Its Present Status in Louisiana*, 40 LA. L. REV. 299 (1980).

⁵⁵Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 n.2 (1953). See also V. SCHWARTZ, *supra* note 6, at 31.

⁵⁶See Prosser, *supra* note 55, at 465 n.2. See also *infra* text accompanying notes 58-59.

⁵⁷IND. CODE § 34-4-33-1(a) (Supp. 1984).

be strictly construed.⁵⁸ Therefore, questions arising due to vagueness or ambiguities in the statute must be resolved in favor of the common law.⁵⁹

Section 3 of the statute indicates that "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages . . . but does not bar recovery"⁶⁰ This section restates the basic purpose of comparative fault which is to alleviate the common law effect of contributory negligence. The section focuses on situations in which the plaintiff has been contributorily negligent.

A similar focus is indicated in the damage sections of the Act.⁶¹ While these sections speak of apportioning fault among the defendants, they do so only after stating that the plaintiff's percent of fault must be determined. If the plaintiff's fault is over 50%, he is denied recovery, just as he would be under a common law approach.⁶² Following this determination, the jury is instructed to "determine the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded."⁶³ The use of the words "if contributory fault were disregarded" implies that the jury is dealing with a contributorily negligent plaintiff. Throughout the Act, reference is consistently made to situations in which both the plaintiff and defendant have been negligent. This focus on the plaintiff's negligence indicates that the Act is truly aimed at achieving the goal of comparative fault—negating the "all or nothing" rule of common law. Because of this focus, the Act should not be applied in situations where the plaintiff has not been contributorily negligent.

Defendants may argue that such an approach is not appropriate because the statute is aimed at a comparison of fault among all individuals, regardless of whether they are a party to the action or not.⁶⁴ The statute,

⁵⁸Connecticut Mut. Life Ins. Co. v. King, 47 Ind. App. 587, 593, 93 N.E. 1046, 1048 (1911).

⁵⁹See, e.g., Stayner v. Nye, 227 Ind. 231, 289, 85 N.E.2d 496, 499 (1949); B.G.L. v. C.L.S. 175 Ind. App. 132, 137, 369 N.E.2d 1105, 1108 (1977); Hummer v. School City of Hartford City, 124 Ind. App. 30, 49, 112 N.E.2d 891, 900 (1953); Universal Discount Corp. v. Brooks, 115 Ind. App. 591, 596, 58 N.E.2d 369, 371 (1945); Connecticut Mut. Life Ins. Co. v. King, 47 Ind. App. 587, 593, 93 N.E. 1046, 1048 (1911).

⁶⁰IND. CODE § 34-4-33-3 (Supp. 1984).

⁶¹IND. CODE § 34-4-33-5 (Supp. 1984).

⁶²*Id.*

⁶³*Id.* § 5(a)(3), (b)(3).

⁶⁴Support for such an argument is found in the nonparty defense section of the statute. IND. CODE § 34-4-33-10 (Supp. 1984). The nonparty defense is not without limitations in Indiana. The defendant must affirmatively assert the defense and carries the burden of proving nonparty fault. *Id.* § 10(b). In all situations, the defense must be pleaded with reasonable promptness, however, under certain circumstances, special time limitations are imposed. If the defendant knows of the defense at the time he files his first answer, he must assert the defense in that answer. *Id.* § 10(c). If the defendant was served with a complaint 150 days before the expiration of the statute of limitations applicable to the plaintiff's claim against the nonparty, the defendant must assert the defense at least 45 days before the

however, also states that "[i]f 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."⁶⁵ Defendants can argue that when the plaintiff's fault is zero, an allocation still occurs because the fault is less than fifty percent. As previously noted, this section of the statute focuses on the amount of damages set by disregarding the "contributory negligence." This implies that the plaintiff has been contributorily negligent. A strict construction of the statute, therefore, results in no application of the statute and the retention of joint and several liability when an innocent plaintiff is involved.

b. Goals of tort law and joint and several liability.—Retaining joint and several liability is consistent with the goals of tort law. It is generally agreed that the primary goal of tort law is prevention of injury, and failing in that objective, compensation to injured parties and loss distribution.⁶⁶ It is recognized that

[t]he defendants in tort cases are to a large extent public utilities, industrial corporations, commercial enterprises, automobile owners, and others who by means of rates, prices, taxes or insurance are best able to distribute to the public at large the risks and losses which are inevitable in a complex civilization. Rather than leave the loss on the shoulders of the individual plaintiff, who may be ruined by it, the courts have tended to find reasons to shift it to the defendants.⁶⁷

This approach is reasonable because corporate defendants and insurance companies can anticipate a certain number of losses each year and adjust their prices, rates, or insurance coverage accordingly.⁶⁸ The individual plaintiff, however, has no such foresight or adjustment mechanism available to him.⁶⁹

statute of limitations expires. *Id.* The trial court, however, is given discretion to alter these time limitations. *Id.* This section gives plaintiffs an incentive to file their claims reasonably early, as the plaintiff is permitted to amend his complaint to add the nonparty as a defendant so long as the applicable statute of limitations has not run. *Id.* § 10(c)(2).

Other limitations are also placed on the defense. For example, a nonparty cannot be the plaintiff's employer. *Id.* § 2(a). Finally, if fault is applied to a nonparty, the nonparty is to be identified by name. *Id.* § 34-4-33-6. Presumably this will prevent fault allocation to phantoms and guard against fraudulent assertions of the nonparty defense.

⁶⁵IND. CODE § 34-4-33-5(a)(3) (Supp. 1984).

⁶⁶See W. PROSSER, *supra* note 18, at 1-27.

⁶⁷*Id.* at 22.

⁶⁸The justification for having insurance in our society is that it spreads the risk from a single entity to all insureds to prevent the victim of the loss from being ruined. Thus, the law distributes the loss among defendants at fault. Whether one wishes to emphasize the accident prevention feature of the tort system or the loss allocation/risk spreading feature, the result has always been to assign responsibility where its assignment will provide incentives to reduce risks and prevent future losses.

⁶⁹While the plaintiff can purchase health insurance, the coverage provided is usually

Under a system of joint and several liability, an insurance company for the defendant may be required to pay for the fault assigned to an insolvent or absent defendant. Again, this system operates consistently with the overall tort goal of loss distribution. Indiana, along with a majority of other states, has made a value judgment to protect an injured plaintiff from the risk of an insolvent defendant by applying joint and several liability.⁷⁰ To put the risk on the plaintiff ignores the fact that insurance companies are in a better position to bear the loss. They have the ability to anticipate the likelihood of such additional losses through statistical experience and large-scale projections, and can take steps to protect against this burden. In addition, insurance companies have the ability and the right to pass the additional burden to thousands or millions of others through minute premium increments.⁷¹ Because of the policies behind insurance programs and the potentially devastating effects on plaintiffs, joint and several liability should be retained.

The allocation of liability to defendants is also based on the idea that the defendant has done something socially unacceptable, and therefore should bear the cost of the loss caused by his conduct.⁷² Accompanying this idea is the prevention of socially unacceptable behavior.⁷³ By placing liability on the manufacturer of a defective product, it is hoped the manufacturer will be encouraged to utilize available engineering technology to produce safe products.⁷⁴ As between a negligent defendant and an in-

inadequate to cover all the losses occasioned by an injury, leaving the plaintiff to bear the burden of his loss unless he successfully seeks recovery through the legal system.

⁷⁰See SPEISER, *supra* note 53, at 392-98. "[E]ven though persons are not acting in concert, nevertheless if the result produced by their acts is indivisible, each person is liable for the whole because the law is loath to permit an innocent plaintiff to suffer as against a wrongdoer defendant." *Id.* at 398. Speiser also discusses the distribution problems specifically associated with insolvent parties, noting that allocation on a fault basis among the solvent defendants and the plaintiff appears to be the fairest approach. Thus, the innocent plaintiff would not be forced to assume any of the loss even if joint and several liability were not utilized. *Id.* at 417-18.

⁷¹Indeed, Indiana insurance companies are uniquely able to adjust their rates. They are subject only to an after the fact review by the Indiana Insurance Commissioner. An industry spokesman recently credited such favorable legislation with providing the climate that makes Indiana the number one state in the country in which to underwrite insurance:

In Indiana, if an insurance firm or a group working through a rating company determines that an increase or decrease is needed, a new rate structure can be developed. The new amount is filed with the Indiana Department of Insurance and immediately goes into effect. The department then has a specified number of days in which to review all data and to accept or disagree with the rate. If the insurance commissioner questions anything, he can issue a cease and desist order and automatically cause the rate to revert to the amount prior to filing.

Vernon, *Indiana Insurance*, 27 INDIANA BUSINESS 14, 15 (1983).

⁷²W. PROSSER, *supra* note 18, at 18.

⁷³*Id.* at 21.

⁷⁴Technology has developed into a number of specialized areas aimed at the production of safe products. The use of reliability engineering, human factors engineering, quality assurance engineering, and system safety engineering can prevent the production of unsafe

nocent plaintiff, the cost distribution and deterrence factors are better served by placing losses on the defendant rather than the plaintiff.

c. The continuing need to apply joint and several liability.—For over one hundred years, it has been held that the goals of the tort system are best achieved by utilizing joint and several liability.⁷⁵ At common law, two situations give rise to joint and several liability—where the defendants act in combination to cause harm,⁷⁶ and where the defendants act independently but cause indivisible harm.⁷⁷ Liability in the case of harm caused by concerted action is imposed on all defendants even though caused by only one of them.⁷⁸ For example, *B* and *C* are drag racing and *C* runs over *A*. *B* and *C* are jointly and severally liable for *A*'s death or injury. Joint and several liability will be imposed where the defendants act independently, each actually causing harm to the plaintiff but under circumstances where it is impossible to allocate harm to each defendant.⁷⁹ Thus if *A* were a passenger in *B*'s taxi which collided with *C* when both *B* and *C* were speeding, *B* and *C* would be jointly and severally liable.

On the other hand, if the tortious conduct was not joint or if the elements of the injury are separable, a defendant is responsible only for the harm he actually caused.⁸⁰ For example, the collision between the speeding vehicles of *B* and *C* results in serious injury to *A*, which keeps him from work for six months. His lost wages are \$15,000 and he has \$30,000 in medical and hospital expenses. *A* sues both *B* and *C* and recovers damages of \$150,000. The jury finds *B* 60% responsible and *C* 40% responsible. If the injury is indivisible, *B* and *C* are jointly and severally liable for the damages.⁸¹ *A* may go to either defendant and demand full payment of his judgment.

If the comparative fault statute is interpreted as eliminating the doctrine of joint and several liability, *A*, even though free from fault, may not be able to collect his judgment in full. The risk that one of the wrongdoers may not be able to pay any of his share of the judgment is transferred from fellow defendants to the innocent plaintiff when joint and several liability is eliminated. To illustrate, suppose the jury, in the speeding vehicle example, found each of the defendant drivers 50% at fault and *C*, one of the defendants, was uninsured and insolvent. The plaintiff's maximum recovery would be \$75,000 or 50% of his damages.

products; yet, some manufacturers fail to take advantage of these systems of analysis. The imposition of liability for defective products will encourage the use of safety oriented technology, resulting in fewer unreasonably dangerous products.

⁷⁵See W. PROSSER, *supra* note 18, at 297-98.

⁷⁶SPEISER, *supra* note 53, at 390-93.

⁷⁷*Id.* at 393-98.

⁷⁸*Id.* at 390-93.

⁷⁹*Id.* at 393-98.

⁸⁰*Id.* at 392-94.

⁸¹*Id.* at 393-94.

If *A*, the plaintiff, were traveling in the course of his employment, the worker's compensation lien, attorney's fees, and litigation expenses would consume most of his recovery.⁸² If the allocation of fault between the defendants was 25% and 75%, and the 75% defendant was insolvent, the effect on the plaintiff would be even more devastating, as the plaintiff is left to bear 75% or \$112,500 of a loss he did not cause. Between the innocent plaintiff and the negligent defendant, it is better to allocate the loss to the defendant.⁸³

Cases in which the plaintiff has not been contributorily negligent should be excluded from the Comparative Fault Act. This exclusion will place a new importance on the operation of sole proximate cause. In situations where the jury determines that the defendant or defendants were the sole proximate cause of the plaintiff's injury, there should be no instruction regarding comparative fault. No comparison is necessary with an innocent plaintiff. The statute focuses on situations involving a negligent plaintiff, and comparing the plaintiff's fault with the defendants'. When the defendants alone are negligent, jurors should not compare fault. Their job is to arrive at a damage figure for which the defendants will be jointly and severally liable.⁸⁴ Such an approach is best-suited to the overall loss allocation and deterrence goals of the tort system.

IV. COMPARATIVE FAULT'S IMPACT ON OTHER DOCTRINES

While Indiana's comparative fault statute specifically includes several areas and doctrines, there are a number of areas left open to question, including areas involving the last clear chance doctrine and no-duty rules. The impact of comparative fault on these areas illustrates the potentially expansive reach of the Act.

A. Last Clear Chance

The major issue surrounding last clear chance is whether the doctrine survives the adoption of comparative fault. Indiana currently recognizes

⁸²An employer's lien for worker's compensation benefits is provided for in Indiana Code section 22-3-2-13. IND. CODE § 22-3-2-13 (1982).

⁸³The best approach would be the retention of joint and several liability in all situations, thus supporting and achieving the public policies behind the tort system. However, if the comparative fault statute has indeed done away with joint and several liability, then the statute should be strictly construed to apply only when the plaintiff has been contributorily negligent. Then at least, the innocent plaintiff will not be forced to bear losses which he had no part in causing. *See Lynn v. Taylor*, 7 Kan. App. 2d 369, 372, 642 P.2d 131, 135 (1982) (when culpable conduct is the fraud of one defendant and the negligence of another, a tort-feasor found guilty of fraudulent concealment may be held jointly and severally liable with the negligent tort-feasor). *But see Scales v. St. Louis-S.F.R. Co.*, 582 P.2d 300 (1978) (where plaintiff could recover only 50% of damages from defendant even though the other 50% of fault was placed on plaintiff's employer who was protected under worker's compensation laws).

⁸⁴In states where joint and several liability has been retained the problem of an inno-

the doctrine of last clear chance.⁸⁵ Under this doctrine, a plaintiff's negligence will not prevent his recovery against a negligent defendant if the defendant, by the exercise of reasonable care, had a later opportunity to avoid injuring the plaintiff.⁸⁶ The doctrine applies, however, only to situations in which the defendant has both actual knowledge of the plaintiff's peril and a later opportunity to avoid the injury.⁸⁷ If the plaintiff has an opportunity to remove himself from danger, then he must do so.⁸⁸ Indiana generally designates "last clear chance a doctrine of causation."⁸⁹ This is based on the theory that "the defendant's 'final negligence' is to be considered the sole proximate cause of the injury."⁹⁰

Because Indiana's comparative fault statute fails to specifically deal with last clear chance, it is questionable whether the doctrine has been abrogated. Generally, last clear chance is thought of and treated as a doctrine aimed at the modification of the contributory negligence doctrine.⁹¹ Two approaches justifying the use of the doctrine developed under common law. One approach, utilized by Indiana, declares the defendant's later negligence the sole proximate cause of the plaintiff's injury.⁹² The other approach terms the defendant's later negligence worse than the plaintiff's and allows the plaintiff to recover from the defendant in spite of the contributory negligence.⁹³ Under either approach, the usefulness of last clear chance is called into question under a comparative fault system.⁹⁴

The causation approach, which Indiana follows, appears to operate as a form of sole proximate cause. However, distinct differences are apparent. Under a normal causation analysis, the jury or court determines whether the plaintiff's negligence was both a cause in fact and a proximate cause of his injury. As noted, the focus is on the foreseeability

cent plaintiff is less important because even if apportionment among the defendants took place, the plaintiff could recover the whole amount from one defendant.

⁸⁵See *McKeown v. Calusa*, 172 Ind. App. 1, 359 N.E.2d 550 (1977); *Bates v. Boughton*, 151 Ind. App. 139, 278 N.E.2d 316 (1972); *Stallings v. Dick*, 139 Ind. App. 118, 210 N.E.2d 82 (1965).

⁸⁶*Bates v. Boughton*, 151 Ind. App. 139, 141, 278 N.E.2d 316, 318 (1972) (quoting *National City Lines v. Hurst*, 145 Ind. App. 278, 282, 250 N.E.2d 507, 510 (1969)).

⁸⁷*Bates v. Boughton*, 151 Ind. App. 139, 141, 278 N.E.2d 316, 318 (1972).

⁸⁸*Id.*

⁸⁹*McKeown v. Calusa*, 172 Ind. App. 1, 6, 359 N.E.2d 550, 554 (1977).

⁹⁰*Id.*

⁹¹H. WOODS, *supra* note 14, at 176 (quoting *Cushman v. Perkins*, 245 A.2d 846 (Me. 1968)).

⁹²W. PROSSER, *supra* note 66, at 427. See also *McKeown v. Calusa*, 172 Ind. App. 1, 6, 359 N.E.2d 550, 554 (1977).

⁹³W. PROSSER, *supra* note 66 at 428.

⁹⁴For a more in depth look at this problem, see Note, *Torts: Comparative Negligence and the Doctrine of Last Clear Chance—Are They Compatible?* 28 OKLA. L. REV. 444 (1975); Note, *The Doctrine of Last Clear Chance—Should It Survive the Adoption of Comparative Negligence in Texas?* 6 TEX. TECH L. REV. 131 (1974).

of injury arising from the conduct.⁹⁵ Under last clear chance, the plaintiff's conduct could technically be a cause of his injury, but because the defendant could have prevented the injury, the plaintiff's conduct is not deemed a cause. For example, assume the plaintiff is standing on a railroad track unaware that a train is approaching. The engineer of the train is aware of the plaintiff's presence and peril but fails to take any corrective action. The plaintiff, unaware of his peril, technically cannot remove himself from the danger. The defendant could do one of two things to avoid hitting the plaintiff: blow the train whistle, or attempt to stop the train. In this case, the defendant assumes the plaintiff will remove himself from danger and does nothing. The plaintiff is struck by the train and severely injured. Two results are possible depending on whether last clear chance is applied in a comparative fault system. Under comparative fault where last clear chance is not applied, the negligence of the plaintiff in standing on a train track will normally be compared to the negligence of the defendant in not blowing the whistle or stopping the train. If last clear chance survives and is applied, the jury may find that the defendant's negligence should be deemed the sole proximate cause of the accident because the negligent plaintiff was unaware of the danger and was unable to remove himself from peril. The defendant engineer, however, could have avoided the accident by blowing the train whistle, and therefore is made to assume full responsibility for causing the accident.

Defendants can argue that the above hypothetical illustrates the reason why last clear chance should not be retained under a comparative fault system. The doctrine defeats the goal of comparative fault by avoiding a comparison when both the defendant and plaintiff have been negligent. Calling the defendant's negligence the sole proximate cause under a contributory negligence system was useful because it prevented barring the plaintiff from any recovery when the defendant could have avoided injuring the plaintiff.⁹⁶ Under a comparative fault system, however, the plaintiff is not barred from recovery. Rather, the amount of recovery is reduced in proportion to the amount of his fault.⁹⁷ Because the last clear chance doctrine results in no comparison of fault, and because comparative fault accomplishes the goals sought by last clear chance, defendants will conclude that the doctrine should not survive the adoption of comparative fault.

⁹⁵See *supra* notes 24-31 and accompanying text.

⁹⁶It is arguable that the concept of defendant as sole proximate cause remains viable under comparative fault as "the jury can still find [the] defendant's negligence as the sole proximate cause and not be required to apportion damages at all." V. SCHWARTZ, *supra* note 6, at 37 (Supp. 1981) (footnote omitted). Under such an approach plaintiffs who have been over 50% negligent would still be permitted to recover if the jury determined their negligence was not a proximate cause of the injury. See *infra* text accompanying notes 98-99.

⁹⁷In Indiana, if the plaintiff's fault is over 50% he will receive no recovery. IND. CODE § 34-4-33-5(a)(2), (b)(2) (Supp. 1984).

Plaintiffs can reply to the above argument by stating that Indiana's comparative fault statute retains the requirement of legal cause.⁹⁸ The statute's purpose is not to alter Indiana requirements but merely to apportion fault where legal requirements of causation have already been met. In the example of the plaintiff on the train tracks, legal cause is not present because the defendant could have avoided any injury to the plaintiff but failed to take measures to avoid the injury. Indiana courts have made a policy determination that under such circumstances, the defendant will be deemed to be the sole proximate cause of the accident. The plaintiff's fault is, therefore, irrelevant as it was not a proximate cause of the accident. Last clear chance remains useful under comparative fault because it encourages accident prevention in situations where the plaintiff is unaware of a present danger and the defendant both knows of the danger and can avoid injuring the unwary plaintiff.⁹⁹ Because of its accident prevention function, plaintiffs will argue that last clear chance should be retained under comparative fault.

The ultimate decision of whether last clear chance survives the passage of the Comparative Fault Act will fall on the Indiana courts. Should the courts determine that comparative fault has abrogated the need for last clear chance, plaintiffs' attorneys will lose a useful tool for situations in which their clients' actions, in a technical sense, created the potential for injury and the defendants' actions brought the potential to reality by failing to avoid injuring the plaintiff.

B. *No-Duty Rules*

The introduction of comparative fault will create special problems with a number of no-duty rules. A no-duty rule states that a person's conduct cannot be labeled negligent or contributorily negligent because the person has no duty to act under common law. For example, several jurisdictions, including Indiana, do not recognize a common law duty to wear seat belts. Because there is no duty to wear a seat belt, the failure to wear one cannot be deemed contributory negligence even though the failure to wear the seat belt may result in increased damages, or actually cause the accident. Under comparative fault, this approach creates a problem because the failure to wear a seat belt contributed to the injury, but the no-duty rule operates to deny a comparison of fault.¹⁰⁰ The issue is whether no-duty rules survive the passage of comparative fault when the questioned conduct in fact contributes to or causes the injury but the no-duty rule results in the conduct being declared non-negligent. Because of the conflict between no-duty rules and comparative fault, it is probable that the no-duty rules will be challenged and re-evaluated after the Comparative

⁹⁸*Id.* § 34-4-33-1(b). See *supra* notes 33-36 and accompanying text.

⁹⁹See *supra* notes 86-90 and accompanying text.

¹⁰⁰See *infra* text accompanying notes 129-170.

Fault Act takes effect. Two no-duty rules will be examined to illustrate how a re-evaluation could operate.

1. *The Open and Obvious Danger Rule.*—The open and obvious danger rule does not focus purely on the plaintiff's conduct and operates in a unique fashion in Indiana. It states that a defendant is relieved of any duty to manufacture and distribute a safe product if the dangers of the product are open and obvious.¹⁰¹ This rule is based on the theory that a plaintiff who is confronted by an apparent danger should be barred from recovery because of his failure to avoid the danger. While the majority of jurisdictions treat the open and obvious danger as just a factor to be considered in the application of the incurred risk doctrine,¹⁰² Indiana opted for the stricter no-duty rule approach.¹⁰³ Under this rule,

¹⁰¹*Bemis v. Rubush*, 427 N.E.2d 1058 (Ind. 1981).

¹⁰²See Phillips, *Products Liability: Obviousness of Danger Revisited*, 15 IND. L. REV. 797 (1982).

¹⁰³*Id.* Indiana's approach to the open and obvious danger rule raises several questions. First, is the open and obvious danger rule appropriate for the social and economic needs of Indiana? Second, why did Indiana join a shrinking minority of states in accepting this doctrine? The open and obvious danger rule was not a natural outgrowth of the common law in Indiana. It was a dramatic change in the tort law that ignored the principle of *stare decisis* and the basic rationale of products liability law as it was developing in Indiana. Indiana adopted the rationale of *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950), a 1950 New York Court of Appeals decision. See *Bemis v. Rubush*, 427 N.E.2d 1058 (Ind. 1981). However, *Campo* had been expressly overruled and rejected by New York in *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

Finally, one must ask whether it is acceptable social and public policy to say that when a machine or condition has a defect that should or must be obvious to all, there is no duty to make any effort to reduce the danger. If scientific, engineering and safety knowledge provide a safer alternative that is technologically and economically reasonable to control a dangerous machine or condition, there should be a corresponding duty to utilize such knowledge. The law should provide incentives to utilize safer and more efficient alternatives.

The open and obvious danger rule insulates the careless contractor and gives immunity to manufacturers who give inadequate attention to quality and safety. The rule also creates a potential for disaster to those who must live and work around unreasonably dangerous machines or conditions. It assumes that all courts can understand and anticipate the dangers human perception and motor behavior are capable of perceiving when individuals come in contact with grossly dangerous machines or conditions. Even worse, it assumes that individual users and not manufacturers are responsible for safety. The fallacy behind such reasoning is best illustrated by an example. Patricia Barry, in a paper titled *Individual Versus Community Orientation in the Prevention of Injuries*, 4 PREVENTIVE MEDICINE 47 (1975), noted that 150-200 infants die annually in crib accidents, and an additional 40,000 babies are injured seriously enough to require medical attention. *Id.* at 50. Prior to the passage of the Consumer Product Safety Act (CPSA) of 1972, accident prevention to babies in cribs was placed on parents who were directed to watch their children more closely. With the passage of the CPSA, the focus shifted to manufacturers and the space between crib bars was required to be narrowed. Such regulation "should virtually eliminate strangulation by cribs. The Consumer Product Safety Commission operates under a public health philosophy; its attention is addressed to hazardous products, not to individual users. By virtue of its philosophy as much as its authority, it has a tremendously far-reaching potential

an individual will have a cause of action when he is injured while using a somewhat unreasonably dangerous product whose danger is not appreciated. However, where the danger or hazard is open and obvious, the individual has no cause of action and the manufacturer has no duty to protect potential users. Presumably, this means a manufacturer could remove the protective cage from a household fan and not be liable because the danger of the turning fan blade is open and obvious. Thus, there is immunity in Indiana for the most defective and dangerous products. The approach is illogical under a contributory negligence system,¹⁰⁴ and becomes even more so under a comparative fault system.

While Indiana's 1984 Comparative Fault Act no longer covers cases brought in strict products liability,¹⁰⁵ the problem created by the open and obvious danger rule has been aggravated by a recent judicial expansion of the rule. The Indiana Court of Appeals in *Law v. Yukon Delta, Inc.*¹⁰⁶ stated that the open and obvious danger rule would apply "in all negligence actions not merely those involving claims based upon products liability."¹⁰⁷ The court stated:

[A]ll negligence actions involve the same closed set of prima facie elements as a basis of recovery whether they sound in products liability or otherwise. Further, the "open and obvious danger" rule is a consistent and logical factor to consider when determining whether a person has acted in an ordinary and reasonable fashion. A person that engages in activity with the knowledge that he is exposing himself to an open and obvious danger can hardly be regarded reasonable or prudent.¹⁰⁸

Under *Law*, the open and obvious danger no-duty rule applies to all negligence actions and so will be applied under the Comparative Fault Act. The validity of the open and obvious danger rule will be subject to question under the comparative fault system because of this expansion. However, in examining the validity of the rule, the courts will probably consider the rule's use in strict product liability cases, as well as negligence cases, although comparative fault applies only to the latter.¹⁰⁹

in injury control." *Id.* at 52. Indiana's no-duty approach to open and obvious danger ignores and defeats the injury control aspect of the tort system. It took New York 26 years to note that "[t]he time ha[d] come to depart from the patent danger rule enunciated in *Campo v. Scofield*" and to reject the doctrine. Indiana courts should again follow New York, and the majority of jurisdictions, in abolishing the open and obvious danger rule.

¹⁰⁴For a discussion of the open and obvious danger rule under a contributory negligence system, see Phillips, *supra* note 102.

¹⁰⁵Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2(a), 1984 Ind. Acts 1468, 1468 (codified at IND. CODE § 34-4-33-2(a) (Supp. 1984) amending IND. CODE §34-4-33-2(a) (Supp. 1983)).

¹⁰⁶458 N.E.2d 677 (Ind. Ct. App. 1984).

¹⁰⁷*Id.* at 679.

¹⁰⁸*Id.* But see *Bridgewater v. Economy Eng'g Co.*, 464 N.E.2d 14, 18 (Ind. Ct. App. 1984).

¹⁰⁹See *supra* notes 12-15 and accompanying text.

The open and obvious danger rule is similar to the assumption of risk defense in that both rules look at the plaintiff's conduct and his proceeding to use a product in spite of a danger that is known or should have been known.¹¹⁰ A majority of comparative fault jurisdictions dealing with the open and obvious danger issue properly allow the evidence as a factor to be weighed against the defendant's negligence.¹¹¹ Is it possible that the legislative adoption of comparative fault may call for the rejection of the open and obvious danger rule in its present form?

The Supreme Court of Minnesota recently dealt with this issue in *Holm v. Sponco Manufacturing, Inc.*¹¹² The *Holm* court looked at a number of factors in specifically rejecting the open and obvious danger rule, as outlined in the earlier Minnesota decision of *Halvorson v. American Hoist & Derrick Co.*¹¹³ In *Halvorson*, the court held that a manufacturer did not owe a plaintiff "any duty to install safety devices on its crane to guard against the risk of electrocution when the record demonstrated that [the] risk was: (1) Obvious; (2) known by all of the employees involved; and (3) specifically warned against."¹¹⁴ The *Holm* court rejected this approach by first taking note of the confused state of the law in Minnesota following the *Halvorson* decision.¹¹⁵ The court also noted the current trend in products liability law:

"The modern trend in the nation is to abandon the strict patent danger doctrine as an exception to liability and to find that the obviousness of the defect is only a factor to be considered as a mitigating defense in determining whether a defect is unreasonably dangerous and whether [the] plaintiff used that degree of reasonable care required by the circumstances."¹¹⁶

An examination of the policies behind manufacturer liability followed. The court noted that in modern day life, it is often difficult to fully comprehend the scope of the danger presented by complicated machines. Because the manufacturer is in a superior position to recognize and cure defects, an increased responsibility is placed on the manufacturer to assure that finished products are not defective. This imposition of responsibility was deemed to be in the public interest and justified because it induces the manufacturer to exercise care to avoid introducing products which create an unreasonable risk of harm to persons exposed to the product when the product is being used in a reasonably foreseeable manner.¹¹⁷

¹¹⁰Phillips, *supra* note 102, at 804.

¹¹¹*Id.*

¹¹²324 N.W.2d 207 (Minn. 1982).

¹¹³307 Minn. 48, 240 N.W.2d 303 (1976).

¹¹⁴*Id.* at 57, 240 N.W.2d at 308.

¹¹⁵324 N.W.2d at 210.

¹¹⁶*Id.* at 211 (quoting *Auburn Mach. Works Co. v. Jones*, 366 So. 2d 1167, 1169 (Fla. 1979)).

¹¹⁷324 N.W.2d at 212.

Such a duty of care is reasonable in light of the policies underlying strict liability. One of these policies is to achieve a distribution of economic losses caused by a product. The manufacturer is in a better position to allocate the losses caused by the product than the individual consumer who is injured. The manufacturer is also better able to guard and protect against the risk of injury created by a product. The imposition of the open and obvious rule defeats both of these policies. First, the plaintiff is forced to assume the entire loss caused by the dangerous product. Second, the manufacturer, rather than being discouraged from producing and marketing dangerous products, is encouraged "to be outrageous in [its] design, to eliminate safety devices, and to make hazards obvious."¹¹⁸ Based on these policies of cost allocation and accident prevention, the Minnesota court rejected the open and obvious danger rule as a complete defense.¹¹⁹

The *Holm* court also noted another important factor. Minnesota's legislature had specifically changed Minnesota's comparative negligence statute to a comparative fault statute.¹²⁰ In the fault statute, the legislature provided that contributory fault, including unreasonable assumption of risk and unreasonable failure to avoid an injury, barred recovery only when that fault was greater than the fault of the defendant. "The latent-patent defect rule makes obviousness a complete bar to recovery. It circumvents [the comparative fault statute] and swallows up the assumption of the risk defense. This result is contrary to the public policy of apportioning loss between blameworthy plaintiffs and defendants."¹²¹ Thus the open and obvious danger rule was rejected because it conflicted with the comparative fault statute.¹²² In its stead, the court applied a reasonable care balancing test.¹²³ Such a test places the burden of care in proper perspective. The obvious danger rule places the entire duty of care on the consumer. In a high-technology society, such a burden on the consumer is inappropriate. The consumer should be able to assume that producers of products have used the skill and resources available to them to produce a product that is not unreasonably dangerous to the consumer.¹²⁴ By the use of a reasonable care test, the court in *Holm* re-

¹¹⁸*Id.* at 213 (quoting *Auburn Mach. Works Co. v. Jones*, 366 So. 2d 1167, 1170 (Fla. 1979)).

¹¹⁹324 N.W.2d at 213.

¹²⁰*Id.*

¹²¹*Id.*

¹²²*Id.*

¹²³*Id.*

¹²⁴The reasonable care approach in evaluating corporate conduct has been recognized in connection with products liability actions. A recent report prepared by Dr. Leslie Ball, the former National Safety Director for NASA, discusses the standards of care imposed on manufacturers to achieve production of safe products. The report notes that damages are available in products liability actions when the plaintiff proves (a) the manufacturer's engineers, through the use of available predictive analyses, should have foreseen the possibility of the occurrence of the accident producing events, (b) the specific design or manufacturing

quired both the manufacturer and the consumer to take appropriate precautions and thus safety was promoted rather than defeated. When the manufacturer is required to produce safe products, the plaintiff who is distracted or fatigued in the workplace is placed in a less hazardous position because the machine he uses will have proper safety guards and devices to protect him. Any risk of serious injury or death is unacceptable if there are safer alternatives that are economically and technologically reasonable. Operating together, the care of the manufacturer and the care of the consumer can result in a decrease in injuries. The reasonable care approach to obvious dangers encourages such a result while the no-duty approach creates a disincentive to include safety as an essential element of good design.

While the above analysis focuses on products liability cases, the analysis is valid for all negligence type cases. However, not all courts have adopted this analysis. In *Sherman v. Platte*,¹²⁵ the Supreme Court of Wyoming addressed the viability of the obvious danger rule under comparative fault in the context of a slip and fall case. The court noted that "whenever the danger is obvious or at least as well known to the plaintiff as it is to the defendant landowner, there exists no duty to remove the danger or warn the plaintiff of its existence."¹²⁶ The plaintiff argued that this rule was abrogated by the adoption of comparative fault.¹²⁷ The court, however, stated that "[c]omparative negligence only abrogated absolute defenses involving the plaintiff's own negligence in bringing about his or her injuries. . . . it did not impose any new duties of care on prospective defendants."¹²⁸ Thus, the court concluded that the obvious danger rule remained viable under comparative fault. While this approach

defects were the proximate causes of converting the foreseeable events into a catastrophic accident, and (c) these defects were not due to limitations in the state-of-the-art, i.e., the available technology but were due to the manufacturer's managements reckless disregard for recognized safety or quality control management practices.

Ball, *Product & Institution Liability Prevention, Proceedings of the World Quality Congress 1-2* (1984).

The report notes that the plaintiff "usually can show that any reasonably competent engineer using Failure Modes and Effects Analysis (FMEA), Fault Tree Hazard Analysis (FTHA) or Job Safety Analysis (JSA) would have foreseen that what did happen could happen." *Id.* at 2. Under Dr. Ball's approach, the reasonable care test extends to management to assure that the proper analysis is performed on the product. For example, management has a duty to require its designers to perform center-of-gravity-height and track-width ratio tests on rollover prone vehicles, and to be sure that advertising does not encourage maneuvers that can result in rollovers. *Id.* at 3. Such a "total management responsibility" approach helps assure that products are not released on the market in unreasonably dangerous conditions. The utilization of an open and obvious danger no-duty rule defeats the goal of having the tort system serve as an accident prevention tool.

¹²⁵642 P.2d 787 (Wyo. 1982).

¹²⁶*Id.* at 789.

¹²⁷*Id.*

¹²⁸*Id.* at 790.

results in the retention of a state's current duty rules, it is questionable whether the retention is desirable when a rule prevents fault comparison and has the unintended consequence of encouraging negligent conduct on the part of defendants. Because of the potential for unintended consequences, Indiana courts considering these issues will want to examine all facets of the problem before deciding whether Indiana will want to retain or set aside its open and obvious danger rule.

2. *The Seat Belt Rule.*—Indiana currently follows the rule that the seat belt defense cannot be used either to prove contributory negligence or to mitigate damages.¹²⁹ The rejection of the seat belt defense has been based on three grounds. First, Indiana courts refuse to impose any duty on an automobile occupant to wear a seat belt.¹³⁰ In *State v. Ingram*,¹³¹ the Indiana Supreme Court stated that “[a]bsent a clear mandate from the legislature to require Indiana automobile riders to wear seat belts, we are not prepared to step into the breach and judicially mandate such conduct.”¹³² The second rationale used by the courts is that the seat belt defense does not fall within the realm of mitigating conduct or avoidable consequences. In *Ingram*, the court stated that the analysis of both of these doctrines is similar, and that both look to “acts of the injured party only after the injury has occurred.”¹³³ Because the seat belt defense deals with conduct of the plaintiff before the accident or injury, it cannot be used to reduce recovery, as it requires plaintiffs to “anticipate negligence and guard against damages which might ensue if such negligence should occur.”¹³⁴ Finally, in *Birdsong v. ITT Continental Baking Co.*,¹³⁵ the court stated that evidence regarding the nonuse of a seat belt was improperly admitted because a reasonable juror could conclude that a reduction of damages was proper based on the proportion of damages attributable to the nonuse. The court noted that such an approach resulted in degrees of negligence being compared, and that Indiana had specifically rejected comparative negligence in earlier decisions.¹³⁶ This decision indicates that some rethinking of the seat belt defense may occur after the Comparative Fault Act takes effect.

a. *The validity of the no-duty rule.*—As previously noted, comparative fault centers on the comparison of a plaintiff's and defendant's negligent conduct.¹³⁷ The effect of a no-duty rule is the avoidance of fault com-

¹²⁹See *State v. Ingram*, 427 N.E.2d 444, 448 (Ind. 1981); *Birdsong v. ITT Continental Baking Co.*, 160 Ind. App. 411, 413, 312 N.E.2d 104, 106 (1974); *Kavanagh v. Butorac*, 140 Ind. App. 139, 155, 221 N.E.2d 824, 831(1966).

¹³⁰*State v. Ingram*, 427 N.E.2d 444, 448 (Ind. 1981).

¹³¹427 N.E.2d 444 (Ind. 1981).

¹³²*Id.* at 448.

¹³³*Id.*

¹³⁴*Taplin v. Clark*, 6 Kan. App. 2d 66, 67, 626 P.2d 1198, 1200 (citation omitted).

¹³⁵160 Ind. App. 411, 312 N.E.2d 104 (1974).

¹³⁶*Id.* at 413, 312 N.E.2d at 106.

¹³⁷See *supra* text accompanying notes 54-63.

parison where the party's conduct has contributed to his injuries in some manner. Indiana's no-duty rule regarding the use of seat belts illustrates the scope of the problem. The plaintiff's failure to use a seat belt may have contributed to his injuries, but the courts impose no duty to wear the belt and the plaintiff cannot be deemed contributorily negligent. This approach, however, creates conceptual problems under a comparative fault system because the plaintiff's nonuse may have clearly resulted in an increased injury. This problem may be solved by close scrutiny into the purpose and rationale of the seat belt rule to determine whether it is valid under a comparative fault system. A number of jurisdictions have dealt with this issue and Indiana courts will probably turn to these jurisdictions for guidance in addressing the problem.

Comparative fault jurisdictions that have dealt with the seat belt issue have done so by examining the policies behind comparative fault and the seat belt defense. Two recent Florida decisions clearly outline the issues associated with the seat belt defense under a comparative fault system.¹³⁸ In *Lafferty v. Allstate Insurance Co.*,¹³⁹ the Florida Court of Appeals, like Indiana, supported the idea of judicial restraint in this area and noted that the duty to wear a seat belt was properly a duty to be imposed by the legislature, not the courts.¹⁴⁰ In support of this decision, the *Lafferty* court noted that before the seat belt could be used to modify a standard of care, there had to be some consensus as to its utility. Even though statistical studies indicated the utility of the seat belt, society had not yet accepted the seat belt as "a necessary accoutrement of safe driving."¹⁴¹ Thus, the court noted that it would be imposing a new standard of conduct on the public as opposed to enforcing a standard generally accepted by the public.¹⁴² In addition, the tests, studies, and surveys necessary to determine the effectiveness and utility of seat belts were deemed to be within the traditional realm of the legislature rather than the courts.¹⁴³ The court concluded that in light of these factors, Florida courts should not impose a duty on the public to wear seat belts.

The *Lafferty* court then addressed the issue of whether the nonuse of a seat belt could be used to decrease the recovery of a plaintiff. To determine that the nonuse of a seat belt could not be used to reduce damages, the court looked at a number of factors:

¹³⁸*Lafferty v. Allstate Ins. Co.*, 425 So. 2d 1147 (Fla. Dist. Ct. App. 1982); *Insurance Co. of N. Am. v. Pasakarnis*, 425 So. 2d 1141 (Fla. Dist. Ct. App. 1982). Both of the cases certified the following question to the Florida Supreme Court: Should Florida courts consider seat belt evidence as bearing on comparative negligence or mitigation of damages? 425 So. 2d at 1151; 425 So. 2d at 1147.

¹³⁹425 So. 2d 1147 (Fla. Dist. Ct. App. 1982).

¹⁴⁰*Id.* at 1149.

¹⁴¹*Id.* at 1148.

¹⁴²*Id.* at 1149.

¹⁴³*Id.*

(1) plaintiff need not predict the defendant's negligence or anticipate an accident; (2) seat belts are not required in all vehicles, and defendant shouldn't be permitted to take advantage of the fact that they were installed in plaintiff's vehicle; (3) most people don't use seat belts, so a jury shouldn't be permitted to find that they should; and (4) allowing a seat belt defense will produce a "veritable battle of experts" on the causation question, and speculative verdicts.¹⁴⁴

The court also focused on the cause of the accident versus the cause of the injury and noted the possibility of confusing the jury if the nonuse of a seat belt was used to reduce damages.¹⁴⁵

The dissent in *Insurance Company of North America v. Pasakarnis*¹⁴⁶ addressed each of these factors and concluded that the nonuse of a seat belt should be considered.¹⁴⁷ The *Pasakarnis* dissent focused on the cause of the injury as a justification for considering the seat belt defense.¹⁴⁸ The distinction between the cause of injury and the cause of the accident is a subtle but important distinction to make. The significance of such a distinction is best illustrated by an example. Assume the plaintiff is an automobile passenger who fails to use her seat belt. The driver of the car turns a corner, the passenger's door flies open, the passenger falls out of the car and is struck by an oncoming vehicle. In this case, the nonuse of the seat belt was a cause of the accident.¹⁴⁹ The more common accident, however, is one in which the car is struck by another car and the passenger is thrown into the front windshield or dash. In this case, the nonuse of the seat belt had no causal relation to the cause of the accident, but did result in an increase in the damages suffered as a result of the accident. Based on this distinction, the *Pasakarnis* dissent suggested that "like all other negligence issues, the 'seat belt defense' may be submitted only when there is also competent evidence that the failure to use it bore a causal relation to the plaintiff's injuries."¹⁵⁰ Thus, a comparison

¹⁴⁴*Id.* at 1149-50 (quoting *Selfe v. Smith*, 397 So. 2d 348, 351 n.8 (Fla. Dist. Ct. App. 1981)).

¹⁴⁵425 So. 2d at 1150.

¹⁴⁶425 So. 2d 1141, 1142 (Fla. Dist. Ct. App. 1982). It should be noted that the *Pasakarnis* dissent was originally written as the majority opinion. However, after its submission, the *Lafferty* opinion was prepared and won the support of the majority in *Pasakarnis*. Thus, the original *Pasakarnis* majority opinion became the dissent. *Id.* at 1142 n.1.

¹⁴⁷*Id.* at 1147.

¹⁴⁸*Id.* at 1143.

¹⁴⁹*See* *Curry v. Moser*, 89 A.D.2d 1, 454 N.Y.S.2d 311 (1982). This fact situation arose in the *Moser* case. The court determined that because the failure to wear the seat belt actually had a causal relation to the accident, it should be considered by the jury. The court noted that the case was distinguishable from the usual cases where the seat belt would have prevented ejection or "second collision" following a collision with another vehicle or object. *Id.* at 7, 454 N.Y.S.2d at 315.

¹⁵⁰425 So. 2d at 1147 (citations omitted).

of fault would occur whenever the nonuse of a seat belt resulted in causing the plaintiff's injuries.

This approach notes that the failure to wear a seat belt would never be negligence per se, but rather would be an issue for the jury.¹⁵¹ A valid point by the *Lafferty* majority indicates that if such a duty is imposed it should not be dependent upon the circumstances of each case.¹⁵² Either the duty exists or it does not.

Another approach to the problem was suggested by the Supreme Court of Wisconsin in *Foley v. City of West Allis*.¹⁵³ The *Foley* decision noted that a Wisconsin court "was one of the first courts to hold that an automobile occupant has a duty based on the common law standard of ordinary care to use available seat belts."¹⁵⁴ The factors given to support the duty were "the realities of the frequency of automobile accidents and the extensive injuries they cause, the general availability of seat belts, and the public knowledge that riders and drivers should 'buckle up for safety[.]'"¹⁵⁵ Individuals who did not utilize seat belts were deemed to be responsible "for the incremental harm caused by their failure to wear available seat belts."¹⁵⁶ The court concluded that when the failure to wear the seat belt is not a cause of the collision but is a cause of the party's injury, the negligence should not be used to determine fault, but should be used to reduce the amount of recoverable damages.¹⁵⁷ When the nonuse of the seat belt actually contributed to the cause of the accident, as when a person falls out of a car, then the nonuse can be considered to apportion fault. However, a double use probably is not permitted. Rather, the nonuse would be used either to apportion fault or reduce damages, not to do both.¹⁵⁸

b. Restraint laws in Indiana.—These approaches suggest that a number of alternatives are available to Indiana under a comparative fault system. Indiana has one unique factor to consider when addressing this issue. The Indiana legislature recently passed the Child Passenger Restraint Systems Act.¹⁵⁹ This Act creates a duty on parents to strap their children safely

¹⁵¹*Id.* at 1146-47.

¹⁵²425 So. 2d at 1149.

¹⁵³113 Wis. 2d 475, 335 N.W.2d 824 (1983).

¹⁵⁴*Id.* at 483, 335 N.W.2d at 828 (citing *Bentzler v. Braun*, 34 Wis. 2d 362, 149 N.W.2d 626 (1967)).

¹⁵⁵*Id.* (footnotes omitted).

¹⁵⁶*Id.*

¹⁵⁷*Id.* at 478, 335 N.W.2d at 826.

¹⁵⁸See *Curry v. Moser*, 89 A.2d 1, 8, 454 N.Y.S.2d 311, 316 (1982).

¹⁵⁹Act of Apr. 15, 1983, Pub. L. No. 141-1983, Sec. 2, §§ 1-9, 1983 Ind. Acts 986-987 (codified at IND. CODE §§ 9-8-13-1 to -9 (Supp. 1984)).

As of July 31, 1983, 41 state legislatures and the District of Columbia had passed legislation requiring the use of child safety seats. It is estimated that child safety seats are 80-90% effective in preventing fatalities and injuries. This is based on studies performed in Washington and Tennessee. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 53 (1983).

into their seats. The statute states, however, that the failure to comply with the law "does not constitute contributory negligence."¹⁶⁰ This section expresses a clear intent on the part of the legislature not to impose civil responsibility for neglecting to perform that duty. It also implies that the legislature has recognized itself as the proper body to deal with the seat belt issue.

The legislature's approach is not necessarily the last word on the seat belt defense in Indiana. The child restraint act was passed under a common law negligence system and must be regarded as a part of that system. The legislature's reluctance to label the nonuse of seat belts as contributory negligence could stem from the harsh results obtained under common law contributory negligence, or the fear that the parent's negligence will be imputed to the innocent child.¹⁶¹ Under a comparative fault system, such a result is no longer mandated as the plaintiff's negligence no longer acts as a complete bar to recovery.

However, for safety devices to achieve the desired results, they must be properly used. See Weber & Melvin, *Injury Potential with Misused Child Restraining Systems*, TWENTY-SEVENTH STAPP CAR CRASH CONFERENCE PROCEEDINGS, p. 134 (1983). The following chart from the National Safety Council indicates the status of child passenger restraint laws as of July 31, 1983.

State	Effective Date	State	Effective Date
Alabama	July 1, 1982	Missouri	Jan. 1, 1984
Arizona	July 1, 1984	Montana	Jan. 1, 1984
Arkansas	Aug. 1, 1983	Nebraska	Aug. 26, 1983
California	Jan. 1, 1983	Nevada	July 1, 1983
Colorado	Jan. 1, 1984	New Hampshire	July 1, 1983
Connecticut	Oct. 1, 1982	New Jersey	Apr. 7, 1983
Delaware	June 2, 1982	New Mexico	June 17, 1983
Dist. of Col.	July 1, 1983	New York	Apr. 1, 1982
Florida	July 1, 1983	North Carolina	July 1, 1982
Georgia	July 1, 1984	North Dakota	Jan. 1, 1984
Hawaii	July 1, 1983	Ohio	Mar. 7, 1983
Illinois	July 1, 1983	Oklahoma	Nov. 1, 1983
Indiana	Jan. 1, 1984	Oregon	Jan. 1, 1984
Kansas	Jan. 1, 1982	Pennsylvania	pending
Kentucky	July 15, 1982	Rhode Island	Apr. 1, 1982
Louisiana	Aug. 29, 1983	South Carolina	July 1, 1984
Maine	Sept. 21, 1983	Tennessee	Jan. 1, 1978
Maryland	Jan. 1, 1984	Virginia	Jan. 1, 1983
Massachusetts	Jan. 1, 1982	Washington	Jan. 1, 1984
Michigan	Apr. 1, 1982	West Virginia	July 10, 1981
Minnesota	Jan. 1, 1982	Wisconsin	Dec. 1, 1982
Mississippi	July 1, 1983		

NATIONAL SAFETY COUNCIL, *Accident Facts 53* (1983) (citing National Transportation Safety Board).

¹⁶⁰IND. CODE § 9-8-13-9 (Supp. 1984).

¹⁶¹The imputation of the parent's negligence on the child could be prevented by other appropriate limitations while still allowing the parent's failure to use the child safety seat to be used for reduction of the parent's recovery.

The enactment of a child safety restraint act illustrates a concern for safety.¹⁶² While the legislature has been reluctant to expand these requirements to adults,¹⁶³ such an expansion may be desirable from a safety standpoint. Safety belts are effective in saving lives or preventing injury fifty to sixty-five per cent of the time.¹⁶⁴ This means that safety belts, if used regularly, could save 12,000 to 16,000 lives annually.¹⁶⁵ One study involving frontal and rollover crashes notes the value of safety belts:

Severe, serious, critical-to-life injuries and fatalities are reduced by the use of belts in both frontal and rollover collisions. In addition, belts increase the occupants [sic] chances of escaping from the crash without injury. In frontal and rollover crashes belts reduce severe-to-fatal head injuries, mostly eliminate neck fatalities, significantly reduce the more severe lower extremity injuries and reduce severe thoracic and abdominal injuries and fatalities.¹⁶⁶

However, the public, as a whole, has been slow to accept and utilize safety belts for a number of reasons, including discomfort and inconvenience.¹⁶⁷ Other factors include beliefs that the the risk of accident is slight and safety belts are not effective.¹⁶⁸ Finally, it must be decided whether a fifty to sixty-five percent effectiveness rate justifies the imposition of a duty to wear seat belts.¹⁶⁹

¹⁶²It should be noted that Indiana also has a protective headgear statute which requires a motorcycle driver under the age of 18 and his passengers to wear a helmet, and to carry glasses, goggles, or a face shield. IND. CODE § 9-8-9-3.1 (Supp. 1984).

¹⁶³At one time Indiana required all motorcycle drivers and passengers to wear protective headgear and to carry glasses, goggles, or a face shield. IND. CODE § 9-8-9-3 (1976) (repealed 1977).

This same type of reluctance has apparently carried over into the safety belt area. As of July 31, 1983, no adult safety belt laws were in effect in the United States. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 53 (1983).

¹⁶⁴NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 53 (1983).

¹⁶⁵*Id.*

¹⁶⁶Huelke, Lawson, Scott, & Marsh, *The Effectiveness of Belt Systems in Frontal and Rollover Crashes*, SOCIETY OF AUTOMOTIVE ENGINEERS 8 (1977). See also SOCIETY OF AUTOMOTIVE ENGINEERS, INC., TWENTY-SIXTH STAPP CAR CRASH CONFERENCE p. 113 (1982) (including several tests and studies regarding the use and benefit of safety belts).

¹⁶⁷Agent, Barclay & Deen, *Use of Safety Belts in Kentucky*, DRIVER PERFORMANCE, PASSENGER SAFETY DEVICES, AND THE BICYCLIST 14 (1979).

¹⁶⁸*Id.* at 15.

¹⁶⁹NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 53 (1983). The effectiveness of adult restraint systems must be contrasted with child restraint systems. It is estimated that child restraint systems are 80-90% effective in preventing injuries. *Id.* This higher effectiveness rate may justify the creation of a duty to strap children in the seats while the 50-65% rate for adults may not. It is notable that even with an 80-90% effectiveness rate for accident prevention for children, the Indiana legislature refused to declare the failure to utilize the belts to be contributory negligence. See *supra* note 160 and accompanying text.

Other factors and studies do, however, indicate some benefits from seat belt use that courts and legislatures may consider when dealing with this issue. First, the economic costs associated with motor vehicle injuries rank just behind cancer in estimated direct and indirect costs to the United States. Among the rated costs the rankings were 1) cancer, 2)

It is not clear which approach Indiana will take. Other jurisdictions dealing with this issue have taken varying approaches; some have continued to refuse to consider the nonuse of a seat belt even under a comparative fault system.¹⁷⁰ The potential for impact in this area is great, and both the Indiana courts and legislature should re-evaluate the issue in light of studies establishing the benefits of seat belts.

V. CONCLUSION

As illustrated, the potential impact on legal practices and procedures is great once the Comparative Fault Act takes effect. The degree of this impact is impossible to predict with any certainty. Much will depend on how courts apply the new statute, and how they re-evaluate rules that arose under the common law contributory negligence system. In addition, since the Act does not take effect until 1985, the legislature may still make amendments that expressly or impliedly alter the issues in any of these areas.¹⁷¹

motor vehicle injuries, 3) coronary heart disease, and 4) stroke. INSURANCE INSTITUTE FOR HIGHWAY SAFETY, POLICY OPTIONS FOR REDUCING THE MOTOR VEHICLE CRASH INJURY COST BURDEN 2-3 (1981). Second, benefits from mandatory seat belt use have been reported in other countries. While no state utilizes an adult safety belt law, 28 foreign countries or provinces have established mandatory safety belt laws. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 53 (1983); see also Green, *Canadians Learn to Live with Seat Belts*, 79 TRAFFIC SAFETY 16 (1979). The benefit from such laws is illustrated by statistics from the Australian State of Victoria. Four years after the passage of safety belt legislation; occupant fatalities had decreased by 37% and injuries by 41%, including a 27% decrease in the incidence of spinal injuries. Am. Assoc. for Automotive Medicine, *Motor Vehicle Safety Belt Use: The Physician's Viewpoint* (pamphlet voicing physicians' support for legislative action). Placing a duty to utilize seat belts on automobile occupants will not diminish or replace the manufacturer's duty to design and produce a crashworthy interior. Rather a duty of care will be shared by the manufacturer and occupant. The occupant will have a duty to wear the seat belt, and the manufacturer will have a duty to design and build a crashworthy interior based on the assumption that the safety belt will *not* always be worn. The manufacturer will also have a duty to design and utilize the best safety belt mechanism available. The duty on the manufacturer is justifiable because of the manufacturer's expertise in automobile design and the manufacturer's access to testing facilities. Unlike the manufacturer, the average consumer lacks the expertise and resources required to determine whether a dashboard is safe for impact or a seat belt design is the safest available.

If the seat belt defense becomes available to mitigate damages or determine causation, significant problems may arise at trial. The defendant will try to prove certain injuries were the result of the occupant's failure to use the seat belt, while the plaintiff will try to prove the injuries were the result of the manufacturer's defective design or other negligence. Various experts will attempt to prove these matters, and the jury will have to determine whether damages should be reduced for the failure to wear the seat belt. In these trials, the resources of biomechanical engineering will be greatly needed and challenged.

¹⁷⁰See, e.g., *Lafferty*, 425 So. 2d 1147.

¹⁷¹The Act has already been amended once by the passage of Senate Bill 419. Act of Mar. 5, 1984, Pub. L. No. 174-1984, 1984 Ind. Acts 1468. The present form of the Act does not take effect until January 1, 1985.

In conclusion, the cumulative effect of the statute must be kept in mind. Ideally, the statute will alleviate the harsh "all or nothing" effect of contributory negligence. However, if joint and several liability has been abrogated, plaintiffs may find that more but smaller judgments may be obtained, and fewer collected. This raises the question of what has truly been accomplished by the Act: Has the harsh "all or nothing" approach merely been replaced by meaningless verdicts? If so, who has really benefited? While no answers to these questions currently exist, it is certain that the adoption of comparative fault will alter legal thinking and practice in Indiana.

