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## THE APPORTIONMENT OF FAULT TO UNIDENTIFIABLE TORTFEASORS UNDER INDIANA'S COMPARATIVE FAULT STATUTE: WHAT'S IN A "NAME"?

The court cannot deny that Indiana's Comparative Fault Act gives rise to numerous uncertainties and is potentially harsh in certain instances. As post-Act litigation develops, some of these uncertainties will be resolved, and the legislature may be called upon to mollify some of the Act's potential harshness.<sup>1</sup>

### I. INTRODUCTION

In 1983, Indiana became the fortieth state to join the increasing number of jurisdictions to adopt some form of a comparative fault system.<sup>2</sup> In-

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1. Huber v. Henley, 656 F. Supp. 508, 512 (S.D. Ind. 1987) (Barker, J.).

2. Chapter 33, Comparative Fault

IND. CODE § 34-4-33-1 (Supp. 1988). Application of chapter; causation

Sec. 1. (a) This chapter governs any action based on fault that is brought to recover damages for injury or death to person or harm to property, except that it does not apply to an action brought against a qualified health care provider under IC 16-9.5 for medical malpractice.

(b) In an action brought under this chapter, legal requirements of causal relation apply to:

(1) fault as the basis for liability; and

(2) contributory fault.

IND. CODE § 34-4-33-2 (Supp. 1988). Definitions; defendant as single party

Sec. 2. (a) As used in this chapter:

"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.

"Nonparty" means a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant. A nonparty shall not include the employer of the claimant.

IND. CODE § 34-4-33-3 (Supp. 1988). Effect of contributory fault

Sec. 3. In an action based on fault, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery except as provided in section 4 of this chapter.

IND. CODE § 34-4-33-4 (Supp. 1988). Barring of recovery; degree of contributory fault

Sec. 4. (a) In an action based on fault that is brought against:

(1) one (1) defendant; or

(2) two (2) or more defendants who may be treated as a single party;  
 the claimant is barred from recovery if his contributory fault is greater than the fault of all persons whose fault proximately contributed to claimant's damages.

(b) In an action based on fault that is brought against two (2) or more defendants, the claimant is barred from recovery if his contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages.

IND. CODE § 34-4-33-5 (Supp. 1988). Instructions to jury; award of damages

Sec. 5. (a) . . .

(b) In an action based on fault that is brought against two (2) or more defendants, and that is tried to a jury, the court, unless all the parties agree otherwise, shall instruct the jury to determine its verdict in the following manner:

(1) The jury shall determine the percentage of fault of the claimant, of the defendants, and of any person who is a nonparty. The percentage of fault figures of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from a nonparty or nonparties.

(2) If the percentage of fault of the claimant is greater than fifty percent (50%) of the total fault involved in the incident which caused the claimant's death, injury, or property damages, the jury shall return a verdict for the defendants and no further deliberation of the jury is required.

(3) If the percentage of fault of the claimant is not greater than fifty percent (50%) of the total fault, the jury shall then determine the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded.

(4) The jury next shall multiply the percentage of fault of each defendant by the amount of damages determined under subdivision (3) and shall enter a verdict against each such defendant (and such other defendants as are liable with the defendant by reason of their relationship to such defendant) in the amount of the product of the multiplication of each defendant's percentage of fault times the amount of damages as determined under subdivision (3).

(c) In an action based on fault that is tried by the court without a jury, the court shall make its award of damages according to the principles specified in subsections (a) and (b) for juries.

IND. CODE § 34-4-33-6 (Supp. 1988). Forms of verdicts; disclosure requirements

Sec. 6. The court shall furnish to the jury forms of verdicts that require the disclosure of:

(1) the percentage of fault charged against each party; and

(2) the calculations made by the jury to arrive at their final verdict.

If the evidence in the action is sufficient to support the charging of fault to a nonparty, the form of verdict also shall require a disclosure of the name of the nonparty and the percentage of fault charged to the nonparty.

IND. CODE § 34-4-33-9 (Supp. 1988). Verdict; inconsistent award with determinations of total damages and percentages of fault

Sec. 9. In actions brought under this chapter, whenever a jury returns verdicts in which the ultimate amounts awarded are inconsistent with its determinations of total damages and percentages of fault, the trial court shall:

(1) inform the jury of such inconsistencies;

(2) order them to resume deliberations to correct the inconsistencies; and

(3) instruct them that they are at liberty to change any portion or portions of the verdicts to correct the inconsistencies.

IND. CODE § 34-4-33-10 (Supp. 1988). Nonparty defense; assertion; burden of proof; pleadings; application

Sec. 10. (a) In an action based on fault, a defendant may assert as a defense that the

diana adopted comparative fault by legislative enactment<sup>3</sup> to alleviate the harsh results produced by the doctrine of contributory negligence.<sup>4</sup> Since implementation of the Indiana Comparative Fault Act in 1985, the few reported decisions interpreting the Act have dealt mainly with the procedural requirement of specifically pleading the non-party defense and the definition of "non-party" as related to state entities and employees.<sup>5</sup>

However, the issue of "naming" an unidentifiable or "phantom" non-party tortfeasor for fault assessment purposes under the Indiana Act has only recently been addressed by one Indiana court and remains unaddressed by the legislature, and will undoubtedly continue to be a source of controversy. The nature of this issue is exemplified by the statutory language of the Comparative Fault Act. Section Two of the Act defines non-party as follows:

"Nonparty" means 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.

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damages of the claimant were caused in full or in part by a nonparty. Such a defense is referred to in this section as a nonparty defense.

(b) The burden of proof of a nonparty defense is upon the defendant, who must affirmatively plead the defense. However, nothing in this chapter relieves the claimant of the burden of proving that fault on the part of the defendant or defendants caused, in whole or in part, the damages of the claimant.

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

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

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

3. Becker, *Indiana's Comparative Fault Law: A Legislator's View*, 17 IND. L. REV. 881 (1984).

4. *Id.* See also Yosha, *Indiana's Comparative Fault Act: Part I*, 27 RES GESTAE 413 (1984).

5. See *infra* note 197 and accompanying text. See also *Walters v. Dean*, 497 N.E.2d 247, 248 (Ind. Ct. App. 1986) (apportionment of fault to non-party only when non-party defense is specially pleaded); *Huber v. Henley*, 656 F. Supp. 508 (S.D. Ind. 1987) (state highway department is a non-party for purposes of the Act); *Hill v. Metropolitan Trucking, Co.*, 659 F. Supp. 430 (N.D. Ind. 1987) (separate state entities are not employers of workers of other state entities for purposes of the non-party provision of the Act).

A nonparty shall not include the employer of the claimant.<sup>6</sup>

Section Ten of the Act allows:

(a) In an action based on fault, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a nonparty. Such a defense is referred to in this section as a nonparty defense.<sup>7</sup>

Yet, section Six of the Act requires that:

If the evidence in the action is sufficient to support the charging of fault to a nonparty, the form of verdict also shall require a disclosure of the *name* of the nonparty and the percentage of fault charged to the nonparty. (emphasis added).<sup>8</sup>

On their face the clarity of these sections seems readily apparent when read individually. However, for purposes of the Comparative Fault Act sections Two, Ten, and Six must be considered together,<sup>9</sup> and when this is attempted, these sections cause much confusion to a practitioner attempting to discern the proper approach to be pursued when confronted with the Act.

The section Two definition of non-party is functional when used in conjunction with the non-party defense in section Ten, which allows a defendant to assert as a defense the fault of a party who is, or may be, liable to the plaintiff for the harm caused. However, neither section Two nor section Ten require that the defendant "name" the non-party when pleading the non-party defense. Yet, as required in section Six, if the jury is going to assess fault to that non-party, the jury must "name" that non-party.

Hence, the central issue to be considered is what constitutes the sufficient "naming" of a non-party for purposes of the Comparative Fault Act so that the jury may take the non-party into consideration for fault assessment purposes. Particularly, when the action involves a "phantom" or unidentifiable tortfeasor, will "the unidentified driver of the red automobile"<sup>10</sup> suffice for identification, or must the defendant, since he has the burden of asserting the non-party defense, name the non-party with specificity so that the non-party may be identified?

This problem will arise in many instances. Consider, for example, a blue automobile traveling on a city street. Suddenly, without warning, a red car darts out in front of the blue automobile. Because of the negligence of

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6. IND. CODE § 34-4-33-2 (Supp. 1988).

7. IND. CODE § 34-4-33-10 (Supp. 1988).

8. IND. CODE § 34-4-33-6 (Supp. 1988).

9. See *Suburban Homes Corp. v. Harders*, 404 N.E.2d 629 (Ind. Ct. App. 1980) (statutes must be construed as a whole).

10. *Jacobs v. Milwaukee & Suburban Transport Corp.*, 41 Wis.2d 661, 165 N.W. 2d 162 (1969).

the driver of the red car, the driver of the blue car skids out of control and strikes an oncoming vehicle. The red car, not knowing of the accident, continues on and is never identified. By applying the Indiana Comparative Fault Act, the Indiana courts could continue to resolve the controversy over whether fault may be assessed to the unidentifiable driver in several ways, but not without confusion and conflicting results.<sup>11</sup> However, the Indiana legislature, by adding a definition of "name" to the Indiana Comparative Fault Act, can easily clarify the issue of "naming" an unidentifiable tortfeasor for fault assessment purposes.

This note first traces the historical development of comparative fault in the United States by specifically examining contributory negligence, early comparative negligence, and the various forms of comparative negligence most prevalent in the United States today. Next, the two main approaches of fault apportionment are highlighted. The third section outlines the development of comparative fault in Indiana with an emphasis on application of the recently adopted Indiana Comparative Fault Act. Finally, this note will identify and analyze the problem of "naming" an unidentifiable non-party for fault assessment purposes under the Indiana Act. This note concludes that the current comparative fault statute should be amended to provide for a concrete definition of "name" as used in the Indiana Comparative Fault Act.

## II. HISTORICAL DEVELOPMENT OF COMPARATIVE NEGLIGENCE

The common law rule of contributory negligence denies recovery to a plaintiff contributing to his own harm. If an injured plaintiff contributes to his own injury, even if only in the slightest degree, the strict application of contributory negligence completely bars the plaintiff's recovery.<sup>12</sup> Throughout the years, many courts began adopting a substantial number of exceptions to the all-or-nothing common law approach of contributory negligence until, in the late 1960s, a "stampede" of jurisdictions began abrogating the doctrine altogether in favor of comparative negligence.<sup>13</sup>

### A. *Contributory Negligence: Accepted then Rejected*

The contributory negligence doctrine was derived from the English

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11. See *infra* notes 216-73 and accompanying text. See also *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968). Speaking to the issue of joinder of parties the court noted that the parties may wish to avoid "inconsistent relief" in multiple litigation. *Id.* at 103.

12. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697 (1978).

13. Digges and Klein, *Comparative Fault in Maryland: The Time Has Come*, 41 MD. L. REV. 276 (1982).

case of *Butterfield v. Forrester*.<sup>14</sup> The doctrine was the general rule in England for many years until Parliament abrogated the rule in 1945.<sup>15</sup> Contributory negligence was first accepted in the United States in the early 1800s<sup>16</sup> and its development is generally attributed to the nature of the common law's adversary system.<sup>17</sup> At early common law, one objective of the judicial system was to reduce the dispute between the parties to certain specific issues and have the court decide for one party or the other.<sup>18</sup> Because the strict application of the rule completely barred recovery if the plaintiff was slightly negligent, the application of the contributory negligence doctrine served this objective well.<sup>19</sup> Compromise was disfavored at common law and was not even considered by the courts.<sup>20</sup> In fact, comparing the negligence of two parties to a lawsuit was unthinkable.<sup>21</sup> One justification for the contributory negligence rule is that the law remained unconvinced of the feasibility of apportioning damages on a comparative negligence basis.<sup>22</sup> Instead of comparing the negligence of the parties, the law chose to leave a plaintiff and defendant who were both at fault where it found them.<sup>23</sup> The result was a denial of recovery to an injured plaintiff who contributed to his own harm.<sup>24</sup>

In the United States, contributory negligence developed simultaneously with the growth of industry and business during the Industrial Revolution.<sup>25</sup>

14. 11 East 60, 103 Eng. Rep. 926 (K.B. 1809). In *Butterfield*, the plaintiff, riding his horse at dusk at great speed was injured when he was knocked off his horse by a pole placed across the road by the defendant. Lord Ellenborough noted that, "[a] party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right . . . Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." This proclamation evolved into the doctrine of contributory negligence.

15. Henry, *Why Not Comparative Negligence in Washington?* 9-10, COMPARATIVE NEGLIGENCE MONOGRAPH (A.T.L.A. 1970).

16. Digges and Klein, *supra* note 13, at 281 n.11, "By consensus, the first American case to apply the doctrine [of contributory negligence] was *Smith v. Smith*, 19 Mass. (2 Pick.) 621 (1824)." The *Smith* case is factually similar to *Butterfield*.

17. James, Kalven, Keeton, Laflar, Malone, Wade, *Comments on Maki v. Frelk - Comparative Versus Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 889, 940 (1968).

18. *Id.* As Wade points out, "It [contributory negligence] was black and white - all or nothing." *Id.*

19. Fleming, *Foreword: Comparative Negligence at Last - By Judicial Choice*, 64 CALIF. L. REV. 239, 242 (1976).

20. Wade, *supra* note 17, at 940.

21. *Id.*

22. *Id.*

23. See generally 38 AM. JUR., *Negligence* § 175 (1954).

24. *Id.*

25. Comment, *Illinois Comparative Negligence: Multiple Parties, Multiple Problems*, 1982 S. ILL. U.L.J. 89, 90; see also Annotation, *Comment Note - The Doctrine of Compara-*

The wide acceptance of contributory negligence was based on the idea that America's economic expansion required protection from oversympathetic juries.<sup>26</sup> The juries regarded the growing corporate defendants as immensely rich intruders who could afford to compensate the injured plaintiff who was only slightly at fault.<sup>27</sup> The rule therefore developed into a check on oversympathetic juries, creating the need to reform the law.<sup>28</sup>

Several other justifications for the widespread acceptance of the contributory negligence rule in the United States have also been advanced. Since the common law did not favor compromise,<sup>29</sup> the defense of contributory negligence was used to punish the plaintiff for his own misconduct.<sup>30</sup> The plaintiff, it was said, had to come into court with "clean hands" and could not be aided if he himself was at fault.<sup>31</sup> A related justification for application of contributory negligence was that the rule was intended to discourage accidents by denying recovery to those who failed to use proper care for their own safety.<sup>32</sup>

Many courts, however, were dissatisfied with the way the harsh all-or-nothing approach of the contributory negligence rule barred recovery to plaintiffs who were only slightly at fault. To alleviate the harshness of the rule, these courts began adopting judicial exceptions to the rule.<sup>33</sup> One notable exception is the doctrine of last clear chance.<sup>34</sup>

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*tive Negligence and Its Relation to the Doctrine of Contributory Negligence*, 32 A.L.R.3d 463, 472 (1970).

26. Fleming, *supra* note 19, at 242. As Fleming notes, "An additional, transcendent factor militating for reform has been the demoralizing effect of the broadscale flouting of the stalemate rule by juries. Many have observed the proclivity of juries to 'compromise' by returning verdicts for the plaintiff but substantially reducing the damages . . ." *Id.*

27. See Note, *supra* note 25, at 90. See also Annotation, *supra* note 25, at 472.

28. See Wade, *supra* note 17, at 943; See also Digges and Klein, *supra* note 13, at 278; Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Fleming, *supra* note 19, at 243.

Fleming notes that,

[T]o the extent that it has been condoned by the courts (verdict compromising by juries), it has also created a credibility gap between the 'official' law, as reflected in jury instructions and the books, and the law as practiced in the courtroom. While one of the vaunted benefits of the jury system is that it can act as a corrective of legal rules in need of reform, a healthy legal system requires that the properly accredited lawmakers heed the hint and take responsibility for bringing the law once more into line with contemporary demands."

Fleming, *supra* note 19, at 247.

29. See Wade, *supra* note 17, at 940.

30. Annotation, *supra* note 25, at 470.

31. Schwartz, *supra* note 12, at 722.

32. *Id.* at 703-04. See also Annotation, *supra* note 25, at 470.

33. See Fleming, *supra* note 19, at 894.

34. *Id.* at 894; See also *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886, 898 (1981). In *Alvis*, the court noted that "the doctrine of 'last clear chance' was created to escape the harshness of the contributory negligence rule." *Id.* at 13, 421 N.E.2d at 898.



The last clear chance doctrine seeks to place the entire blame on the wrongdoer who had the last genuine opportunity to avoid the harm.<sup>35</sup> The doctrine allows a contributorily negligent plaintiff to recover where the defendant had knowledge of the plaintiff's perilous position, or had an opportunity to avoid injuring the plaintiff, but failed to exercise reasonable care by not avoiding the accident.<sup>36</sup> Last clear chance, which originated in England in 1842,<sup>37</sup> was extensively criticized<sup>38</sup> because the doctrine applied only when the defendant's negligence was last in time.<sup>39</sup> Thus, the doctrine was merely a limited relief valve to contributory negligence.<sup>40</sup> Most jurisdictions which eventually adopted comparative negligence abolished the doctrine of last clear chance by case law.<sup>41</sup>

In addition to the last clear chance exception, many juries began ignoring court instructions on contributory negligence,<sup>42</sup> and instead, began issuing compromise verdicts<sup>43</sup> in order to ameliorate the harsh effects of contributory negligence.<sup>44</sup> This trend led to a decline in respectability and support for the contributory negligence rule<sup>45</sup> until the rule was eventually abandoned by many states.<sup>46</sup>

The doctrine of contributory negligence fell increasingly into disfavor

35. 1 Rhodes, Litvin, & Sheridan, *Comparative Negligence: Law & Practice*, § 1.20[2] (1988) [hereinafter 1 Rhodes].

36. Easterday and Easterday, *The Indiana Comparative Fault Act: How Does It Compare With Other Jurisdictions?*, 17 IND. L. REV. 883, 891 (1984).

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

38. W. PROSSER, *THE LAW OF TORTS* § 66, at 427 (4th ed. 1971); *See also* Kaatz v. State, 540 P.2d 1037 (Alaska 1975) (The "last clear chance" doctrine becomes largely superfluous in jurisdictions which employ the comparative negligence rule).

39. 1 Rhodes, *supra* note 35, at § 1.20[2], p. 1-33.

40. *Id.*

41. Easterday, *supra* note 36, at 891.

Many courts noted that the underlying rationale for last clear chance did not exist without contributory negligence. *See, e.g.*, Kaatz v. State, 540 P.2d 1037 (Alaska 1975), where the court noted that, "the last clear chance doctrine is, in the final analysis, merely a means of ameliorating the harshness of the contributory negligence rule. Without the contributory negligence rule there would be no need for the palliative doctrine of last clear chance." *Id.* at 1050.

42. 1 Rhodes, *supra* note 35, at 1-34.

43. The reason for jury compromises, in addition to the rule's harshness, was that the contemporary social values of the United States were changing toward the now social desirable goal of compensating accident victims. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 156 (1946).

44. 1 Rhodes, *supra* note 35, at 1-33; Keeton, *supra* note 17, at 916; Fleming, *supra* note 19, at 243.

45. *See* Hoffman v. Jones, 280 So. 2d 431, 437 (Fla. 1980). "[T]here is something basically wrong with a rule of law that is so contrary to the settled convictions of the lay community that laymen will almost always refuse to enforce [contributory negligence], even when solemnly told to do so by a judge whose instructions they have sworn to follow." *Id.*

46. 1 Rhodes, *supra* note 35, at 1-34.

with American courts.<sup>47</sup> Corresponding with the declining popularity of contributory negligence was a movement toward widespread tort reform.<sup>48</sup> In the late 1960s and early 1970s no-fault insurance began attracting popularity.<sup>49</sup> In addition, heavy criticism of the common law tort system<sup>50</sup> facilitated other reforms, notably the acceptance of a products liability tort action.<sup>51</sup> Comparative negligence<sup>52</sup> also began attracting significant support.<sup>53</sup>

As societal values evolved, corporations, and industry in general, no longer needed to be protected by the courts and given such a disguised subsidy.<sup>54</sup> In addition, accident victim compensation had become a desirable social goal which could be achieved by spreading losses through the use of liability insurance.<sup>55</sup> Contributory negligence was also weakened by workmen's compensation statutes, which covered most claims against industrial defendants,<sup>56</sup> and by the acceptance of products liability actions.<sup>57</sup>

By the mid-1940s, England, where the contributory negligence rule originated, had abandoned contributory negligence in favor of comparative negligence.<sup>58</sup> America had now become the final stronghold of the contributory negligence doctrine.<sup>59</sup> By 1968, the weakening justifications for the

47. See generally Keeton, *supra* note 17, at 916; 1 Rhodes, *supra* note 35, at 1-33; Fleming, *supra* note 19, at 242-43.

48. See Wade, *A Uniform Comparative Fault Act - What Should It Provide?*, 10 U. MICH. J. L. REF. 220, 221 (1976-77).

49. Schwartz, *supra* note 12, at 697 n.5; See also Wade, *supra* note 48, at 221.

50. Wade, *supra* note 48, at 225; See also 1 Rhodes, *supra* note 35, at 1-42.

51. Products liability was first recognized in *Greenman v. Yuba Power Products*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963).

52. Generally, comparative negligence does not bar a plaintiff's recovery if he is at fault. The negligence of each party is compared and the plaintiff's recovery is reduced according to his negligence. See *infra* notes 65-168 and accompanying text.

53. Schwartz, *supra* note 12, at 697. As Fleming notes, *supra* note 19, at 239, Until the late 1960s only a handful of states had taken the embrace [of comparative negligence], and that mostly many years before. Not so much legislative inertia as a rigorous lobby mounted by the insurance industry and defense organizations had for generations successfully blocked persistent efforts at reform. This scene underwent a dramatic change when no-fault plans were unveiled. Opponents of these plans sought to retrieve the substance of the common law fault system by half-heartedly offering for sacrifice such notorious culprits as the absolute bar of contributory negligence.

54. Fleming, *supra* note 19, at 242.

55. *Id.*

56. *Id.* Workmen's Compensation benefits are due regardless of fault by the worker or absence of fault by the employer. *Id.*

57. See *Greenman v. Yuba Power Products*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963).

Contributory negligence in its strict application has been held in most jurisdictions not to be a defense to strict products liability. See, e.g., I.C. 34-4-33-13 (Supp. 1988).

58. *Id.* See also Henry, *supra* note 15, at 9-10, for a listing of those countries abandoning contributory negligence for comparative negligence.

59. Fleming, *supra* note 19, at 242; Annotation, *supra* note 25, at 469 n.15; Wade,

contributory negligence rule,<sup>60</sup> and the problem of jury compromise,<sup>61</sup> made it clear that the doctrine of contributory negligence had become a "deplorable blight on the legal system."<sup>62</sup> Furthermore, contributory negligence was no longer defensible within the framework of modern societal trends toward compensating plaintiffs.<sup>63</sup> Many jurisdictions began to abandon contributory negligence in favor of some method of comparative negligence. The rush to abandon contributory negligence turned what was once a "march" toward comparative negligence into a "stampede."<sup>64</sup>

### *B. The Development of Comparative Negligence in the United States*

Although many states adopted some method of comparative fault in the late 1960s and early 1970s,<sup>65</sup> the doctrine of comparative fault has a history dating perhaps to the Roman Empire.<sup>66</sup> While no original date for the origin of comparative negligence can be established, many commentators agree that the doctrine may have evolved from international maritime rules adopted by the English admiralty courts in the early 1700s.<sup>67</sup> These courts applied the equal division rule<sup>68</sup> to admiralty cases until England later modified this rule to one of pure comparative negligence in 1945.<sup>69</sup>

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*supra* note 17, at 899 n.14.

60. Fleming, *supra* note 19, at 243-44. As Fleming notes,

No more persuasive has been the argument that contributory negligence promotes self-protective care and thus prevents accidents: for one thing, the sanction seems unduly harsh and, for another, it would be more effective if it fell on or deterred both plaintiff and defendant. More serious perhaps was the defense prognosis that a change to comparative negligence would lead to a substantial increase of insurance rates. This appears not to have been borne out by verifiable experience.

*Id.*

61. See *supra* notes 42-46 and accompanying text.

62. Keeton, *supra* note 17, at 913.

63. *Id.*

64. Digges and Klein, *supra* note 13, at 276.

65. See *supra* note 53 and accompanying text.

66. SCHWARTZ, *COMPARATIVE NEGLIGENCE*, 8-9 (1974). The academic controversy over whether comparative negligence in fact finds its origins in ancient Rome centers on interpretation of a provision of Justinian's Digest. *Id.*

67. Turk, *Comparative Negligence on the March*, 28 CHI-KENT L. REV. 189, 226 (1950).

68. See SCHWARTZ, *supra* note 66, at 53. Under the equal division rule, when a plaintiff and defendant are both negligent, damages are equally divided. Therefore, if plaintiff suffers \$10,000 in damages due to his own and the defendant's negligence, the plaintiff recovers \$5000. This equal division occurs regardless of the relative degrees or percentages of negligence of the parties. Even if the defendant could be regarded as 95% at fault, damages are still divided equally. *Id.* See, e.g., *Federal Ins. Co. v. The S.S. Royalton*, 194 F. Supp. 543 (E.D. Mich. 1961).

69. SCHWARTZ, *supra* note 66, at 10. "Pure" comparative negligence reduces the contributorily negligent plaintiff's damages in proportion to the amount of negligence attributable to him. *Id.* at 46. For a complete examination of "pure" comparative negligence see *infra*

The United States applied the equal division rule enunciated in the English cases<sup>70</sup> until 1975.<sup>71</sup> The decisions applying the equal division rule may have been America's first rough application of comparative fault.

While the equal division rule was being applied to maritime cases in the United States courts, Congress, in the late 1800s and early 1900s, began enacting the first significant body of comparative fault legislation.<sup>72</sup> These legislative enactments were in response to the common law fault system's harsh treatment of injured workmen, especially railroad employees.<sup>73</sup> The final enactment of the Federal Employers' Liability Act (FELA)<sup>74</sup> in 1908 provided that employees of interstate railroad carriers would not be totally barred by their own negligence from bringing an action against their employers.<sup>75</sup> Instead, the employees' damages were to be diminished in proportion to their own assessed negligence.<sup>76</sup>

Two other important developments in comparative negligence occurred in the United States in 1920 when Congress enacted the Jones Act<sup>77</sup> and the Death on the High Seas Act.<sup>78</sup> Both statutes incorporated pure comparative negligence principles to protect seamen suffering physical injury or death in the course of their employment.<sup>79</sup> These statutes remain in force today.<sup>80</sup>

In addition to the federal movement toward adoption of comparative

notes 108-20 and accompanying text.

70. *The Schooner Catharine v. Dickinson*, 58 U.S. 169 (1854).

71. In 1975 the U.S. Supreme Court in *U.S. v. Reliable Transfer Co.*, 421 U.S. 397 (1975), abrogated the equal division rule in U.S. Maritime Law replacing the rule with pure comparative negligence. The Court concluded that the equal division rule had prevailed by "sheer inertia" and its ease of application was far outweighed by the unjust results it created. *Id.* at 410.

72. SCHWARTZ, *supra* note 66, at 11. These initial laws were essentially applicable to personal injury actions. *Id.*

73. Prosser, *supra* note 28, at 475-79. The common law's trilogy of defenses, contributory negligence, assumption of risk, and the fellow-servant rule, led to demands for modification or abolition of the fault system of liability which completely barred the plaintiff's recovery if the plaintiff was found negligent. *Id.*

74. Federal Employers' Liability Act of April 22, 1908, ch. 149, § 3, 35 Stat. 66, 45 U.S.C.A. § 51. The original FELA, enacted in 1906, was invalidated by *Howard v. Illinois Central Ry. Co.*, 207 U.S. 463 (1907), on grounds that the Act exceeded Congress's power to regulate interstate commerce. *Id.* at 503.

75. 45 U.S.C.A. § 53.

76. *Id.*

77. Act of June 5, 1920, ch. 250, § 33, 41 Stat. 1007, 46 U.S.C.A. § 688.

78. Act of March 30, 1920, ch. 111, § 6, 41 Stat. 537, 46 U.S.C.A. § 766.

79. See generally Jones Act, 46 U.S.C.A. § 688, et. seq. and Death on the High Seas Act, 46 U.S.C.A. § 766, et. seq..

80. For application of the Jones Act see *Caddy v. Texaco, Inc.*, 363 Mass. 36, 292 N.E.2d 348 (1973). For the Death on the High Seas Act see *Nutt v. Loomis Hydraulic Testing Co.*, 552 F.2d 1126 (5th Cir. 1977).

negligence in the late 1800s, a few states had also become disenchanted with the harsh all-or-nothing results occasioned by the contributory negligence rule, and began to apply comparative negligence. Illinois, among the first states to apply comparative negligence principles, adopted a system which allowed a plaintiff to recover if his "negligence was comparatively slight and the defendant's gross in comparison."<sup>81</sup> The effect of this comparative negligence scheme was to shift the entire burden of fault to the defendant if the plaintiff's negligence was comparatively slight. Illinois' application of comparative negligence, however, was not consistent. In 1894, Illinois reverted back to contributory negligence,<sup>82</sup> but, in 1981, again accepted comparative negligence, this time in its pure form.<sup>83</sup> Finally, in 1986, the Illinois legislature passed a statute replacing pure comparative negligence with modified comparative negligence.<sup>84</sup>

Concern about the extreme harm caused to railroad employees by the railroad industry prompted Georgia, in 1863, to abrogate contributory negligence in favor of comparative negligence.<sup>85</sup> The Georgia Code provided for a diminution of damages if a plaintiff was negligently injured by railroad operations.<sup>86</sup> In 1913, the Georgia Supreme Court expanded the railroad statute to encompass a general comparative negligence system for the entire state.<sup>87</sup> In a related case,<sup>88</sup> the Georgia Supreme Court added the 49 percent rule of modified comparative negligence<sup>89</sup> requiring damages to be apportioned according to fault unless the plaintiff's negligence was equal to or greater than the negligence of the defendant.<sup>90</sup> As one commentator

81. *Galena & Chicago Union Ry. Co. v. Jacobs*, 20 Ill. 478 (1858). Prior to *Jacobs* the Illinois Supreme Court had adopted contributory negligence in *The Aurora Branch R.R. v. Grimes*, 13 Ill. 585 (1852).

The method adopted in *Jacobs* is known as the slight-gross method of comparative negligence. For more complete treatment of the slight-gross method see *infra* notes 132-34 and accompanying text.

82. *City of Lanark v. Dougherty*, 153 Ill. 163, 38 N.W. 892 (1894). "The law of comparative negligence is no longer the law of this court." *Id.* at 164, 38 N.E. at 893.

83. *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981). Pure comparative negligence takes into account the negligence of all persons involved in the occurrence and reduces a plaintiff's recovery in direct proportion to his own fault. See *infra* notes 108-20 and accompanying text.

84. Ill. Rev. Stat. ch. 110, § 2-1116 (1986). For full treatment of modified comparative negligence see *infra* notes 121-31 and accompanying text.

85. *Macon & W. R.R. Co. v. Winn*, 19 Ga. 440 (1856). See also SCHWARTZ, COMPARATIVE NEGLIGENCE, *supra* note 66, at 12.

86. GA. CODE ANN. § 46-8-291 (Supp. 1983). This diminution of damages worked generally in the same manner as pure comparative fault to reduce a plaintiff's recovery. See SCHWARTZ, *supra* note 66, at 12.

87. *Elk Cotton Mills v. Grant*, 140 Ga. 727, 79 S.E. 836 (1913).

88. *Christian v. Macon Ry. & Light Co.*, 120 Ga. 314, 47 S.E. 923 (1904).

89. See *infra* notes 126-28 and accompanying text.

90. 47 S.E. at 923.

noted, "[t]he court thus inadvertently laid the groundwork for the majority of comparative negligence statutes of general application in the United States today."<sup>91</sup>

Soon after Illinois and Georgia adopted their original comparative negligence schemes, a few other states followed, led by Tennessee in 1879 and Florida in 1897.<sup>92</sup> In addition, in 1910 Mississippi enacted a pure comparative negligence statute which applied to all negligence actions, not merely industrial accidents.<sup>93</sup> In 1931, Wisconsin enacted legislation implementing modified comparative negligence patterned after FELA and state legislation which protected railroad workers.<sup>94</sup> In contrast to the original Georgia statute, the Wisconsin statute applied to all injured plaintiffs, not merely railroad workers, because citizens were now "pitted against complex machines driven by steam [and] electricity."<sup>95</sup> Aside from these states, only Nebraska, South Dakota,<sup>96</sup> and Arkansas<sup>97</sup> adopted any form of comparative negligence until the reform movement of the late 1960s.<sup>98</sup>

Judicial<sup>99</sup> and legislative<sup>100</sup> support in favor of abrogating the contributory negligence doctrine<sup>101</sup> increased markedly in the late 1960s and early

91. SCHWARTZ, *supra* note 66, at 12.

92. These statutes were also enacted to impose comparative negligence in actions against railroad companies. 1 Rhodes, *supra* note 35, at 1-12. The Florida statute provided that: "If the complainant and the agents of the company are both at fault the former may recover; but the damages shall be diminished by the jury trying the case, in proportion to the amount of fault attributable to him." 1897 Florida Laws ch. 3744, § 1. This statute was declared unconstitutional on equal protection grounds in Georgia So. & Florida Ry. Co. v. Seven-Up Bottling Co., 175 So. 2d 39 (Fla. 1965).

93. SCHWARTZ, *supra* note 66, at 18-19. Now MISS. CODE ANN. § 11-7-15 (1972). The Act was extended in 1920 to include actions for damage to property.

94. Padway, *Comparative Negligence*, 16 MARQ. L. REV. 3, 5 (1931).

95. *Id.*

96. Nebraska in 1913, and South Dakota in 1941, adopted the slight-gross form of comparative negligence. NEB. REV. STAT. 25-21, 183 1943, § 25-1151. S.D. CODIFIED, § 20-9-2 (1978).

97. Ark. Acts 1955, No. 191, codified as ARK. STAT. ANN. § 16-64-122 (1979) (Cum. Supp. 1983) (pure form).

98. See *supra* notes 48-53 and accompanying text.

99. Between 1969 and 1988 eleven states have adopted some form of comparative negligence by judicial action. Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab. Co., 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975) (California); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) (Florida); Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984) (Kentucky); Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979) (Michigan); Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983) (Missouri); Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981) (New Mexico).

On the merits of judicial or legislative adoption of comparative negligence, see generally Wade, *supra* note 17.

100. Since 1969 twenty-seven states have adopted comparative negligence by legislative enactment. See generally Alvis v. Ribar, 85 Ill. 2d 1, 12-14, 421 N.E.2d 898, 91-2 (1981).

101. See *supra* notes 47-64 and accompanying text.

1970s, culminating in perhaps one of the largest reform movements in modern legal history. By 1988, forty-five states, Puerto Rico, and the Virgin Islands had adopted some form of comparative negligence,<sup>102</sup> and of those forty-five, thirty-eight had adopted the doctrine between 1969 and 1988.<sup>103</sup>

### C. Forms of Comparative Negligence

As the doctrine of comparative negligence developed in the United States, three main forms of apportioning fault emerged. One method, the pure form of comparative negligence, takes into account the plaintiff's contributory negligence and reduces the plaintiff's award in direct proportion to the total fault.<sup>104</sup> Under the second form, modified comparative negligence, or the 50 percent system, contributory negligence of a plaintiff will not bar recovery as long as the amount of the plaintiff's fault remains below a fixed level in comparison with that of the defendant.<sup>105</sup> The third well-recognized method of comparative fault is the slight-gross system under which a plaintiff's contributory negligence bars his recovery unless his negligence is slight and the defendant's gross in comparison.<sup>106</sup> The pure and modified approaches are the two methods most widely adopted in the United States. Only three states follow the slight-gross system.<sup>107</sup>

At present, thirteen states<sup>108</sup> have adopted pure comparative negligence, six by legislative enactment<sup>109</sup> and seven by judicial decree.<sup>110</sup> The first state to enact a pure system was Mississippi, in 1910.<sup>111</sup> In states adopting pure comparative negligence the amount of the plaintiff's recovery depends on the degree of negligence directly attributable to him.<sup>112</sup> Therefore, a plaintiff is not barred from recovery unless he is 100 percent at fault.<sup>113</sup> Criticism of the pure comparative negligence method centers on the system's allowance of recovery to a plaintiff who may be 90 percent, 95

102. 1 Rhodes, *supra* note 35, at 2-28.

103. See generally 1 Rhodes, *supra* note 35, at 2-28 - 57.

104. See, e.g., Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979); Buford v. Horne, 300 So. 2d 913 (Miss. 1974).

105. See, e.g., Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979).

106. See, e.g., Urban v. Wait's Supermarket, Inc., 294 N.W.2d 793 (S.D. 1980); C.C. Natvig's Sons, Inc. v. Summers, 198 Neb. 741, 255 N.W.2d 272 (1977); Crab v. Wade, 84 S.D. 93, 167 N.W.2d 546 (1969).

107. Nebraska, South Dakota, and Tennessee. See generally 1 Rhodes, *supra* note 35, at 2-28.

108. Alaska, Arizona, California, Florida, Kentucky, Louisiana, Michigan, Mississippi, Missouri, New Mexico, New York, Rhode Island, and Washington. *Id.*

109. Arizona, Louisiana, Mississippi, New York, Rhode Island, and Washington. *Id.*

110. Alaska, California, Florida, Kentucky, Michigan, Missouri, New Mexico. *Id.*

111. 1910 Miss. Laws 135. The act applied only to personal injury and death actions initially, but was amended to include property damage actions in 1920. 1920 Miss. Laws 312.

112. 1 Rhodes, *supra* note 35, at 2-3.

113. *Id.*

percent, or even 99 percent negligent.<sup>114</sup>

Proponents of the pure system, however, note the system's simplicity of application, especially since apportionment is made by the trier of fact.<sup>115</sup> Application of the pure system is easier because juries calculate the percentage of negligence of each tortfeasor instead of ignoring non-parties.<sup>116</sup> Another rationale advanced by those jurisdictions adopting the pure form of comparative negligence concerns criticism of the arbitrary lines drawn by the modified system.<sup>117</sup> As the Supreme Court of Illinois noted when judicially adopting pure comparative negligence in 1981,<sup>118</sup> "[t]he pure form of comparative negligence is the only system which truly apportions damages according to the relative fault of the parties and, thus, achieves total justice."<sup>119</sup> In contrast, critics contend that the pure comparative negligence method favors the parties who have incurred the most damage regardless of their degree of negligence.<sup>120</sup>

The second method of comparative negligence is the modified, or 50

114. As stated by the West Virginia Supreme Court when adopting modified comparative negligence in *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979), "[i]t is difficult, on theoretical grounds alone, to rationalize a system which permits a party who is 95% at fault to have his day in court as a plaintiff because he is 5% fault free." *Id.* at 883.

115. See generally Prosser, *supra* note 28. See also Turk, *supra* note 67.

116. See Smith and Wade, *Fairness: A Comparative Analysis of the Indiana and Uniform Comparative Fault Acts*, 17 IND. L. REV. 969, 980 (1984). ("Adopting full loss allocation would also equalize the burden of litigating the liability of absent parties . . .").

117. Modified comparative negligence bars recovery for a plaintiff who is 49% or 50% negligent. Once the 49% or 50% threshold of contributory negligence by a plaintiff is reached, the plaintiff will be totally barred from recovery. See *infra* notes 121-31 and accompanying text.

See also *Vincent v. Pabst Brewing Co.*, 47 Wis. 2d 120, 136, 177 N.W.2d 513, 520 (1970) (Hallows, C.J., dissenting).

118. *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981). However, in 1986 the Illinois legislature statutorily rejected pure comparative negligence in favor of a modified system. ILL. REV. STAT. ch. 110, § 2-1116 (Supp. 1986).

A similar set of events occurred in Iowa, judicially adopting pure comparative negligence in *Goetzman v. Wichern*, 327 N.W.2d 742 (Iowa 1983), which was legislatively modified in 1984 by the state legislature who adopted a 50% system. IOWA CODE ANN. § 668.3 (West 1985).

119. *Alvis v. Ribar*, 85 Ill. 2d 1, 27, 421 N.E.2d 886, 898 (1981).

120. *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 883 (W. Va. 1979). This favoritism is set out in an example by Easterday, *supra* note 36, at 884. To illustrate, consider a plaintiff, twenty percent at fault and suffering \$100,000 in damages, and a defendant, eight percent at fault who has suffered only \$10,000 in damages. Under the pure form the plaintiff would recover eight percent of his damages or \$8,000. However, suppose it was the defendant who had suffered the \$100,000 in damages and the plaintiff who had suffered only \$10,000 in damages. The plaintiff would still recover eight percent of his damages, or \$8,000, but the defendant, assuming he counterclaimed, would be able to recover from the plaintiff twenty percent of his damages or \$20,000. This result seems unfair, say the proponents of the modified system, and fear a plaintiff may be reluctant to file suit against a defendant, even though that defendant is eight percent at fault.



percent system of comparative negligence. This system contains two forms of modified comparative negligence: the 50 percent, or "not greater than" form; and, the 49 percent, or the "not as great as" form.<sup>121</sup> Today, modified comparative negligence has become the law in a majority of states. By 1988, twenty-nine states had adopted one of the two forms of modified comparative negligence.<sup>122</sup> Under these forms of comparative negligence, the common law bar of contributory negligence is retained and is a complete bar to recovery when a plaintiff's negligence exceeds a specified threshold.<sup>123</sup>

The 50 percent rule, or the "not greater than" method of modified comparative negligence, permits the plaintiff to recover provided that the amount of the plaintiff's negligence is not greater than the negligence of the defendant. If a plaintiff's negligence exceeds that of the defendant, the plaintiff cannot recover any damages. However, under the 50 percent form, if the plaintiff's negligence is equal to the defendant's negligence, he may still recover.<sup>124</sup> Currently, twenty states follow the 50 percent rule.<sup>125</sup>

The other rule under the modified comparative negligence system is the 49 percent rule, or the "not as great as" rule. As opposed to the 50 percent form where a plaintiff's recovery is barred when his negligence exceeds 50 percent, the 49 percent rule bars a plaintiff's recovery when his negligence equals 50 percent or more. This system permits a plaintiff to recover provided his share of the negligence is not as great as that of the defendant.<sup>126</sup> If the plaintiff's negligence is greater than the negligence of the defendant the plaintiff takes nothing, as contributory negligence acts as a complete bar to recovery once the plaintiff's negligence exceeds the 49 percent threshold. For example, if the plaintiff is 25 percent negligent and suffers \$10,000 in damages, and the defendant is 75 percent negligence and suffers no damages, the plaintiff will recover 75 percent of his damages or \$7,500 because his negligence did not exceed the 49 percent threshold. However, if the plaintiff is 75 percent negligent and suffers \$10,000 in dam-

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121. The 50% or "not greater than" form permits the plaintiff to recover provided the amount of the plaintiff's negligence does not exceed the negligence of the defendant. The 49%, or "not as great as" form, permits a plaintiff to recover provided his share of the negligence is less than that of the defendant.

122. Those states employing the 50% rule are: Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Vermont, Wisconsin, and Wyoming. The states following the 49% rule are: Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, North Dakota, Utah, and West Virginia. See generally 1 Rhodes, *supra* note 35, at 2-28.

123. 1 Rhodes, *supra* note 35, at 2-15.

124. *Id.* at 2-18.

125. For a listing of these states, see *supra* note 122. For application of the 50% rule, see Sorensen v. Jarvis, 119 Wis. 2d 627, 350 N.W.2d 108 (1984).

126. SCHWARTZ, *supra* note 66, at 76.

ages, and the defendant is 25 percent negligent and suffers no damages, the plaintiff will be completely barred from recovery since the 49 percent threshold has been exceeded. Nine states currently follow this approach to modified comparative negligence.<sup>127</sup>

While at first glance the logic behind the two rules may appear similar, there is an essential distinction between them. The fundamental difference is that the 50 percent rule permits a negligent plaintiff to recover from an equally negligent defendant, while the 49 percent rule does not permit recovery unless the plaintiff's negligence is less than that of the defendant. According to the proponents of the 49 percent rule, this difference is essential because no person should be permitted to recover from another who is not more at fault.<sup>128</sup>

Even though a majority of states which operate under some form of comparative negligence follow a modified system, that system has been widely criticized. Dean Prosser has characterized the modified form as a political compromise adopted by courts or legislatures that were unable to obtain support for the "more desirable" pure form.<sup>129</sup> In addition, the Supreme Court of California noted that modified comparative negligence simply shifts "the lottery aspect of the contributory negligence rule to a different ground."<sup>130</sup> This criticism stems from the fact that the modified versions retain a 49 percent or 50 percent arbitrary threshold amount of contributory negligence which, when exceeded, totally bars recovery.<sup>131</sup>

127. See, e.g., *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979).

128. 1 Rhodes, *supra* note 35, at 2-18. An example of a 49% statute is demonstrated by Arkansas. ARK. STATS. ANN. § 16-64-122 (Cum. Supp. 1983) provides:

If the fault chargeable to a party claiming damages is of less degree than the fault chargeable to the party or parties from whom the claiming party seeks to recover damages, then the claiming party is entitled to recover the amount of his damages after they have been diminished in proportion to the degree of his own fault. If the fault chargeable to a party claiming damages is equal to or greater in degree than any fault chargeable to the party or parties from whom the claiming party seeks to recover damages, then the claiming party is too entitled to recover such damages.

*Id.*

Minnesota's comparative negligence statute exemplifies the 50% rule. MINN. STATS. ANN. § 604.01 subd. 1 (Cum. Supp. 1984) provides:

Contributory fault shall not bar recovery in an action by any person or his legal representative to recover damages for fault resulting in death or injury to person or property, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the person recovering.

*Id.*

129. Prosser, *Comparative Negligence*, 41 CALIF. L. REV. 1, 16-17 (1953).

130. *Li v. Yellow Cab. Co.*, 13 Cal. 3d 804, 827, 532 P.2d 1226, 1242, 119 Cal. Rptr. 858, 874 (1975).

131. See, e.g., *Kirby v. Larson*, 400 Mich. 585, 256 N.W.2d 400 (1977). "The rule preventing recovery if plaintiff's negligence exceeds 50% of the total fault is just as arbitrary

The third form of comparative negligence, sometimes also considered to be a form of modified comparative negligence, is the slight-gross method. This form of comparative negligence is applied in different variations in three states.<sup>132</sup> The slight-gross method places a more onerous burden on plaintiffs since, in order to recover, the plaintiff's negligence must be slight in amount and the defendant's gross in comparison.<sup>133</sup> In addition, the small number of jurisdictions opting for the slight-gross rule is evidence of the rule's unattractiveness. As Dean Prosser notes, the rule "leaves the damages undivided in too many cases . . . and lead[s] inevitably to . . . confusion."<sup>134</sup>

In addition to controversy over the correct form of comparative negligence to be used in determining fault assessment, or the "how should fault be assessed" question, many states are split over the method employed to apportion the fault, or the "to whom should fault be assessed" question. This question is considered in the next section.

### III. FAULT APPORTIONMENT TO NON-PARTY TORTFEASORS

#### A. Approaches to Fault

While the answer to the question of "to whom should fault be apportioned" seems clear when the question involves only one plaintiff and one defendant, the apportionment question becomes increasingly difficult when there are multiple defendants and one or more of those multiple defendants are unknown non-parties.<sup>135</sup> The method of distributing the fault of a non-

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as that which completely denies recovery. Is the person who is 49% negligent that much more deserving than the one who is 51% negligent?" *Id.* at 642, 256 N.W.2d at 428.

132. Nebraska, South Dakota and Tennessee. For cases applying the slight-gross method see *supra* note 106.

133. See, e.g., *Hickman v. Parks Constr. Co.*, 162 Neb. 461, 76 N.W.2d 403 (1956).

The plaintiff's burden is more onerous under this approach because, since the plaintiff's burden can only be "slight in comparison", the higher thresholds of the modified system and the pure system will permit more negligence by an at fault plaintiff.

134. Prosser, *supra* note 28, at 508. For extended treatment of the slight-gross rule and all forms of comparative negligence, see SCHWARTZ, *supra* note 66, at 43-82, and Supp. 1981.

135. IND. CODE § 34-4-33-2 (1)(a) defines a non-party to mean "a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant. A nonparty shall not include the employer of the claimant."

This definition of a non-party can include a tortfeasor who is absent for many reasons. First, a non-party can be one who has settled out of court with the plaintiff prior to trial. Also, a non-party may be one who is immune from suit as when a passenger is injured by the driver of an automobile and the driver is immune due to a guest statute. Finally, a non-party can include a defendant who is beyond jurisdiction and service of process. This note will focus on the non-party tortfeasor who is unidentifiable or a "phantom" defendant. For full treatment of the non-party tortfeasors briefly described in this footnote, see generally Eilbacher, *Comparative Fault and the Nonparty Tortfeasor*, 17 IND. L. REV. 903 (1984).

party tortfeasor has a significant impact on the recovery of injured plaintiffs and the culpability of negligent defendants.<sup>136</sup> At present, two main approaches are employed to apportion fault.<sup>137</sup> Under the limited approach, apportionment of fault will be made only to those persons who are actually made parties to the action.<sup>138</sup> By contrast, the unlimited approach requires apportionment of fault to all individuals or entities involved in the occurrence, including unknown non-parties.<sup>139</sup>

### 1. The Limited Approach

Several states and two model statutes follow the limited approach.<sup>140</sup> This approach ignores the fault of the absent tortfeasor, limiting comparison of fault to the parties to the lawsuit.<sup>141</sup> Presumably, the result of this approach is to shift the absent tortfeasor's liability to the remaining defendants and to any plaintiff at fault.<sup>142</sup> For example, in *National Farmers Union Property and Casualty Co. v. Frackelton*,<sup>143</sup> the plaintiff suffered severe electrical burns while working at the defendant's job site.<sup>144</sup> The plaintiff named only a power company as the defendant, inadvertently failing to name a co-worker who was largely responsible for the plaintiff's injury.<sup>145</sup> In weighing the competing interests in the two main methods of fault apportionment<sup>146</sup> the court determined that fault should be limited to

136. See, e.g., *Larsen v. Wisconsin Power & Light Co.*, 120 Wis. 2d 508, 520, 355 N.W.2d 557, 564 (1984). "Were the judgment not modified, one defendant would bear a liability resulting from the causal negligence attributed by the jury to the immune and nonparty defendants." See also *National Farmers Union Property and Casualty Co. v. Frackelton*, 662 P.2d 1056, 1060 (Colo. 1983). "[A] comparison of the negligence of absent tortfeasors may work to defeat any recovery by a deserving plaintiff." See generally Eilbacher, *supra* note 135, at 904-05 n.2 (1984); See also Berg, *Comparative Contribution and Its Alternatives*, 43 INS. COUNS. J. 577, 587-88 (1976); Chamallas, *Comparative Fault and Multiple Party Litigation in Louisiana: A Sampling of the Problems*, 40 LA. L. REV. 373, 387-88 (1980).

137. See generally Eilbacher, *supra* note 135, at 903; Fleming, *supra* note 191, at 241; Sobelsohn, *Comparing Fault*, 60 IND. L.J. 413, 445 (1984-85).

138. See *infra* notes 140-56 and accompanying text.

139. See *infra* notes 157-68 and accompanying text.

140. For purposes of this Note, this method will be termed the limited approach since fault apportionment is limited to the parties to the action. See generally Smith and Wade, *supra* note 116, at 979.

141. For cases apportioning fault according to this method see, e.g., *National Farmers Union Property and Casualty Co. v. Frackelton*, 662 P.2d 1056 (Colo. 1983); and see also *Sugue v. F.L. Smithe Machine Co.*, 56 Hawaii 598, 546 P.2d 527 (1976), *overruled by Espaniola v. Candrey Mars Joint Venture*, 707 P.2d 365 (Hawaii 1985).

142. Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Assoc. v. Superior Court*, 30 HASTINGS L.J. 1465, 1494 (1979).

143. 662 P.2d 1056 (Colo. 1983).

144. *Id.* at 1057.

145. *Id.*

146. The court stated that the rule requiring allocation of fault to both parties to the

the parties to the action, because a comparison of the negligence of an absent tortfeasor would work to defeat recovery by a deserving plaintiff.<sup>147</sup> The court noted, however, that in limiting fault assessment only to parties to the action, the defendant might be prejudiced by having to bear the burden of the non-party's fault. The court stated that "defendants in particular may not wish to risk . . . liability for the plaintiff's losses with slight hopes of recovering."<sup>148</sup>

In addition to the reasons noted in *Frackelton*, advocates of the limited approach advance several reasons for limiting apportionment of fault to parties to the action. Initially, supporters of this approach claim that juries have difficulty including a non-party in the fault apportionment scheme.<sup>149</sup> The second argument advanced by those favoring exclusion of non-parties from fault allocation is that the apportionment of fault cannot bind a party because of *res judicata* principles.<sup>150</sup> Proponents of the limited approach also argue that determining a non-party's percentage of fault would be "futile."<sup>151</sup> Furthermore, proponents of limiting fault allocation to the parties to the action note that excluding non-parties encourages joinder,<sup>152</sup> as "the more parties joined whose fault contributed to the injury, the smaller the percentage of fault allocated to each of the other parties."<sup>153</sup> Finally, exclu-

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action and also to non-parties is based upon the premise that comparison should be made among all parties at fault in the occurrence; that such a rule promotes bringing all such parties into the action as parties to the lawsuit; and that settlement is encouraged.

In addition, the court noted that the rule limiting allocation to the parties to the litigation is supported by arguments that a comparison of the negligence of absent tortfeasors may defeat recovery by a deserving plaintiff, and it is unfair to saddle the plaintiff with the burden of litigating liability issues of a non-party, especially when the non-party cannot be bound by *res judicata* principles. *Id.* at 1061-62.

147. *Id.* at 1061.

148. *Id.* at 1060.

149. The Commissioner's Comment to the Uniform Comparative Fault Act makes it clear that the limited approach supporters feel juries would have a difficult time assessing fault to non-parties. As the Comment notes:

"The limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. *This is a deliberate decision.* It cannot be told with certainty whether that person was actually at fault or what amount of fault should be attributed to him." (Emphasis added). Unif. Comp. Fault Act, § 2, Commissioner's Comment, 12 U.L.A. 35 (1984).

150. See, e.g., *National Farmers Union Property Co. v. Frackelton*, 662 P.2d 1056, 1062-63 (Colo. 1983). "Collateral estoppel cannot be applied to the disadvantage of a person who has not litigated the issue in question. It was error for the trial court to bind Frackelton in a declaratory judgment action to the jury's findings of relative fault in the prior action to which he was not a party." See also Comment, *supra* note 25, at 95.

151. Unif. Comp. Fault Act, § 2, Commissioner's Comment, 12 U.L.A. 35 (1984).

152. Sobelsohn, *supra* note 137, at 451. Generally, joinder is joining additional persons as parties to the same proceeding.

153. Unif. Comp. Fault Act, § 2, Commissioner's Comment, 12 U.L.A. 35 (1984).

sion of non-parties is said to be justified on joint and several liability<sup>154</sup> and contribution<sup>155</sup> principles. A defendant who assumes the full share of the absent tortfeasor's fault may eventually be able to recover the absent tortfeasor's share under either joint and several liability or contribution principles.<sup>156</sup>

## 2. The Unlimited Approach

The unlimited approach<sup>157</sup> includes the absent tortfeasor in the allocation of fault, apportioning the fault among all persons who legally caused the plaintiff's harm.<sup>158</sup> Advocates of the unlimited approach say that to achieve complete fault assessment "all tortfeasors must be named in the apportionment question, and their negligence be percentaged so that the total negligence of 100 percent can be determined."<sup>159</sup> This approach is rational, the proponents say, because each person's negligence is his own negligence and "should not be shifted to some other tortfeasor who participated in the occurrence just because such tortfeasor is a party."<sup>160</sup>

Proponents of the unlimited approach make several arguments in favor

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154. Under principles of joint and several liability, each wrongdoer is individually responsible for the entire judgment, and the person harmed can collect from one wrongdoer or from all of them together until the judgment is satisfied. For treatment of joint and several liability under comparative fault see generally Eilbacher, *supra* note 135.

155. Under principles of contribution a tortfeasor against whom a judgment is rendered is entitled to recover a proportionate share of the judgment from other joint tortfeasors whose negligence contributed to the injury.

156. See Sobelsohn, *supra* note 137, at 454.

157. For purposes of this Note, this method will be termed the unlimited approach since fault apportionment includes all persons who contribute to the plaintiff's harm. See generally Smith and Wade, *supra* note 116.

158. See generally Heft and Heft, *Controversial Concepts Within Comparative Negligence*, 1982 FED. INS. COUNSEL Q. 49, 52. "But the search is for the truth - and the percentage of liability of all tortfeasors, parties or not, are necessary to consider before the truth can be determined."

See also Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579, *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982); Bowman v. Barnes, 168 W.Va. 111, 282 S.E.2d 613 (W. Va. 1981); Paul v. N.L. Industries, Inc., 624 P.2d 68 (Okla. 1980); Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978).

159. Heft and Heft, *supra* note 158, at 52. See also Connar v. West Shore Equipment Co., 68 Wis. 2d 42, 227 N.W.2d 660 (1975), "The apportionment must include all whose negligence may have contributed to creating the cause of action whether parties or not." *Id.* at 45, 227 N.W.2d at 660.

160. Heft and Heft, *supra* note 158, at 52. See also Kirby Bldg. Systems v. Mineral Explorations Co., 704 P.2d 1266 (Wyo. 1985).

Or, as the Oklahoma Supreme Court so aptly put it in Paul v. N.L. Industries, 624 P.2d 68 (Okla. 1980), "To limit the jury to viewing the negligence of only one tortfeasor and then ask it to apportion that negligence to the overall wrong is to ask it to judge a forest by observing one tree. It cannot, and more important should not, be done."

of apportioning fault among all persons who legally caused the plaintiff's harm. First, allocating fault to all responsible parties eliminates or reduces any difficulty a jury may have in apportioning fault while ignoring someone who obviously shares in the blame for the accident.<sup>161</sup> Secondly, proponents argue that including the non-party tortfeasor in the fault apportionment scheme encourages settlement<sup>162</sup> among the remaining identifiable parties. Also, including the non-party tortfeasor may fix the maximum amount of recovery in the original action against the unidentifiable party in any subsequent action for contribution.<sup>163</sup>

Finally, determining which remaining party has assumed the share of the unjoined tortfeasor and therefore who should retain a subsequent cause of action against the non-party tortfeasor is far more complex if the jury ignores allocating fault to the non-party in the original action.<sup>164</sup> In relation, it is said that no one knows to whom the jury has assigned the share of fault of the non-party tortfeasor.<sup>165</sup>

Professor Sobelsohn notes that "neither approach escapes difficulty"<sup>166</sup> and that the most equitable result is to apportion the fault of the absent tortfeasor among the remaining tortfeasors on a proportionate basis according to their assessed percentage of liability,<sup>167</sup> sometimes termed the "ratio

161. Sobelsohn, *supra* note 137, at 447. See also Kirby Bldg. Systems v. Mineral Explorations Co., 704 P.2d 1266 (Wyo. 1985). "If the objective or purpose of the statutory change from common law contributory negligence to comparative negligence was to apportion damages according to fault, the same is completely lost in those instances involving multiple defendants when one of the defendants must bear damages [of the non-party defendant] completely beyond his fault." *Id.* at 1279. (Rooney, J., dissenting).

162. Sobelsohn, *supra* note 137, at 447.

163. *Id.*

164. *Id.* at 448. See also National Farmers Union Property and Casualty Co. v. Frackelton, 662 P.2d 1056 (Colo. 1983). "Plaintiffs and defendants may not wish to litigate because of the effect on the jury of the unknown factor of absent tortfeasors." *Id.* at 1060.

165. *Id.*

166. Sobelsohn, *supra* note 137, at 446.

167. See, e.g., Larsen v. Wisconsin Power & Light Co., 120 Wis. 2d 508, 355 N.W.2d 557 (1984), *disapproved by* C.L. v. Olson, 143 Wis. 2d 701, 422 N.W.2d 614 (1988).

Were the judgment not modified, one defendant would bear a liability resulting from the causal negligence attributed by the jury to the immune and nonparty defendants. This inequitable distribution of damages would be inconsistent with the basic premise . . . that no defendant should bear 'an unequal proportion of the common burden.' The 55% negligence attributed to the immune and nonparty defendants must be divided according to the proportion of the remaining [defendants].

*Id.* at 520-21, 355 N.W.2d at 564. See also Fleming, *supra* note 142, at 1492. Fleming notes that the only sound solution is to distribute the shortfall of non-party fault among the solvent parties, plaintiff as well as defendants, in proportion to the respective share of fault. He notes further that many scholars, common law countries and the Uniform Comparative Fault Act advocate the proportionate approach. However, it appears that if a state is to adopt this approach, fault assessment would have to take into account the non-party in fault assessment to determine the non-party's share of liability to be reapportioned.

approach."<sup>168</sup>

#### IV. COMPARATIVE FAULT IN INDIANA

##### A. Legislative History

Indiana's movement toward adoption of comparative fault began in the state legislature in 1973.<sup>169</sup> However, no bill received serious consideration until 1981 when a "pure" comparative fault proposal<sup>170</sup> was introduced based on the 1977 Uniform Comparative Fault Act.<sup>171</sup> The 1981 bill progressed only as far as a committee hearing.<sup>172</sup> In 1983, a modified comparative fault bill attracted substantial support in the legislature, passing both houses by overwhelming margins.<sup>173</sup> The new legislation was codified under Indiana Code Chapter 33, and is known as the Indiana Comparative Fault Act.<sup>174</sup>

Several reasons have been cited by Indiana legislators for abrogating the traditional contributory negligence rule in favor of adopting a comparative fault scheme.<sup>175</sup> Initially, legislators noted that abrogation of contributory negligence is more equitable to the plaintiff who is slightly at fault,<sup>176</sup> because, under comparative fault, a plaintiff who is only 5 percent at fault

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168. Chamallas, *supra* note 136, at 390. See also Wilkins, *Indiana's Comparative Fault Act at A First (Lingering) Glance*, 17 IND. L. REV. 687, 719 (1984). "If the equitable reapportionment system suggested in the previous discussion is adopted, for example, it could not be fully effective without an amendment of the [Indiana Comparative Fault] Act expressly permitting contribution."

169. H.B. 1680 and 1771, 98th Gen. Assembly, 1st Sess. (1973). Neither bill made it out of the House Judiciary Committee, 1973 House Journal 1893, 1907, as reported in Bayliff, *Drafting and Legislative History of the Comparative Fault Act*, 17 IND. L. REV. 863 (1984).

In *Lewis v. Mackley*, 122 Ind. App. 247, 99 N.E.2d 442 (1951), plaintiff's dependent was killed when the car he was driving collided with the defendant's milk truck. In applying the contributory negligence rule and denying recovery to the plaintiff the appellate court expressly ruled that Indiana did not recognize comparative negligence. *Id.* at 253, 99 N.E.2d at 443.

170. H.B. 2054, 102nd Gen. Assembly, 1st Sess. (1981).

171. Unif. Comp. Fault Act, 12 U.L.A. 35 (1984).

172. Ind. House and Senate Journal Index 220 (1981) as reported in Bayliff, *supra* note 169, at 863. As Bayliff notes, "Lobbyists representing insurance company interests stoutly opposed the 1981 bill. They were especially concerned with the prospect of plaintiffs and defendants both being able to recover in the same action." *Id.* at 863.

173. *Id.* The Act passed the House 78-12, and the Senate 41-6.

174. Indiana's Act is framed in terms of comparative "fault" rather than comparative "negligence". Comparative "fault" encompasses more than negligence actions and contributory negligence defenses. It covers strict liability, warranty, and wilful and wanton misconduct actions as well as defenses based upon assumption of risk, incurred risk, misuse, unreasonable failure to avoid injury, and failure to mitigate damages. However, the method of fault apportionment is generally the same. See Yosha, *supra* note 4, at 416.

175. Contributory negligence was applied to bar recovery in Indiana as late as 1987. See *Howard v. H.J. Ricks Construction Co.*, 509 N.E.2d 201 (Ind. Ct. App. 1987).

176. Becker, *supra* note 3, at 881.



can still recover from a defendant who is 95 percent at fault. By contrast, under contributory negligence the plaintiff would be completely barred from recovery.<sup>177</sup> Also, many legislators felt that adoption of comparative fault avoided the inequity under the contributory negligence rule of totally barring recovery to deserving plaintiffs.<sup>178</sup> Furthermore, legislators noted that they felt many juries ignored the contributory negligence rule or used other devices such as the doctrine of last clear chance to avoid the rule's harsh effects.<sup>179</sup> Finally, Indiana legislators felt that enactment of a comparative fault system would provide more predictability, greater equity and a restored sense of respect for the law.<sup>180</sup>

### B. Application of the Indiana Comparative Fault Act

The Indiana Comparative Fault Act applies the 50 percent, or "not greater than," rule of modified comparative negligence.<sup>181</sup> Thus, the contributory negligence doctrine is not totally abrogated under the Indiana Act, but a claimant's contributory negligence will not bar recovery unless the total contributory negligence exceeds the 50 percent threshold.<sup>182</sup> The Indiana Act is based on "fault" rather than negligence, and, therefore, encompasses a wider variety of conduct.<sup>183</sup>

In addition, the Indiana Act encompasses statutorily what many states have left to be resolved judicially.<sup>184</sup> Many of the Act's provisions explicitly

177. See, e.g., *Hundt v. LaCrosse Grain Co.*, 446 N.E.2d 327 (Ind. 1983). In *Hundt*, the plaintiff fell down basement stairs in an office building suffering severe injuries. The contributory negligence rule applied to completely bar recovery. *Id.*; *Urschel v. United States*, 145 F. Supp. 284 (N.D. Ind. 1956), where the plaintiff-farmer was injured when he put his hand into a grain tank to get a handful of shelled corn to see if it was moldy and got his fingers caught in the conveyor belt. The court held the plaintiff was guilty of contributory negligence and completely barred him from recovery. *Id.* at 285.

178. Becker, *supra* note 3. Representative Becker, one of the sponsors of the legislation, noted, "By abolishing contributory negligence, legislators felt that juries would no longer be forced to contrive ways to circumvent the harsh treatment of the slightly-at-fault plaintiff." *Id.* at 881.

179. Becker, *supra* note 3, at 881. See also Fleming, *supra* note 19, at 243, where he notes that compromising by juries led to a decline in respect and support for the contributory negligence rule.

180. Becker, *supra* note 3, at 881.

181. See IND. CODE § 34-4-33-4, *supra* note 2, "In an action based on fault . . . the claimant is barred from recovery if his contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages."

182. See IND. CODE § 34-4-33-5, *supra* note 2.

183. See *supra* note 174.

184. Compare the detail of the Indiana Act's provisions, *supra* note 2, with the entire one paragraph statutes of Minnesota and Arkansas, *supra* note 128.

Compare *Lesmeister v. Dilly*, 330 N.W.2d 95 (Minn. 1983) (comparative fault inapplicable to breach of warranty actions); *Duff v. Bonner Bldg. Supply, Inc.*, 103 Idaho 432, 649 P.2d 391 (1982), *aff'd*, 105 Idaho 123, 666 P.2d 650 (1983) (comparative fault applicable to breach

denote whether the statute is applicable to certain tort actions.<sup>185</sup> Determining whether the statute is applicable to certain tort actions provides for less confusion in the courts and also leads to predictability of results. However, in Indiana's rush to adopt a scheme of comparative fault<sup>186</sup> the Indiana legislature left many questions regarding the new Act unresolved.<sup>187</sup> For example, the statute does not consider how comparative fault principles should apply in derivative cases,<sup>188</sup> nor does the Act address the issue of

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of warranty actions), with IND CODE § 34-4-33-13 (Supp. 1988) "This chapter does not apply in any manner to . . . breach of warranty actions."

185. See, e.g., IND CODE § 34-4-33-7 (Supp. 1988) "under this chapter, there is no right of contribution among tortfeasors." See also IND. CODE § 34-4-33-8 (Supp. 1988) "This chapter does not apply in any manner to tort claims against governmental entities or public employees." And, see, e.g., *State v. Scheutter*, 503 N.E.2d 418 (Ind. 1987) (state comparative fault act is not applicable to tort claims against the state).

In addition, IND CODE § 34-4-33-13 (Supp. 1988) explicitly states that "This chapter does not apply in any manner to strict liability actions under IND CODE § 33-1-1.5 (Products Liability)." Other states have been left to resolve this question judicially. See, e.g., *Zahrte v. Sturm, Ruger & Co.*, 498 F. Supp. 389 (D. Mont. 1980); *Robinson v. Parker-Hannifin Corp.*, 4 Ohio Misc. 2d 6, 447 N.E.2d 781 (1982).

186. Bayliff, *supra* note 169, at 877, says, "As earlier mentioned the 'empty chair' or 'non-party' language of the Act was added at the eleventh hour before passage in 1983."

187. Schwartz, *Comparative Negligence in Indiana: A Unique Statute That Will Reshape the Law*, 17 IND. L. REV. 957, 960 (1984). Professor Schwartz notes that a few of the questions unaddressed by the legislature and in need of resolving are whether punitive damages should still be awarded in cases of willful, wanton, or reckless misconduct; and, whether the rule of joint and several liability is abolished.

In addition, another question left unresolved by the Act is whether the last clear chance doctrine survives the enactment of comparative fault in Indiana. As recently as 1977, before enactment of Indiana's comparative fault statute, Indiana still recognized the last clear chance doctrine. See *McKeown v. Clausa*, 172 Ind. App. 1, 359 N.E.2d 550 (1977); *Bates v. Boughton*, 151 Ind. App. 139, 278 N.E.2d 316 (1972). Since the Indiana Comparative Fault Act fails to specifically address last clear chance the Indiana courts will be left to determine whether the Act abrogates the doctrine of last clear chance. However, since it is thought that the doctrine is aimed at the modification of the contributory negligence doctrine a strong argument can be made that under Indiana's comparative fault statute the last clear chance doctrine has been abrogated.

See also Pardieck, *The Impact of Comparative Fault in Indiana*, 17 IND. L. REV. 925, 929 (1984).

While Indiana's . . . 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 . . . 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 . . . The final word on the Act's scope and impact [will be] in the hands of the judiciary.

*Id.*

188. Most jurisdictions apply comparative negligence to derivative causes. Generally, a derivative action is where the negligence of the agent is imputed to the principal. See, e.g., *Garrison v. Funderburk*, 262 Ark. 711, 561 S.W.2d 73 (1978) (comparative negligence of minor in possession of his mother's automobile was imputed to mother in her counterclaim for damages).

whether joint and several liability is abolished.<sup>189</sup>

Since the Act became effective in 1985, the most litigated issue under the statute has centered on who can be defined as a non-party for purposes of fault assessment.<sup>190</sup> As amended in 1984, the Act includes a non-party defense which allows a defendant to plead the negligence of a non-party.<sup>191</sup> Within the context of the provision, it is the defendant's responsibility to specially plead the defense within a specified time, and the defendant must also affirmatively assert the possible negligence of the non-party.<sup>192</sup> In addition, after the defendant specially pleads the defense he is responsible for proving the causal connection between the non-party's actions and the plaintiff's damages at trial.<sup>193</sup> The effect of the non-party defense is to reduce the percentage of fault allocated to a defendant who specially pleads the defense and who is successful in proving the causal fault of a non-party at trial.<sup>194</sup> If the defendant is successful, the result is generally a reduction of plaintiff's recovery of damages.<sup>195</sup> Before a defendant may attempt to prove the causal fault of a non-party by specially pleading the non-party defense, however, the alleged non-party must fall within the "non-party" definition of the Act.<sup>196</sup> Conforming with the "non-party" definition has caused considerable difficulty for many defendants.<sup>197</sup>

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The Indiana courts allow derivative causes of action in contributory negligence cases. *Bender v. Peay*, 433 N.E.2d 788 (Ind. Ct. App. 1982).

189. However, most commentators agree that the Indiana Act, while not expressly doing so, effectively eliminates the joint and several liability doctrine. *See generally* Yosha, *supra* note 4, at 416. *See also* Easterday, *supra* note 36, at 899.

190. IND. CODE § 34-4-33-2 (Supp. 1988) defines a "nonparty" as "a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant." *Id.*

191. *See* IND. CODE § 34-4-33-10(b) (Supp. 1988). "The burden of proof of a nonparty defense is upon the defendant, who must affirmatively plead the defense." *Id.*

192. IND. CODE § 34-4-33-10(c) (Supp. 1988). *See also supra* note 2 for the full text of the non-party provision of the Indiana Comparative Fault Act.

193. IND. CODE § 34-4-33-10(b) (Supp. 1988). *See also supra* note 2 for the full text of the non-party provisions of the Indiana Comparative Fault Act.

194. *See generally* Wilkins, *supra* note 168, at 734-35. *See also* Walters v. Dean, 497 N.E.2d 247 (Ind. Ct. App. 1986).

195. *Id.*

196. IND. CODE § 34-4-33-2(a) (Supp. 1988). "'Nonparty' means a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant. A nonparty shall not include the employer of the claimant." *Id.*

197. The Indiana courts' difficulty in defining who is a non-party under the Act is exemplified by two recent cases. In *Huber v. Henley*, 656 F. Supp. 508 (S.D. Ind. 1987), the plaintiff was injured in a highway accident and instituted an action for negligence against the driver of the truck who struck the plaintiff. The named defendant inspected the wreckage and later determined that the state highway department might have been negligent in its maintenance of the highway. Pursuant to this discovery, the defendant asked the court to join the state highway department as a non-party to be taken into account for fault assessment purposes. Before

The Indiana statute provides somewhat of a solution to the question of "to whom fault should be assessed."<sup>198</sup> Section Five of the Act instructs the jury to determine the percentage of fault of all persons contributing to the plaintiff's harm.<sup>199</sup> In addition, this section instructs the jury that if the plaintiff's fault exceeds 50 percent (the not greater than form of modified comparative negligence) the plaintiff is barred from recovery.<sup>200</sup> The Act does not determine whether the fault of a non-party should be taken into consideration for fault allocation purposes if the defendant does not specially plead the non-party defense provided in section Ten of the Act.

However, this discrepancy in the Act has been clarified in the 1986 case of *Walters v. Dean*<sup>201</sup> where an Indiana appellate court had to determine how to allocate fault in actions where a non-party was largely responsible for the harm.<sup>202</sup> In *Walters*, the non-party left the plaintiff's car unattended on the side of the road. Subsequently, the defendant was injured when his car collided with the plaintiff's vehicle.<sup>203</sup> The plaintiff sued the defendant for damage to his parked car, and the defendant counterclaimed asserting the non-party was the sole cause of the collision.<sup>204</sup> The precise

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allowing the defendant to proceed with proving the fault of the state highway department as a non-party, the court had to first determine whether the state highway department was a non-party within the definition of "non-party" in the Comparative Fault Act. The court held that the plaintiff would have had an action against the state if the time for filing a claim against the state had not expired, and allowed the defendant to prove the fault of the state highway department as a non-party. *Id.* at 511.

Also, in *Hill v. Metropolitan Trucking Co.*, 659 F. Supp. 430 (N.D. Ind. 1987), an Indiana court was again faced with the issue of determining whether certain state entities are non-parties within the definition of "non-party" in the Indiana Comparative Fault Act. Specifically, the court had to determine whether separate state entities were "employers" of workers of other state entities within the definition of "non-party" in the Indiana Act.

In *Hill*, two employees of the Indiana State Highway Department were summoned to an accident scene on the Indiana Toll Road. While working in a lane closed to traffic, a tractor trailer driven by the defendant struck and killed one employee and seriously injured the other. The defendants alleged as non-parties the fault of two state entities: the Indiana State Police and the State Department of Highways. The court held that the legislature did not define "employer" to include all persons in the same employment as the plaintiff due to the ambiguity which would result. The court did not allow the State Police or the Department of Highways to be taken into account for fault assessment purposes. *Id.* at 434.

198. See IND. CODE § 34-4-33-5 (Supp. 1988), outlining the 50% method, and IND. CODE § 34-4-33-10 (Supp. 1988) making it a party-defendant's responsibility to specially plead the non-party defense.

199. IND. CODE § 34-4-33-5 (Supp. 1988). "In an action based on fault . . . [t]he jury shall determine the percentage of fault of the claimant, of the defendant, and of any person who is a non-party."

200. *Id.* "If the percentage of fault of the claimant is greater than fifty percent 50% of the total fault involved in the incident . . . the jury shall return a verdict for the defendant."

201. 497 N.E.2d 247 (Ind. Ct. App. 1986).

202. *Id.* at 253.

203. *Id.* at 249.

204. *Id.*

question on appeal was whether, under Indiana law, the fault of a non-party was to be considered in all cases or only in those cases where the non-party defense is specially pleaded by the defendant under the non-party defense provision of the Act.<sup>205</sup> After reviewing the two main approaches to fault allocation<sup>206</sup> the court declared that,

The Indiana legislature has adopted a middle-ground position between the two competing viewpoints concerning allocation of non-party fault. It is our opinion that allocation of non-party fault is to be made only in those cases where the non-party defense is specially pleaded by a named defendant. Otherwise, allocation of fault is to be limited to the parties to the action.<sup>207</sup>

The Indiana Comparative Fault Act is unique in that it is the first comparative fault legislation which addresses statutorily the involvement of the non-party tortfeasor in the apportionment scheme.<sup>208</sup> By limiting allocation of fault to the parties to the action if the non-party defense is not specially pleaded by a named defendant, Indiana is the only state which gives the defendant who can identify the non-party tortfeasor a choice between the two competing approaches of fault allocation. If a named defendant specially pleads the non-party defense, and can name a non-party, fault will be allocated to the named non-party according to the unlimited approach.<sup>209</sup> However, if the named defendant does not specially plead the non-party defense, fault allocation is limited to the parties to the action,<sup>210</sup> and fault will be assessed according to the limited approach.<sup>211</sup> This rationale has found support among commentators on the Indiana Comparative Fault Act.<sup>212</sup>

However, while the court in *Walters*<sup>213</sup> and the commentators on the Indiana Comparative Fault Act seem to have sound reasoning within the context of the Act, one question remains unaddressed by the Indiana legislature and has only recently been addressed by one Indiana court.<sup>214</sup> How

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205. *Id.* at 253.

206. *Id.* at 252. *See also supra* notes 135-68 and accompanying text.

207. 497 N.E.2d at 253.

208. Eilbacher, *supra* note 135, at 904-05 n.2; *See also* Hill v. Metropolitan Trucking Co., 659 F. Supp. 430, 432 (N.D. Ind. 1987).

209. *See supra* notes 157-68 and accompanying text.

210. *See generally* Walters v. Dean, 497 N.E.2d 247 (Ind. Ct. App. 1986).

211. *Id.*

212. Wilkins, *supra* note 168, at 739. *See also* Eilbacher, *supra* note 135, at 921-22. Indeed, Eilbacher suggests that when the non-party defense is not specially pleaded, fault allocation must be limited to the parties to the action to avoid a mistrial. *Id.* at 921. *See also* Walters v. Dean, 497 N.E.2d 247, 253 (Ind. Ct. App. 1986).

213. 497 N.E.2d 247 (Ind. Ct. App. 1986).

214. *See* Cornell Harbison Excavating, Inc. v. May, 530 N.E.2d 771 (Ind. Ct. App. 1988), and *infra* notes 222-31 and accompanying text.

will the allocation of fault be assessed to unidentified or "phantom" non-party tortfeasors who may not be able to be specially pleaded by "name" within the non-party defense of the Indiana Comparative Fault Act?<sup>215</sup> Thus, the crucial issue to be considered is what will sufficiently constitute "naming" an unidentified non-party tortfeasor.

#### V. THE INDIANA COMPARATIVE FAULT ACT: WHAT'S IN A "NAME"?

Since the issue of what will sufficiently constitute "naming" an unidentified non-party tortfeasor for purposes of fault assessment under the Indiana Comparative Fault Act has not been addressed thus far by the Indiana legislature, and has only recently been addressed by one Indiana court, the problem may continue to be resolved by either the courts, in a variety of ways, or by the legislature through amendment to the Act. However, continued judicial resolution of this issue will lead to inconsistency and judicial speculation of legislative intent. Therefore, the most sound approach is for legislative resolution of the problem by amendment to the Indiana Comparative Fault Act.

##### A. Solving the "Name" Problem by Judicial Interpretation

As previously indicated<sup>216</sup> the Indiana Comparative Fault Act requires a party defendant to specially plead the fault of the non-party by affirmatively asserting the non-party defense under section Ten of the Act in order for fault to be assessed to a tortfeasor who is not a party to the action. However, this section has no requirement that the non-party be "named" before taken into account for fault assessment purposes.<sup>217</sup> In addition, while section Six of the Act defines a non-party as one who is, or may be liable, to the claimant, but has not yet been joined in the action as a defendant by the claimant<sup>218</sup> the Act also requires the jury to disclose the name of the non-party on the jury verdict form if fault is to be allocated to

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215. An example will illustrate how this will occur. For instance, assume that, in the *Walters* case, the non-party, Andrew, had stolen the plaintiff's car, was unknown, and could not be found. In the answer, the defendant attempts to specially plead the non-party defense, under section Ten of the Comparative Fault Act, naming "the unknown driver who abandoned the stolen car on the shoulder of the road." However, since under IND. CODE § 34-4-33-6, the jury "shall name" the non-party to whom they are assessing fault, the question arises as to what it means to "name" the non-party. Is "the unknown driver who abandoned the stolen car on the shoulder of the road" sufficient for naming the non-party for fault assessment purposes? See *Jacobs v. Milwaukee & Suburban Transport Corp.*, 41 Wis. 2d 661, 165 N.W.2d 162 (1969). See also *infra* notes 216-88 and accompanying text.

216. See *supra* notes 201-12 and accompanying text.

217. See IND. CODE § 34-4-33-10 (Supp. 1988), *supra* note 2.

218. See IND. CODE § 34-4-33-2 (Supp. 1988), *supra* note 2.

the non-party.<sup>219</sup> The question thus arises as to what will sufficiently constitute "naming" an unidentifiable non-party tortfeasor to satisfy the Act's verdict form name requirement in order that fault may be assessed by the jury to the non-party tortfeasor.

This analysis involves a two-part inquiry. The threshold question is whether the defendant must identify with specificity the non-party when pleading the non-party defense under section Ten of the Act. The second part of the inquiry is what will be a sufficient "naming" of the non-party to satisfy the requirement in section Six of the Act that the jury name the non-party. The two questions are closely related. These questions are unique to the Indiana Comparative Fault Act since no other state has the requirement that the jury disclose the name of the non-party on the jury verdict form.<sup>220</sup>

In addressing these questions, the court may proceed in three principal ways. First, the court may accept a defendant's assertion of the "unidentifiable driver of the red car" as sufficiently identifying the non-party for purposes of specially pleading the non-party defense. Secondly, the court may incorporate by analogy the reasoning and policies underlying the doctrine which prohibits recovery by a motorist from a "phantom" or hit-and-run driver under the uninsured motorist provision of an insurance policy. Finally, the court can focus on the language of the Indiana Act.

Initially, the court may accept a defendant's assertion of the "uniden-

219. IND. CODE § 34-4-33-6 (Supp. 1988). "If the evidence in the action is sufficient to support the charging of fault to a non-party, the form of verdict also shall require a disclosure of the name of the nonparty and the percentage of fault charged to the nonparty." *Id.*

220. See, e.g., VERMONT STAT. ANN. tit. 12, § 1036 (Cum. Supp. 1987).

Contributory negligence shall not bar recovery in an action by any plaintiff, or his legal representative, to recover damages for negligence resulting in death, personal injury or property damage, if the negligence was not greater than the causal total negligence of the defendant or defendants, but the damages shall be diminished by general verdict in proportion to the amount of negligence attributed to the plaintiff. Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. *Id.*

See also R.I. GEN. LAWS § 9-20-4 (1985).

In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may not have been in the exercise of due care shall not bar a recovery, but damages shall be diminished by the finder of fact in proportion to the amount of negligence attributable to the person injured, or the owner of the property or person having control over the property.

Notice that neither statute, Vermont's being a "not greater than" modified comparative negligence statute and Rhode Island's being a pure comparative fault statute, requires a jury to disclose the name of an unidentified non-party to whom fault is to be assessed. *Id.*

tifiable driver of the red car" as sufficiently identifying a non-party for purposes of specially pleading the non-party defense. If the court does permit such identification, however, the jury should also be permitted to name the "unidentifiable driver of the red car" so as to fulfill the name requirement of the jury verdict form.<sup>221</sup>

Recently, one Indiana appellate court has considered the question of whether the defendant, who is responsible for pleading the non-party defense under section Ten of the Act,<sup>222</sup> must "name" that non-party with specificity at the pleading stage in order to satisfy the jury verdict form "name" requirement under section Six of the Act.<sup>223</sup> The Fourth Circuit Court of Appeals of Indiana answered this question affirmatively in *Cornell Harbison Excavating, Inc. v. May*,<sup>224</sup> striking the defendant's non-party defense for failure to specifically "name" the non-party in its pleading.

The facts in *Cornell Harbison* are typical of many situations in which the question will arise of whether the defendant must "name" the non-party with specificity under the Act. The plaintiffs below, the Mays, were driving their car when a dog ran into the roadway causing the driver to swerve into a ditch in order to avoid hitting the dog. The defendant below, Cornell Harbison Excavating, Inc., had placed drainage and sewer pipes in the ditch for work they were doing in the median. When the plaintiff swerved to miss the dog and went into the ditch, they struck the drainage and sewer materials placed there by the defendants. The complaint alleged that the defendant had negligently stored the pipes in the ditch. In its answer, the defendant, Cornell Harbison, attempted to plead the fault of a non-party by naming the "unknown owner of the dog."<sup>225</sup> At trial, the plaintiff argued that the attempted identification of the "unknown owner of the dog" should be stricken because of the Act's policy of ensuring maximization of recovery by plaintiffs when the non-party cannot be identified.<sup>226</sup> In response, the defendant argued that the policy underlying the Act is to allocate percentage of fault to all persons responsible for a plaintiff's injury regardless of whether they have been specifically named.<sup>227</sup>

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221. See Wilkins, *supra* note 168, at 739 n.234. "The requirement of section six [of the Indiana Comparative Fault Act], that the party be named, probably does not mean that the defense will fail unless the person can be named with specificity. Under proper circumstances, a 'John or Jane Doe' identification should suffice." *Id.*

222. See IND. CODE § 34-4-37-10, *supra* note 2.

223. See IND. CODE § 34-4-33-6, *supra* note 2.

224. 530 N.E.2d 771 (Ind. Ct. App. 1988).

225. *Id.* at 772.

226. *Id.* at 772. See also, Eilbacher, *supra* note 135, at 920.

227. 530 N.E.2d at 772. While the *Cornell Harbison* court rejected this argument, other courts have accepted such an argument for identification of unknown non-parties. See Jacobs v. Milwaukee and Suburban Transport Corp., 41 Wis. 2d 661, 165 N.W.2d 162 (1969). And see, Wilkins, *supra* note 168, at 739 n. 234. "The requirement of section six [of The Indiana



In its holding, the court noted that two schools of thought have developed on the subject of apportionment of fault to unidentified tortfeasors.<sup>228</sup> The court reasoned that the Indiana Act clearly implied that a claimant's recovery is not to be diminished by the percentage of fault of unidentified non-parties,<sup>229</sup> thus adopting the limited approach to fault apportionment.<sup>230</sup> Therefore, the court held, the defendant's attempted identification of the "unknown owner of the dog" was an insufficient naming of the non-party in order to plead the fault of the non-party, and the non-party defense was stricken.<sup>231</sup> Thus, one Indiana court has concluded that in order for fault to be assessed to an unidentifiable non-party, that non-party must be "named" with specificity at the pleading stage in order to fulfill the section Six "name" requirement of the jury verdict form.

Other jurisdictions have also considered the question of apportioning fault to unknown non-parties. A Wisconsin court has permitted the use of "the unknown driver of the red automobile" as sufficient identification for fault assessment purposes. In *Jacobs v. Milwaukee & Suburban Transport Corp.*,<sup>232</sup> a passenger brought an action against a bus company for injuries sustained by the passenger during a fall in the aisle of a bus. The bus had made a sudden stop to avoid colliding with a car which darted out in front of the bus. In apportioning negligence, the jury assessed 69 percent of the causal fault to the "unknown driver of the red automobile,"<sup>233</sup> and the Wisconsin Supreme Court found no reason to upset this apportionment of negligence.<sup>234</sup> Unlike the Indiana Comparative Fault Act, the Wisconsin statute does not require the jury to disclose the name of the non-party to whom fault is being assessed.<sup>235</sup> However, it is evident that the Wisconsin court

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Comparative Fault Act], that the party be named, probably does not mean that the defense will fail unless the person can be named with specificity. Under proper circumstances, a 'John or Jane Doe' identification should suffice." *Id.*

228. 530 N.E.2d at 772. *See also, supra* notes 135-65 and accompanying text.

229. *Id.* at 773.

230. *See supra* notes 135-65 and accompanying text.

231. 530 N.E.2d at 774.

232. 41 Wis. 2d 661, 165 N.W.2d 162 (1969).

233. *Id.* at 663, 165 N.W.2d at 163.

234. *Id.* at 665, 165 N.W.2d at 164. *See also* Varnado v. Continental Ins. Co., 446 So. 2d 1343, 1345 (La. App. 1984) ("the driver of the white Cadillac" found to be 60% at fault; plaintiff unable to recover that portion assessed to the unknown driver); Bartlett v. New Mexico Welding Supply, 98 N.M. 152, 646 P.2d 579 (1982) ("the driver of the unknown lead car" found to be 70% at fault; plaintiff denied recovery for that portion assessed to the unknown car).

235. The Wisconsin statute, in the 50% form of modified comparative negligence, states,

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the

would accept "the unknown driver of the red automobile" as sufficient identification of an unidentifiable non-party to allow the jury to allocate fault to the non-party.

Allowing an unidentifiable non-party to be sufficiently named by being identified as "the unknown driver of the red automobile" or a "John or Jane Doe" will allow for pure comparison of fault<sup>236</sup> and also for full apportionment of fault.<sup>237</sup> Although full fault apportionment is deemed necessary in many jurisdictions,<sup>238</sup> Indiana courts have rejected the goal of complete fault apportionment by limiting fault allocation only to parties to the action if the non-party defense is not specially pleaded.<sup>239</sup> Thus, the argument asserted in *Cornell Harbison* and accepted by the court is that Indiana will compromise complete fault assessment, and will require a specific identification of the unidentifiable non-party at the pleading stage before fault will be assessed to a "phantom" or unidentifiable non-party tortfeasor.<sup>240</sup>

Permitting an unidentifiable non-party to be sufficiently named by an "unknown driver of the red car" or "unknown owner of the dog" declaration may result in the use of the non-party defense by named defendants to fraudulently reduce their own assessed fault.<sup>241</sup> Furthermore, construing "name" in vague terms to allow for a "John or Jane Doe" identification will result in line drawing by the courts causing conflicting results and inconsis-

proportion to the amount of negligence attributable to the person recovering.  
WIS. STAT. ANN. § 895.045 (1983).

Compare the Wisconsin statute with IND. CODE § 34-4-33-6 (Supp. 1987). "if the evidence in the action is sufficient to support the charging of fault to a nonparty, the form of verdict also shall require a disclosure of the name of the nonparty and the percentage of fault charged to the nonparty." *Id.*

*But see* Becker, *supra* note 3, at 882.

The Act required disclosure of the name of the nonparty in order to prevent the possibility of the 'phantom defendant.' However, the disclosure requirement was unfair to defendants who could not identify an at-fault nonparty who had left the scene or was unaware of his fault. The 1984 amendment dropped the disclosure requirement for at-fault nonparties . . .

*Id.*

This statement is a bit curious because the Act still requires the name disclosure requirement. *See* IND. CODE § 34-4-33-6 (Supp. 1987).

236. *See supra* notes 108-20 and accompanying text.

237. *See supra* notes 157-68 and accompanying text.

238. *See generally* Heft and Heft, *supra* note 158, at 52. "but the search is for the truth - and the percentages of liability of all tortfeasors, parties or not, are necessary to consider before the truth can be determined." *Id.*

239. *Walters v. Dean*, 497 N.E.2d 247 (Ind. Ct. App. 1986).

240. *See Cornell Harbison Excavating, Inc. v. May*, 530 N.E.2d 771 (Ind. Ct. App. 1988).

241. *Pardieck, supra* note 187, at 936 n.64. "presumably [identification of a nonparty by name] will prevent fault allocation to phantoms and guard against fraudulent assertions of the nonparty defense." *Id.* This important policy reason was not pointed out by the court in the *Cornell Harbison* decision.

tencies. Also, allowing for a "John or Jane Doe" identification raises policy issues of who is to bear the burden of any fault assessed to the "phantom".

It is clear that the Indiana Act favors maximizing recovery by the injured plaintiff at the expense of the party-defendant, especially when the non-party cannot be identified.<sup>242</sup> Thus, fault allocation to an unidentifiable non-party tortfeasor, or "phantom", is not favored by the Indiana Act, and an attempted "unknown driver of the red car" or "John or Jane Doe" or "unknown owner of the dog" identification is insufficient for purposes of pleading the non-party defense under section Ten of the Act. In fact, allowing for a vague identification of a non-party for fault assessment purposes under the Act will defeat the expressed legislative intent favoring a plaintiff's recovery since a party-defendant will be able to reduce his own fault by having fault apportioned to a "phantom", and no remedy exists for a plaintiff to recover from a "phantom" unless that "phantom" is somehow subsequently identified. Hence, since the "unknown driver of the red car" or "John or Jane Doe" identification should not be allowed when the defendant specially pleads the non-party defense under section Ten, the jury should not be permitted to use the "unknown driver of the red car" or "John or Jane Doe" identification to fulfill the "name" requirement on the jury verdict form required under section Six of the Act. Therefore, until the legislature adds a definition of "name" to the Act the Indiana courts should continue to disallow a "John or Jane Doe" or "unknown owner of the dog" identification.

The second principal manner in which a court may proceed in resolving the "name" issue is to adopt the reasoning and policies underlying the automobile cases in which uninsured motorist coverage is denied when a "phantom" or hit-and-run driver is involved. In *Ely v. State Farm Mutual Auto Ins. Co.*,<sup>243</sup> an insured brought an action against the insurer under an uninsured motorist policy provision claiming damages from a hit-and-run driver. The court denied recovery to the insured under the then existing Indiana insurance statute provision covering uninsured motorists,<sup>244</sup> since the insured could not prove his damages had been caused by contact with the hit-and-run driver in accordance with the insurance policy's physical contact rule. The physical contact rule requires physical contact with the hit-and-run driver<sup>245</sup> before recovery will be allowed.

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242. See Eilbacher, *supra* note 135, at 920.

The Indiana Act is mildly tarnished by the sacrifice [of true apportionment of damages among all tortfeasors in proportion to their fault] in favor of maximizing recovery by the injured plaintiff when the nonparty cannot be identified. This seems to be the most blatant instance in the act of a shifting of priorities.

243. 148 Ind. App. 586, 268 N.E.2d 316 (1971).

244. IND. CODE § 27-7-5-1 (Supp. 1988). Repealed by Acts 1982, P.L. 166, § 6. See now, IND. CODE §§ 27-7-5-2, 27-7-5-4 and 27-7-5-6 (Supp. 1988).

245. See, e.g., *Allied Fidelity Ins. Co. v. Lamb*, Ind App. , 361 N.E.2d 174 (1977).

In its holding, the *Ely* court outlined the policies underlying the statute and the physical contact rule and noted that the prevalent policy in preventing recovery from hit-and-run drivers in these situations is to prevent fraudulent claims.<sup>246</sup> Similarly, the policy requirement denying recovery from a hit-and-run driver under the uninsured motorist statute is also one of the main policies underlying the identification of a non-party by name with specificity.<sup>247</sup> Hence, since the policy underlying the physical contact rule under the uninsured motorist statute and the requirement that the non-party be named with specificity is the same, following the reasoning outlined in *Ely*, the jury will be precluded from assessing fault to a non-party or "phantom" tortfeasor unless the "phantom" can be named with specificity in order to prevent fraudulent claims.

A third alternative for a court is to focus on the language of the Indiana Act. Thus far, two Indiana courts have solved problems arising under the Indiana Comparative Fault Act by looking at the legislative history and by interpreting the legislative intent. In *Huber v. Henley*,<sup>248</sup> the court interpreted the non-party provision of the Act and noted that,

the provisions of Indiana's Comparative Fault Act signal a legislative policy favoring the principle of fair allocation among all tortfeasors. In most instances, the legislature gave this principle preeminence over the objective of fully compensating plaintiffs . . . Any interpretation of legislative intent must therefore be made with a cognizance of this policy.<sup>249</sup>

In light of the *Huber* court's interpretation of legislative intent, a defendant can argue that naming an unidentified non-party as a "John or Jane Doe", or as the "unidentifiable driver of the red car", should suffice for allocation of fault to unidentified non-parties. This argument is consistent with a legislative policy favoring a fair allocation among all tortfeasors

246. *Ely v. State Farm Auto Ins.*, 148 Ind. App. at 590, 268 N.E.2d at 319.

247. See Pardieck, *supra* note 187, at 936 n.64. "Presumably [identification of a non-party by name] will prevent fault allocation to phantoms and guard against fraudulent assertions of the nonparty defense." *Id.*

248. 656 F. Supp. 508 (S.D. Ind. 1987).

249. *Id.* at 511. In addition the court noted,

In return for the removal of the contributory negligence bar to recovery, plaintiffs lost the ability to recover the full measure of damages from any one joint tortfeasor. With this abolition of joint and several liability, the legislature favored strict apportionment of fault and left the burden of damages attributable to insolvent tortfeasors, inadvertently omitted tortfeasors, intentionally omitted tortfeasors, and jurisdictionally unavailable tortfeasors on plaintiffs. Any interpretation of legislative intent must therefore be made with a cognizance of this policy . . .

*Id.*

Note that the court did not include unidentified tortfeasors in the legislature's list of tortfeasors from whom the plaintiff could recover.

at the expense of full recovery by a plaintiff.<sup>250</sup> However, as noted earlier,<sup>251</sup> the Indiana Act appears to favor maximizing recovery by the injured plaintiff. In addition, while it may be argued that the non-party defense in section Ten of the Indiana Act further supports the argument that a non-party may be "named" by a "John or Jane Doe" identification by allowing a defendant to specially plead and attempt to prove the fault of a non-party,<sup>252</sup> there is still the requirement in section Six of the Act that the jury "name" the non-party on the jury verdict form.

The *Cornell Harbison*<sup>253</sup> court also considered the legislative history and legislative intent in reaching its result that fault cannot be assessed to an unidentifiable non-party.<sup>254</sup> The *Cornell Harbison* court noted that legislative intent is most important in construing any statute, and concluded "these statutes as presently written [The Comparative Fault Act], coupled with their legislative history, clearly evidences the legislature's intent to place the burden of pleading and proving the specific name of the non-party on the defendant."<sup>255</sup>

Rather than interpreting the legislative history and intent of the Act, a court could interpret the plain meaning of the statute.<sup>256</sup> Section Five of the Act instructs the jury to determine the percentage of fault "of any person who is a non-party."<sup>257</sup> Together with the requirement in section Six that

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250. See Wilkins, *supra* note 168, at 734-36.

251. See *supra* note 242.

252. See Eilbacher, *supra* note 135, at 904 "[T]he Indiana nonparty provision has significantly altered the distribution of the burden of plaintiff's injury and damages and has shifted a substantial risk of non-recovery to the plaintiff." *Id.*

253. *Cornell Harbison Excavating, Inc. v. May*, 530 N.E.2d 771 (Ind. Ct. App. 1988).

254. *Id.* at 773.

255. *Id.* It is also important to note that the court made reference to the "statutes as presently written" intended to preclude fault assessment to unidentifiable non-parties. As this Note concludes, the legislature should amend the statutes as presently written to remove any doubt as to whether an unidentifiable non-party can be named with specificity.

256. See *Hill v. Metropolitan Trucking, Co.*, 659 F. Supp. 430, (N.D. Ind. 1987). In construing the Indiana Comparative Fault Act's definition of "employer" the court noted that the General Assembly did not, however, define "employer" to include all persons in the same employ as the claimant; the General Assembly did not choose to use a term marked by ambiguity. The General Assembly chose to use the term 'employer'. If the plain language of the statute is clear, courts are not to look beyond the statute's words to interpret the statute.

*Id.* at 434. See also *Govern. Interinsurance Exch. v. Khayyata*, 526 N.E.2d 745 (Ind. Ct. App. 1988). In construing The Indiana Comparative Fault Act's 180-day notice provision the court noted that "Nonetheless, the legislature chose to include such an exception, and where the meaning of the legislative enactment is clear and unambiguous, our duty is to give effect to the plain and manifest meaning of the language used and apply the provision as the legislature intended." *Id.* at 747.

257. IND. CODE § 34-4-33-5(a)(1), *supra* note 2.

the jury "shall require a disclosure of the *name*"<sup>258</sup> of the non-party on the jury verdict form, an argument can be made that sections Five and Six indicate that the legislature intended that the non-party be "named" with specificity. In addition, the language "the verdict form *shall* require"<sup>259</sup> lends further support to the argument that the non-party must be "named" with particularity. "Shall" is generally defined as *mandatory*,<sup>260</sup> and "name" cannot be by a description or abbreviation.<sup>261</sup> Therefore, read together, "The form of verdict also *shall* require a disclosure of the *name* of the non party,"<sup>262</sup> clearly mandates that "name" in section Six of the Act means the literal name of the non-party. Thus, any other attempted identification of a "phantom" non-party by an "unidentified driver of the red car" or "John or Jane Doe" designation will be insufficient to "name" a non-party for fault assessment purposes under section Six of the Act. This seems more evident given the fact that section Six is the only time the "name" requirement appears in the comparative fault statute, thus indicating that the legislature contemplated a literal "naming" of the unidentified non-party with specificity before that party will be considered in the fault assessment scheme.<sup>263</sup>

Obviously, there is room for doubt as to what will sufficiently constitute "naming" an unidentified non-party for fault assessment purposes. However, it is clear that in many instances it is to a defendant's advantage to be able to "name" an unidentified non-party to reduce the allocation of fault to the defendant.<sup>264</sup>

Many cases from other jurisdictions which have not allowed consideration of unidentified "phantom" tortfeasors in the fault apportionment scheme have relied on statutory interpretation.<sup>265</sup> For example, in *Baldwin*

258. See IND. CODE § 34-4-33-6, *supra* note 2 (emphasis added). "Name" is defined in Black's Law Dictionary to "consist of one or more Christian or given names and one surname or family name. It is the distinctive characterization in words by which one is known and distinguished from others, and description, or abbreviation, is not the equivalent of a 'name'." BLACK'S LAW DICTIONARY 922 (5th ed. 1979).

259. IND. CODE § 34-4-33-6, *supra* note 2.

260. As defined in WEBSTER'S NEW COLLEGIATE DICTIONARY 1056 (7th ed. 1984), *shall* means, "used in laws, regulations, or directives to express what is *mandatory*" (emphasis added).

261. See *supra* note 258.

262. IND. CODE § 34-4-33-6, *supra* note 2.

263. In its holding the *Cornell Harbison* court made reference to these statutes but did not emphasize the "shall" language in section Six. See *Cornell Harbison Excavating, Inc. v. May*, 530 N.E.2d 771 (Ind. Ct. App. 1988).

264. See *supra* note 161.

265. See, e.g., *Payne Plumbing & Heating Co. v. McKiness Excavating & Grading, Inc.*, 382 N.W.2d 156 (Iowa 1986); *Baldwin v. City of Waterloo*, 372 N.W.2d 486 (Iowa 1985).

*v. City of Waterloo*,<sup>266</sup> the plaintiff brought an action against the defendants who had negligently allowed a pole to be placed in the street. The plaintiff was injured when his car struck the pole. The defendants attempted to have "unidentified vandals" taken into account for fault assessment purposes, but the court did not allow the alleged negligence of the vandals to be considered.<sup>267</sup> In interpreting the Iowa comparative fault statute's definition of "party"<sup>268</sup> the court specifically noted that "a 'party' includes third-party defendants and certain persons who have been released, but it does not include unidentified persons."<sup>269</sup>

While the Iowa court's interpretation is consistent with the Iowa statute, the Indiana Comparative Fault Act specifically dictates that the "percentage of fault of the claimant, of the defendants, and of any person who is a nonparty" be taken into account for fault assessment purposes.<sup>270</sup> The Indiana court's interpretation in *Walters v. Dean*,<sup>271</sup> allowing the non-party to be taken into account for fault assessment purposes only when the non-party defense is specially pleaded by a defendant, is also consistent with the Indiana statute allowing for fault assessment to non-parties. Therefore, since the Indiana Comparative Fault Act anticipates taking into account the fault of non-parties when the non-party defense is specially pleaded, an argument may initially be made that a "John or Jane Doe" identification should suffice to include an unidentifiable non-party in the fault apportionment scheme.<sup>272</sup> The "John or Jane Doe" identification may initially suffice because the Act only requires the non-party defense under section Ten to be specially pleaded. However, after this initial threshold question is addressed

266. 372 N.W.2d 496 (Iowa 1985).

267. *Id.* Iowa has also recently precluded apportionment of fault to unidentifiable non-parties. See *Selchert v. State*, 420 N.W.2d 816 (Iowa 1988).

268. IOWA CODE ANN. § 668.4 (1987) defines "party" as,

1. A claimant,
2. A person named as defendant,
3. A person who has been released,
4. A third-party defendant.

*Id.*

269. *Baldwin*, 372 N.W.2d at 493.

270. IND. CODE § 34-4-33-5(b)(1) (Supp. 1988).

271. 497 N.E.2d 247 (Ind. Ct. App. 1986).

272. The Indiana Act's definition of "nonparty" as "a person who is, or may be, liable to the claimant . . ." also supports the argument that unidentifiable tortfeasors sufficiently named shall be taken into account for fault assessment purposes. See IND. CODE § 34-4-33-2 (Supp. 1988). Further strengthening the argument that an unidentifiable non-party may be "named" by a "John or Jane Doe" identification is Indiana Trial Rule 17(F) which reads:

(F) Unknown Persons. When the name or existence of a person is unknown, he may be named as an unknown party, and when his true name is discovered his name may be inserted by amendment at any time.

*Id.*

See also, *Honda Motors Co., Ltd. v. Parks*, 485 N.E.2d 644 (Ind. Ct. App. 1985).

the question then becomes what will be sufficient to "name" the "phantom" on the jury verdict form as required in section Six. As noted,<sup>273</sup> policy reasons and implicit statutory language suggest that a non-party must be named with specificity.

If a court accepts the identification of "the unknown driver of the red car" as specially pleaded by a defendant in the non-party defense, judicial line drawing will be necessary, varying with the circumstances of each case, and resulting in numerous inconsistencies. In addition, accepting a vague identification of an unidentifiable non-party will promote fraudulent use of the non-party defense by defendants. Finally, by focusing on the language of the Indiana Act, different courts may derive varying conclusions as to the legislative intent or plain meaning of the statute, and thus will arrive at different results. While any of these arguments could be accepted by the court, it would be easier for the legislature to avoid speculation and possible confusion by solving the problem.

In addition, while the *Cornell Harbison* court reached the correct result in its decision, the precedential effect of its holding is unfortunate. Since two schools of thought have developed on this subject,<sup>274</sup> and since this problem frequently occurs, many arguments can be made to support the opposite result.<sup>275</sup> If another Indiana court reaches the opposite result, the practitioner will again be confused as to whether the unidentifiable non-party must be named with specificity or whether an "unknown owner of the dog" identification will suffice. In some courts fault will then be assessable to "phantoms" while in other Indiana courts the defendant will be required to specifically "name" the non-party. This confusion will undermine the declared intent of the Act of predictability and greater equity.<sup>276</sup> Thus, the Indiana courts should leave the resolution of this problem to the legislature, who should act to add a definition of "name" to section Two of the Act.

### B. Solving the "Name" Problem by Legislative Amendment

To clarify other sections of the comparative fault statute, explicit definitions of necessary words are given.<sup>277</sup> However, nowhere in the Act is "name" defined. How "name" is defined for purposes of the verdict form requirement of the Indiana Act<sup>278</sup> will determine whether fault will be as-

273. See *supra* notes 232-64 and accompanying text.

274. See *supra* note 228. See also *supra* notes 135-65 and accompanying text.

275. See *supra* notes 157-65 and accompanying text. See also Wilkins, *supra* note 168, at 739 n. 234.

276. See Becker, *supra* note 180 and accompanying text.

277. See IND. CODE § 34-4-33-2, *supra* note 2, defining "Fault" and "Nonparty". In fact, the original Act was amended in 1984 to add a definition for "Nonparty" and to amend the definition of "Fault" as used in the Act. See P.L. 174-1984, § 1.

278. IND. CODE § 34-4-33-6 (Supp. 1988).



sessed to a "John or Jane Doe", or whether fault will be allocated only to those parties proceeding to trial.<sup>279</sup> A mere addition to the definitions section of the Indiana Comparative Fault Act<sup>280</sup> to clarify the definition of "name" as it is used in the jury verdict form requirement of section Six of the Act will avoid the continuing need for judicial resolution of what sufficiently constitutes "naming" an unidentifiable non-party.

Specifically, the legislature should amend section Two of the Indiana Comparative Fault Act to add a new definition to read:

"Name", as used in this chapter, means the designation of an individual person, firm, corporation, organization, or any other entity, sufficient for the legal service of process to be effectuated.

By amending the Indiana Comparative Fault Act to include this definition of "name", the legislature will avoid speculation and confusion over what will sufficiently constitute "naming" an unidentifiable non-party for fault allocation purposes. In Indiana, the legal service of process is governed by Trial Rules 4 through 4.17.<sup>281</sup> Requiring an unidentifiable non-party to

279. See *Walters v. Dean*, 497 N.E.2d 247 (Ind. Ct. App. 1986).

280. IND. CODE § 34-4-33-2 (Supp. 1988).

281. Rule 4. Process

(A) Jurisdiction over parties or persons - In general. The court acquires jurisdiction over a party or person who under these rules commences or joins in the action, is served with summons or enters an appearance, or who is subjected to the power of the court under any other law.

(C) Form of summons. The summons shall contain:

(1) The name and address of the person on whom the service is to be effected;  
 (2) The name of the court and the cause number assigned to the case;  
 (3) The title of the case as shown by the complaint, but, if there are multiple parties, the title may be shortened to include only the first named plaintiff and defendant with an appropriate indication that there are additional parties;

(4) The name, address, and telephone number of the attorney for the person seeking service;

(5) The time within which these rules require the person being served to respond, and a clear statement that in case of his failure to do so, judgment by default may be rendered against him for the relief demanded in the complaint.

The summons may also contain any additional information which will facilitate proper service.

Rule 4.1 Summons: Service on individuals

(A) In general. Service may be made upon an individual, or an individual acting in a representative capacity, by:

(1) sending a copy of the summons and complaint by registered or certified mail or other public means by which a written acknowledgement of receipt may be requested and obtained to his residence, place of business or employment with return receipt requested and returned showing receipt of the letter; or

(2) delivering a copy of the summons and complaint to him personally; or

(3) leaving a copy of the summons and complaint at his dwelling house or usual place of abode; or

be "named" through the methods of legal service of process will insure that an unidentifiable non-party cannot be "named" without specificity and proper identification,<sup>282</sup> and will effectuate many of the goals underlying the Comparative Fault Act; namely, maximizing an injured plaintiff's recovery,<sup>283</sup> and preventing fraudulent use of the non-party defense.<sup>284</sup> While this definition does not allow for the use of a "John or Jane Doe" or "unidentifiable driver of the red car" or "unknown owner of the dog" identification to satisfy the jury verdict form requirement, it will provide for consistency.

Arguably, this definition compromises the legislature's goal of true fault comparison.<sup>285</sup> However, this compromise is made in application of the non-party defense provisions when the non-party defense is not specially pleaded.<sup>286</sup> In addition, the legislature seemingly made a conscious decision to forego true fault apportionment among all tortfeasors in favor of compensating plaintiffs, especially when a non-party cannot be identified.<sup>287</sup> By requiring a "naming" of the unidentifiable non-party with specificity under the Act, the legislative intent of compensating plaintiffs when a non-party cannot be identified will be fulfilled.

In addition, since one of the goals of any comparative fault system is to compensate the plaintiff for his injury, the plaintiff's recovery will not be defeated if an unidentifiable non-party cannot be taken into consideration for fault assessment purposes. Also, the proposed definition of "name" meets all of the goals of the Indiana Comparative Fault Act for plaintiffs as

(4) serving his agent as provided by rule, statute or valid agreement.

(B) Copy service to be followed with mail. Whenever service is made under Clause (3) or (4) of subdivision (A), the person making the service also shall send by first class mail, a copy of the summons without the complaint to the last known address of the person being served, and this fact shall be shown upon the return.

IND. CODE, Trial Rules of Procedure (1988).

282. See, e.g., *Poteet v. Bethke*, 507 N.E.2d 652 (Ind. Ct. App. 1987) (automobile accident wherein court held service of process upon defendant's liability insurer was not sufficient service of process to inform or to specify to the defendant of action against him).

283. See *supra* note 262.

284. See *supra* note 241 and accompanying text.

285. See *supra* notes 136-51 and accompanying text.

286. See *Walters v. Dean*, 497 N.E.2d 247 (Ind. Ct. App. 1986).

287. See *Eilbacher*, *supra* note 135, at 920.

The drafters of the Indiana Act were left to reconcile two competing considerations. The first was the achievement of full comparative recovery for the plaintiff by ignoring existing but unidentifiable tortfeasors. However, the drafter also had to consider a philosophy which emphasized a true apportionment of damages among *all* tortfeasors in proportion to their fault, irrespective of their amenability to suit and their solvency.

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

*Id.*

well as defendants. Amending the Act to include the proposed definition of "name" will not overburden named defendants since fault will be assessed to all parties, and will not result, automatically, in the named defendant assuming the burden of fault of the "phantom". Furthermore, the fault of any non-party "phantom" should be borne by all parties to the action which supports the notion of each party bearing their share of fault.<sup>288</sup>

## VI. CONCLUSION

Although Indiana's comparative fault system has been in effect for only four years and is still experiencing "growing pains",<sup>289</sup> most would agree that the new system is a vast improvement over the outdated doctrine of contributory negligence. Many of the issues unresolved by the Indiana Comparative Fault Act are now beginning to make their way through the Indiana courts and will continue to ease the Act's "growing pains". Other problems, like the issue of "naming" an unidentifiable non-party for fault assessment purposes, are unique to the Indiana Act and will call for unique solutions by the legislature. The issue of what will sufficiently constitute "naming" an unidentifiable or "phantom" tortfeasor has recently arisen, and one Indiana court has adopted one of the several methods suggested to resolve the problem of what will sufficiently constitute "naming" an unidentifiable non-party for fault assessment purposes. However, the Indiana legislature can avoid needless inconsistencies and confusion in the courts by adding the proposed definition of "name" to the Indiana Comparative Fault Act. Since the proposed definition will add clarity to the application of the Act, the Indiana legislature should heed Judge Barker's proclamation that "the legislature may be called upon to mollify some of the Act's potential harshness"<sup>290</sup> and take corrective action to amend the Indiana Comparative Fault Act to include the proposed definition of "name".

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288. See Wilkins, *supra* note 168, at 734-39.

289. See Eilbacher, *supra* note 135, at 923.

290. See *supra* note 1 and accompanying text.