Comparative Negligence in Indiana: A Unique Statute That Will Reshape the Law

VICTOR E. SCHWARTZ*

I. INTRODUCTION

Indiana has joined the stampede against the common law contributory negligence rule,[1] becoming the thirty-ninth state to adopt some form of comparative negligence either by statute or by case law decision.[2] As will be detailed in this Article, the statute is unique: it will, over time, totally reshape the law of torts in the state and require attorneys on both sides of the aisle to rethink trial strategies.

This Article will address some of the major issues under Indiana's Comparative Fault Act, including the nature of the statutory definition of "fault"; the legislative efforts to remove strict products liability actions

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*Partner, Crowell & Moring, Washington, D.C. Coauthor, Prosser, Wade & Schwartz, CASES AND MATERIALS ON TORTS (7th ed. 1982). Author, COMPARATIVE NEGLIGENCE (1974). Mr. Schwartz was the principal author of the UNIFORM PRODUCT LIABILITY ACT. Mr. Schwartz gratefully acknowledges the assistance of Ms. Evelyn F. Rowe, a recent graduate of the Georgetown University Law Center, in preparing this Article.

[1]Act of Apr. 21, 1983, Pub. L. No. 317-1983, 1983 Ind. Acts 1930 (codified at IND. CODE §§ 34-4-33-1 to -8 (Supp. 1984)), *amended by* Act of Mar. 5, 1984, Pub. L. No. 174-1984, 1984 Ind. Acts 1468 (codified at IND. CODE §§ 34-4-33-2, 4, 5, 9, to -13 (Supp. 1984)); *see also* V. SCHWARTZ, COMPARATIE NEGLIGENCE §1.1 (Supp. 1981).

[2]Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981); Goetzman v. Wickern, 327 N.W.2d 742 (Iowa 1982); Scott v. Riggs, 96 N.M. 682, 634 P.2d 1234 (1981); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979); ARK. STAT. ANN. §§ 27-1763 to -1765 (1979); COLO. REV. STAT. §§ 13-21-111, -406 (1973 & Supp. 1983); CONN. GEN. STAT. ANN. § 52-572 h, o (West Supp. 1984); HAWAII REV. STAT. § 663-31 (1976); IDAHO CODE § 6-801 (1979); KAN. STAT. ANN. § 60-258a (1976); LA. CIV. CODE ANN. art. 2323 (West Supp. 1984); ME. REV. STAT. ANN. tit. 14, § 156 (1979); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1984-85); MICH. COMP. LAWS ANN. § 600. 2949 (Supp. 1983-84); MINN. STAT. ANN. 604.01 (West Supp. 1984); MISS. CODE ANN. § 11-7-15 (1972); MONT. CODE ANN. § 27-1-702 (1981); NEB. REV. STAT. § 25-1151 (1979); NEV. REV. STAT. § 41.141 (1979); N.H. REV. STAT. ANN. § 507:7-a (1983); N.J. STAT. ANN. §§ 2A:15-5.1 to -5.3 (West Supp. 1983-84); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976); N.D. CENT. CODE § 9-10-07 (1975); OHIO REV. CODE ANN. § 2315.19 (Page 1981); OKLA. STAT. ANN. tit. 23, § 13 (West Supp. 1983-84); OR. REV. STAT. 18.470 (1975); PA. STAT. ANN. tit. 42, § 7102 (Purdon 1982); R.I. GEN. LAWS § 9-20-4 (Supp. 1983); S.D. CODIFIED LAWS ANN. § 20-9-2 (1979); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1984) (*modified by* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984)); UTAH CODE ANN. § 78-27-37 (1977); VT. STAT. ANN. tit. 12, § 1036 (1973 & Supp. 1983); WASH. REV. CODE ANN. §§ 4.22.005-22.925 (Supp. 1983-84); WIS. STAT. ANN. § 895.045 (West 1983); WYO STAT. § 1-1-109 (1977).

In late 1983, Missouri became the fortieth state to adopt a form of comparative negligence. Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983).

from the scope of the statute; and the effect of the statute on apportionment of fault among multiple tortfeasors. These issues will be developed by comparing Indiana's approach to the approaches of other comparative fault jurisdictions.

II. Overview of Indiana's Comparative Fault Act

Rather than adopt pure comparative negligence which simply reduces damages based on claimants' fault,[3] the Indiana legislature elected a modified form. Damages in Indiana are permitted only if the plaintiff is 50% or less "responsible" for his injuries.[4] Thus, in some cases contributory negligence will continue to act as a complete bar to recovery. This raises questions as to whether doctrines such as last clear chance, which were meant to modify the harshness of the common law contributory negligence rule, will remain viable. The Act also includes assumption of risk in its scope.

The Indiana statute[5] is entitled "Comparative Fault." The scope of the statute is controlled by its definition of fault.[6] The Act originally covered all product liability actions whether based on negligence, strict liability, or breach of warranty and also actions based on abnormally dangerous activities.[7] The only tort actions that clearly were not covered by the original Act were intentional torts.[8] However, the scope of Indiana's statute was altered in 1984 by amendments which excluded actions based on strict liability and breach of warranty.[9]

The statute compares the negligence of the plaintiff to that of the defendant unless the plaintiff's "contributory fault is greater than the fault of all persons whose fault *proximately* contributed to claimant's damages."[10] This clause allows a defendant to escape liability or increase the plaintiff's total share of fault by establishing that his conduct was not the "proximate cause" of the plaintiff's damages.

Additionally, a single defendant or group of defendants may be able to reduce their share of the damages if they can shift the blame to someone who is not in the litigation. This "nonparty defense" is permitted under Indiana's comparative fault scheme.[11] The Act defines a nonparty

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[3]Schwartz, *supra* note 1, at § 3.2.

[4]Ind. Code §§ 34-4-33-5(a)(2), (b)(2), (3) (Supp. 1984).

[5]Ind. Code §§ 34-4-33-1 to -8 (Supp. 1984).

[6]*Id.* § 34-4-33-2(a).

[7]*Id.*

[8]*Id.*

[9]Act 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)).

[10]Ind. Code § 34-4-33-4(a) (Supp. 1984) (emphasis added).

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

as "a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant."[12] The definition of "nonparty" may, however, present some problems. To illustrate, it is unclear whether the definition would encompass, for example, bankrupt parties or parties beyond the reach of the state's jurisdiction. Arguably, such parties may not be "liable to the claimant." In any case, the nonparty defense and other features of the Act will present a whole new series of strategic considerations for both plaintiff and defense counsel.

III. The Nature of Indiana's Comparative Fault

The Indiana definition of "fault" tracks that found in the Uniform Comparative Fault Act in most respects.[13] There are some interesting deviations, however, including the omission of the words "in any measure" before "negligent or reckless" as found in the Uniform Act, the addition of "willful" and "wanton" to "negligent or reckless," as well as the addition of specific language excluding intentional torts. There may be some zone at the bottom end of the scale of plaintiff's or defendant's fault where slight fault will not be considered; under the common law contributory negligence system juries tended to do this anyway.[14] The explicit omission of intentional acts may be an attempt to avoid the ambiguity surrounding the comparative fault acts of Maine and Arkansas,[15] which must be closely read to arrive at the conclusion that the legislatures meant to only cover actions where contributory negligence formerly would have been a complete defense.[16] While disavowing application to intentional acts, the statute nonetheless includes "willful" acts or omissions. It seems most likely that by these terms, the legislature intended conduct which is not directly intended to cause harm but is nonetheless so unreasonable and dangerous that the actor knew or should have known it was highly probable that harm would result. This is the equivalent of

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[12] *Id.*

[13] The Unif. Comparative Fault Act § 1(b), 12 U.L.A. 35, 36-37 (Supp. 1984) provides:

> "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.

[14] Schwartz, *supra* note 1, at § 1.2(B). Juries may ignore instructions when the result under them would seem manifestly unfair. Judges no longer instruct that "even the slightest negligence on the part of the plaintiff will bar his claim." *See* Huey v. Milligan, 242 Ind. 93, 175 N.E.2d 698 (1961).

[15] Ark. Stat. Ann. §§ 27-1763 to -1765 (1979); Me. Rev. Stat. Ann. tit. 14, § 156 (1979).

[16] Schwartz, *supra* note 1, at § 5.2.

"reckless disregard" found in the Restatement and other jurisdictions.[17]

At common law and under the Restatement, the contributory negligence defense does not apply when the defendant's conduct rises to the level of "reckless disregard."[18] The courts disallowed the contributory negligence defense because the defendant's conduct was so culpable as to be different in kind from the plaintiff's.[19] The rule also ameliorated the harshness of the contributory negligence rule, a justification which disappears when comparative negligence is adopted.[20]

Most state courts that have considered the question have generally held that comparative negligence applies to mitigate damages when the defendant's conduct is aggravated, even though the legislature did not address the question.[21] Thus, the California Supreme Court has suggested that apportionment of liability should occur in all cases involving less than intentional misconduct,[22] and several courts have applied comparative negligence to cases of gross or willful and wanton negligence.[23] On the other hand, states have been reluctant to allow apportionment for recklessness.[24]

Another question to be resolved will be whether punitive damages should still be awarded in cases of willful, wanton, or reckless misconduct. Some have suggested that in light of the advantage comparative negligence gives to a plaintiff, punitive damages should no longer be available upon a showing of "recklessness."[25] On the other hand, it can be argued that comparative negligence is really irrelevant to the punitive damages issue: if a plaintiff proved recklessness under the contributory

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[17]RESTATEMENT (SECOND) OF TORTS § 500 (1965) provides:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

The conduct described in this section of the Restatement is often called "wanton or willful misconduct" in statutes and court opinions.

[18]*Id.* §§ 481, 482, 500.

[19]W. PROSSER, HANDBOOK OF THE LAW OF TORTS 426 (4th ed. 1971).

[20]SCHWARTZ, *supra* note 1, at § 5.3.

[21]Billingsley v. Westrac Co., 365 F.2d 619 (8th Cir. 1966) (applying Arkansas law before the comparative fault statute was enacted); Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

[22]Ewing v. Cloverleaf Bowl, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

[23]*E.g.*, Amoco Pipeline Co. v. Montgomery, 487 F. Supp. 1268 (W.D. Okla. 1980).

[24]*E.g.*, Draney v. Bachman, 138 N.J. Super. 503, 351 A.2d 409 (1976) (comparative negligence applies in cases of gross negligence but not in cases of willful or wanton negligence; "gross" negligence is merged into ordinary negligence).

[25]*See, e.g.*, Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962) (punitive damages available only for intentional torts).

negligence rule, his claim would not have been barred. Comparative negligence does not provide an advantage in that precise situation.

The question whether punitive damages should be awarded under a comparative fault system is a significant issue in Indiana. A recently enacted Indiana statute allows punitive damages to be awarded against a defendant when there is criminal liability.[26] Therefore, punitive damages can be imposed in drunk driving cases.[27] Courts in other states have generally held that the purposes of punitive damages, punishment and deterrence, are so completely outside the theories of compensatory damages that punitive damages may be awarded even when the plaintiff has been negligent.[28]

IV. The Intersection With the Law of Product Liability

The Indiana statute originally applied comparative fault to strict liability and breach of warranty actions and included "misuse of a product for which the defendant otherwise would be liable" in its definition of "fault."[29] This inclusion of products liability in comparative negligence was consistent with the Uniform Products Liability Act,[30] the Uniform Comparative Fault Act,[31] and some, but not all, of the other states that have adopted comparative negligence.[32] However, in the 1984 amendments to Indiana's Comparative Fault Act, actions based on strict liability and breach of warranty were removed from the scope of the Act.[33]

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[26]Act of Feb. 29, 1984, Pub. L. No. 172-1984, Sec. 2, § 2, 1984 Ind. Acts 1462, 1462 (codified at Ind. Code § 34-4-34-2 (Supp. 1984)) provides:

> It is not a defense to an action for punitive damages that the defendant is subject to criminal prosecution for the act or omission that gave rise to the civil action. However, a person may not recover both:
> (1) punitive damages; and
> (2) the amounts provided for under section 1 of this chapter.

[27]According to Ind. Code § 9-11-2-2 (Supp. 1984), "[a] person who operates a vehicle while intoxicated commits a Class A misdemeanor."

[28]Amoco Pipeline Co. v. Montgomery, 487 F. Supp. 1268 (W.D. Okla. 1980); Teche Lines v. Pope, 175 Miss. 393, 166 So. 539 (1936).

[29]Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 2, 1983 Ind. Acts 1930, 1930 (codified at Ind. Code § 34-4-33-2. (Supp. 1983)); *amended by* Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2, 1984 Ind. Acts 1468, 1468 (codified at Ind. Code § 34-4-33-2 (Supp. 1984)).

[30]Model Unif. Products Liability Act § 111 (A), 44 Fed. Reg. 62,714, 62,734 (1979) (phrased in terms of "comparative responsibility").

[31]Unif. Comparative Fault Act § 1(b), 12 U.L.A. 35 (Supp. 1984).

[32]West v. Caterpillar Tractor Co., 547 F.2d 885 (5th Cir. 1977) (applying Florida law); Stueve v. American Honda Motors Co., 457 F. Supp. 740 (D. Kan. 1978); Sun Valley Airlines v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979); Black v. General Elec. Co., 89 Wis. 2d 195, 278 N.W.2d 224 (1979).

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

There are those who have argued that comparative fault does not work in product liability actions,[34] but recent court decisions and most commentators have observed that they can work together.[35] It has been so in New Hampshire since 1968.[36] Moreover, there is a continuing ideological debate over the role of fault in strict product liability actions. Theoretically, strict liability focuses on the defectiveness of the product and not on the manufacturer's conduct.[37] Persons who have studied product liability, however, respond that strict liability has never been "strict," at least in the areas of product design and warnings, because almost every court takes into account the actual circumstances at the time of manufacture and incorporates "reasonableness" into its liability standard.[38] Thus, one is still comparing fault although the liability base in product design and warranty actions has been mislabeled as strict.[39] The 1984 amendments to Indiana's Comparative Fault Act were not a response to the debate over the "strict nature of liability." Instead, the Indiana legislature wanted to preserve the assumption of risk and unforeseeable misuse defenses in strict liability actions.[40] The net result of the 1984 amendments may be that plaintiffs' lawyers will simply choose between negligence and strict liability theories in order to obtain maximum return in accordance with the facts of the case.

Although the 1984 amendments specifically state that Indiana's comparative fault statute shall not apply in any manner to strict liability actions under the product liability statute,[41] Indiana courts could create their own common law rule of comparative fault in this area. Courts in other states

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[34]*See, e.g.*, Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297 (1977) (suggesting that application of comparative fault in a products case may negate the very reason for deciding that defendant's product is defective).

[35]SCHWARTZ, *supra* note 1, at § 12.7.

[36]In 1968, New Hampshire enacted its basic comparative negligence law. N.H. REV. STAT. ANN. § 507:7-a (1983). The statute was applied to assumption of risk in the strict product liability case, Hagenbuck v. Snap-on Tools Corp., 339 F. Supp. 676 (D. N.H. 1972).

[37]RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused . . . .
>
> (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product . . . .

[38]*E.g.*, Powers, *The Persistence of Fault in Products Liability, 61* TEX. L. REV. 777 779 (1983) ("It is not surprising that courts resolve difficult conceptual problems by relying on the familiar analytical concepts of negligence . . . .").

[39]*Id.* at 780 ("[C]ourts have had difficulty avoiding fault when they have attempted to apportion a loss . . . between a culpable plaintiff and a defendant . . . .").

[40]E. Bayliff, *Amendments to the 1983 Comparative Fault Act*, INDIANA'S COMPARATIVE FAULT ACT II-1, 4-5 (Indiana Continuing Legal Education Forum 1984).

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

have recently applied comparative negligence and equitable apportionment principles to strict product liability.[42] In *Duncan v. Cessna Aircraft Co.*,[43] for example, the Texas Supreme Court adopted comparative apportionment of fault in a strict liability action against the manufacturer of a light aircraft. In *Duncan*, the defendant-manufacturer sought contribution from the pilot's estate and reduction of the award to the pilot's estate on the ground that the pilot was contributorily negligent. Under previous Texas decisions, contributory negligence was no defense to a Restatement section 402A action, although assumption of risk was a complete defense. The Texas Supreme Court had already adopted comparative negligence in cases of unforeseeable product misuse. The court commented that differing rules for strict liability, negligence, and breach of warranty actions caused procedural difficulties; there was no "qualitative difference" between contributory negligence and recognized strict product liability defenses that would justify the complexity of the existing rules.[44] These rules also unnecessarily complicated allocation among multiple tortfeasors.[45] Although the Texas comparative fault statute focused solely on negligence actions, the court adopted comparative apportionment of fault as "a feasible and desirable means of eliminating confusion and achieving efficient loss allocation in strict liability cases."[46]

V. The Interface Among the 50% Rule, Joint and Several Liability, and Contribution and Indemnity

While most commentators advocate a "pure" system of comparative negligence, one in which the plaintiff can collect something as long as his share of fault falls short of 100%,[47] some states, including Indiana, have been unwilling to go that far.[48] Many have adopted the "50% system" adhered to by Indiana, on the ground that it is unjust for a plaintiff to recover when he was more at fault than the defendant.[49] In fifteen states and the Virgin Islands, the plaintiff must not be more than 50% negligent in order to recover.[50] In nine states the plaintiff must be

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[42]Austin v. Raybestos-Manhattan, Inc., 471 A.2d 280 (Me. 1984), Day v. General Motors Corp., 345 N.W.2d 349 (N.D. 1984) (applying comparative fault in a "second collision" strict liability case where the plaintiff had fallen asleep at the wheel); Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984).

[43]665 S.W.2d 414 (Tex. 1984).

[44]*Id.* at 423.

[45]*Id.*

[46]*Id.* at 427.

[47]Schwartz, *supra* note 1, at § 21.3.

[48]*See infra* notes 50-51 and accompanying text.

[49]Schwartz, *supra* note 1, at § 21.3. In actual practice, lopsided comparative verdicts are rare. As one party's fault approaches 100% and the other's approaches zero, causation and the substantial factor rule take over.

[50]Conn. Gen. Stat. Ann. § 52-572h (West Supp. 1984) (not applicable in products

less than 50% at fault or the plaintiff's contributory negligence will act as a complete bar to his recovery.[51]

The difference of a percentage point is important. Juries have a tendency to split fault down the middle and return verdicts that the parties were equally at fault.[52] In states where juries are required to bring in special verdicts on percentage of fault but cannot be instructed on the consequences of a 50% verdict, the jury may be misled by the system and unintentionally leave the plaintiff with nothing.[53] For this reason, many states that started with the less than 50% rule have changed their laws to the 50% or less version.[54]

Regardless of where the "vital point" falls, difficult issues arise when the contributory negligence defense remains viable. Doctrines aimed at modifying the harshness of the contributory negligence defense, such as last clear chance, may still be applicable.[55] Some states with a modified comparative fault system have retained the last clear chance doctrine.[56] It should be noted that jurisdictions that have retained the rule have not given very broad scope to the doctrine. The rule has been restricted to *conscious* last clear chance, where the defendant knew that the plaintiff was in peril and failed to use reasonable care to avoid the accident.[57]

A consistent system of comparative fault, in addition to adopting pure comparative negligence, would apportion fault among multiple tortfeasors, allow contribution, and abolish joint and several liability. By way of contrast, the Indiana statute bars any right of contribution among tortfeasors

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liability cases); IND. CODE § 34-4-33-1 to -8 (Supp. 1984); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1984-85); MINN. STAT. ANN. § 604.01 (1) (West Supp. 1984); MONT. CODE ANN. § 27-1-702 (1981); NEV. REV. STAT. § 41.141 (1979); N.H. REV. STAT. ANN. § 507:7-a (1983); N.J. STAT. ANN. § 2A:15-5.1 (West Supp. 1983-84); OHIO REV. CODE ANN. § 2315.19 (Page 1981); OKLA. STAT. ANN. tit. 23, § 13 (West Supp. 1983-84); OR. REV. STAT. § 18.470 (1975); PA. STAT. ANN. tit. 42, § 7102 (Purdon Supp. 1982); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1984); VT. STAT. ANN. tit. 12, § 1036 (1973 & Supp. 1983); V.I. CODE ANN. tit. 5, § 1451 (Supp. 1983); WIS. STAT. ANN. § 895.045 (West 1983).

[51]Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979); ARK. STAT. ANN. § 27-1764 (1979); COLO. REV. STAT. § 13-21-111(1) (1973) (not applicable in products liability cases); HAWAII REV. STAT. § 663-31 (1976); IDAHO CODE § 6-801 (1979); KAN. STAT. ANN. § 60-258a (1976); ME. REV. STAT. ANN. tit. 14, § 156 (1979); N.D. CENT. CODE § 9-10-07 (1975); WYO. STAT. § 1-1-109 (1977).

[52]SCHWARTZ, *supra* note 1, at § 3.5(B).

[53]*Id.*

[54]*Id.* Massachusetts, Minnesota, Montana, Ohio, Oklahoma, Oregon, Pennsylvania, the Virgin Islands and Wisconsin amended their statutes, rejecting the "less than 50%" rule in favor of the "50% or less" version.

[55]In addition to last clear chance, Indiana common law includes such doctrines as "choice of ways" and "sudden emergency." Vargo, *Comparative Fault: A Need for Reform of Indiana Tort Law*, 11 IND. L. REV. 829, 834 (1978).

[56]SCHWARTZ, *supra* note 1, at § 7.2.

[57]*Id.* §§ 7.1, 7.2.

while allowing actions in indemnity,[58] and Indiana retains the common law rule of joint and several liability..[59]

The rule against contribution among tortfeasors can have unfair consequences for defendants in a comparative negligence state where joint and several liability is the rule. For example, if the plaintiff were 20% negligent, defendant *A* 15% negligent, and defendant *B* 65% negligent but bankrupt, defendant *A*, though less negligent than the plaintiff, might have to pay 80% of the plaintiff's loss. The Texas statute offers one solution to this problem by making tortfeasors jointly and severally liable if they are more at fault than the plaintiff but proportionally liable if they are less at fault than the plaintiff.[60]

The Arkansas Supreme Court provided an alternative solution to the unfairness which might result when a comparative fault statute is applied in a case involving multiple tortfeasors. The Arkansas Supreme Court adopted the practice of allocating fault proportionally among tortfeasors.[61] The court reasoned that the legislature did not intend to deny recovery to a plaintiff less than half at fault. Yet denial of recovery would result under Arkansas' nonaggregate approach if the most negligent defendants were judgment-proof. Thus, the court concluded that a distribution of the costs of an accident among those who caused it was consistent with legislative intent.[62]

Three alternatives exist when comparative fault statutes are applied in cases involving multiple tortfeasors. Contribution between tortfeasors is the most equitable alternative. The Texas system, which goes on to limit liability when the defendant's fault is less than the plaintiff's, approaches equity. The Arkansas rule, which seems to comport with results under the Indiana statute, is reasonably fair.

The combination of a 50% rule and multiple defendants can produce unfair consequences for plaintiffs as well. Indiana Code section 34-4-33-4(b) avoids one instance of unfairness by allowing recovery as long as the plaintiff's fault is equal to or less than that of all persons whose fault proximately caused the accident, rather than denying recovery if the plaintiff's fault exceeds that of any one defendant.[63]

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[58]IND. CODE § 34-4-33-7 (Supp. 1984). The bar against contribution is not limited to actions under the statute, as Indiana also bars contribution at common law. Jackson v. Record, 211 Ind. 141, 5 N.E.2d 897 (1937); Hunt v. Lane, 9 Ind. 248 (1857); Barker v. Cole, 396 N.E.2d 964 (Ind. Ct. App. 1979).

[59]Cooper v. Robert Hall Clothes, Inc., 271 Ind. 63, 390 N.E.2d 155 (1979); Barker v. Cole, 396 N.E.2d 964 (Ind. Ct. App. 1979).

[60]TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(a)(2)(c) (Vernon Supp. 1984).

[61]Riddell v. Little, 253 Ark. 686, 488 S.W.2d 34 (1972); Walton v. Tull, 234 Ark. 882, 356 S.W.2d 20 (1962).

[62]253 Ark. at 689, 488 S.W.2d at 36; 234 Ark. at 893, 356 S.W.2d at 26. The Arkansas statute was amended in 1975 to reflect these decisions. ARK. STAT. ANN. § 27-1765 (1979).

[63]IND. CODE § 34-4-33-4(b) (Supp. 1984).

VI. Strategic Considerations for the Advocate

In Indiana's system, the plaintiff should join as many defendants as possible. Their fault will be considered whether they are in the lawsuit or not.[64]

Under Indiana's modified "50% or less" rule, the plaintiff's attorney faces the danger that his client will leave the courtroom with nothing because the plaintiff's negligence exceeds 50%. Settlement may be more difficult where defendants consider this possibility realistic. If the plaintiff was negligent, his attorney must plan his strategy with the utmost care to show that the defendant was considerably more culpable in regard to the accident than was the plaintiff. In Indiana, a split of liability down the middle is not a total loss but such a jury finding would be considered less than desirable.[65]

To mitigate the effect of the "50% or less" rule, Indiana plaintiffs should strive for the adoption of a judge-made Wisconsin rule. Under the Wisconsin rule, a plaintiff need not be found more at fault than the defendant merely because he was guilty of the same kind of negligence as the defendant.[66]

The defendant's main goal, if he has in fact negligently injured the plaintiff, is to establish the plaintiff's culpability and to use that culpability as a basis for reducing the amount of the award. In arguing to the jury, defense counsel should stress the statutory language providing for reduction of the award when the plaintiff was negligent and impress the jury with the fairness of the comparative negligence principle. The fairness of comparative negligence may cause a jury to apply it more strictly against a plaintiff than the jury would have applied the common law contributory negligence rule.

In Indiana, assumption of the risk is no longer a complete defense, as it is merged into negligence in the statute.[67] However, it still may be the basis of an effective argument to the jury. Common sense dictates and a jury may be convinced that a plaintiff who has voluntarily and knowingly assumed a known risk is more than half responsible for his injuries. Such an apportionment of fault will push the plaintiff over the vital point barring his recovery.

In multiple tortfeasor cases the defendant faces an interesting tactical problem, especially in view of the Indiana rule that a defendant's fault

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[64]Ind. Code § 34-4-33-5(b)(1) (Supp. 1984) ("The jury shall determine the percentage of fault of the claimant, of the defendants, and of any person who is a nonparty.").

[65]Under Indiana's comparative fault statute, a split of liability down the middle would entitle the plaintiff to recover only 50% of the total amount of damages. *See* Ind. Code § 34-4-33-5(a)(4) (Supp. 1984).

[66]*See* Lovesee v. Allied Dev. Corp., 45 Wis. 2d, 340, 345, 173 N.W.2d 196, 199 (1970); Taylor v. Western Casualty & Surety Co., 270 Wis. 408, 71 N.W.2d 363 (1955).

[67]Ind. Code § 34-4-33-2(a) (Supp. 1984) (" 'Fault' includes . . . unreasonable assumption of risk not constituting an enforceable express consent . . . . ").

is to be considered whether he is in the courtroom or not. On the one hand, he wants to place 100% of the blame on others and exonerate himself. On the other hand, the more parties who are considered, the greater the proportion of fault that may be assigned to the defendants as a group. A defendant whose strategy fails may find himself with a small proportion of the fault but end up paying the entire judgment under the joint and several liability rule.[68] If, however, he is the only tortfeasor whose fault is considered, he may be able to attribute more than half the fault to the plaintiff and escape liability entirely. The best he can do is to avoid consideration of the other defendants' fault unless they are solvent or adequately insured.

Indiana's modified comparative negligence rule gives the defense a sledgehammer, since it is much easier for the defendant to escape liability under a modified system than under a pure system. At the same time, even if the defendant has been more than half at fault, the defense may be able to cut its losses by arguing for a 50-50 apportionment of fault. In complex accident cases, equal apportionment is often a very comfortable position for the trier of fact, much easier than trying to arrive at a precise percentage. In Indiana the plaintiff may still recover half his damages,[69] but if the defendant was clearly negligent, that result is not so bad, especially if the defendant is counterclaiming for his own damages.

Defense attorneys should strive for the adoption of the seat belt defense, which has previously been rejected in Indiana as a form of comparative negligence.[70] The comparative fault statute wipes out this line of reasoning, and adoption of the defense would have the beneficial result of encouraging voluntary seat belt use.

VII. Conclusion

The new Indiana law of comparative fault will have a major impact on the law of torts in the state. At the same time, one may characterize it by saying that half a loaf is better than none at all. The 50% rule, preservation of joint and several liability, and the rule against contribution still offer the potential for unfair or lopsided results.

The Act will also present a whole new series of strategic considerations for both plaintiff and defense counsel. Strategies that were appropriate under the old contributory negligence defense may backfire.

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[68]*See, e.g.*, Cooper v. Robert Hall Clothes, Inc., 271 Ind. 63, 65, 390 N.E.2d 155, 157 (1979) ("Joint tort-feasors constitute, in a sense, one entity, each of them being jointly and severally liable for injury to the plaintiff.").

[69]Ind. Code § 34-4-33-5(a)(4) (Supp. 1984).

[70]Birdsong v. ITT Continental Baking Co., 160 Ind. App. 411, 312 N.E.2d 104 (1974) (reduction in damages because of a motorist's failure to have his seat belt fastened at the time of a collision was improper, as Indiana courts had refuted the doctrine of comparative negligence). *Birdsong* is discussed in Vargo, *Comparative Fault: A Need for Reform of Indiana Tort Law*, 11 Ind. L. Rev. 831, 841 (1978).

Counsel must be careful to think through strategies in light of the rule including defendants not before the court in the fault calculation. Perhaps most importantly, subsequent judicial interpretation of the Act will lead to new and interesting twists in the field of comparative negligence.