Indiana Law Review



Volume 17 No. 3 1984

Symposium on Indiana's Comparative Fault Act

The Indiana Comparative Fault Act At First (Lingering) Glance

Lawrence P. Wilkins

Drafting and Legislative History of the Comparative Fault Act

Edgar W. Bayliff

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

Nelson J. Becker

The Indiana Comparative Fault Act: How Does It Compare With Other Jurisdictions?

Debra S. Easterday

Thomas V. Easterday

Comparative Fault and the Nonparty Tortfeasor

Leonard E. Eilbacher

The Impact of Comparative Fault in Indiana

Roger L. Pardieck

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

Victor E. Schwartz

Fairness: A Comparative Analysis of the Indiana and Uniform Comparative Fault Acts

David Randolph Smith John W. Wade

Comparative Fault and Product Liability in Indiana

Henry Woods

$Registered\ Professional$ Reporters

JOHN E. CONNOR & Associates

204 Union Federal Building and 3050 American United Life Building Indianapolis, Ind. 46204 (317) 632-5533 or 638-0110

Reference: MARTINDALE-HUBBELL

INDIANA LAW REVIEW

We are pleased to announce that Volume 18, Number 1

1984 SURVEY OF RECENT DEVELOPMENTS IN INDIANA LAW

Will be available in January, 1985 Price: \$9.00

Send orders to: Business Editor
Indiana Law Review
Indiana University School of Law—Indianapolis
735 W. New York Street, Indianapolis, Indiana 46202

For personalized service... you need to know the right banker.

That's what our Personal Services Bankers like Vicki Wood and her associates can provide a busy professional like you. They can expedite action on your request for any service and provide you with direct access to personal and business loans, long and short term investments, depository services, trust services, financial analysis—or any of the many services that could benefit you. If you need things to be coordinated with your attorney, accountant or insurance agent—that will be done too. Only Indiana National offers this concentration of banking resources through one specialist for the professional—at a time and location that's convenient to you.

Get to know the *right* people. Call Vicki and ask for your own Personal Services Banker. 317/266-5319. Personal Services Banking/One Indiana Square, Indianapolis, IN 46266.

Indiana National



Pioneers in Banking

WESTLAW Rated Superior In Datapro Survey Again!

For the second year in a row, WESTLAW has come out on top in Datapro's "User Ratings of Information Retrieval Services."

WESTLAW outscored Lexis in user ratings of 10 major information retrieval services. The results of the survey indicate that, based on a weighted average scale of 4.0 for EXCELLENT, WESTLAW outscored LEXIS/NEXIS in all categories, as follows:

	WESTLAW	LEXIS
Response Time	3.35	3.06
Dependability (up time)	3.55	3.38
Technical/Instructional Support	3.05	2.69
Documentation	3.16	2.40
Ease of Use	3.20	3.14
Cost/Performance Ratio	3.05	2.57
Overall Satisfaction	3.26	2.89

WESTLAW ranked Number 1 in Response Time, Number 1 in Dependability, Number 2 in Overall Satisfaction, and Number 3 for Technical/Instructional Support, Documentation, and Cost/Performance Ratio!

Among the 10 services, Lexis ranked Number 6 in Response Time, Number 2 in Dependability, Number 8 in Overall Satisfaction, Number 7 in Technical/Instructional Support, Number 10 in Documentation, and Number 9 in Cost/Performance Ratio.

Once again, this independent survey confirms what we've been saying for some time. WESTLAW is the finest computer-assisted legal research service. It is keeping pace with the needs of the legal profession.

For more information about WESTLAW, contact your local West Sales Representative, or call us at: 1-800-328-9352 (or collect at 612-228-2973).



Keeping Pace With The Legal Mind

As reported in DATAPRO On-Line Services News, July 1984, and DATAPRO Directory of On-Line Services, published by DATAPRO Research Corporation, Delran, NJ 08075.

Indiana Law Review

VOLUME 17 1984 Number 3

Copyright © 1984 by the Trustees of Indiana University

TABLE OF CONTENTS

S	ymp	osium on Indiana's Comparative Fault Act	
		Comparative Fault Act at First (Lingering)	87
I.	Intro	ODUCTION 6	87
II.	Gene	ERAL FEATURES OF THE ACT	88
	A.	Operation of the Apportionment Principle 6	88
	В.	Section 1: Coverage 6	92
	<i>C</i> .	Section 2: "Fault" Defined 6	92
	D.	Sections 3 and 4: Statement of the Comparative Fault Principle	97
	E.	Sections 5, 6, and 9: Controlling the Jury 7	01
	F.	Section 7: Contribution and Indemnity 7	18
	G.	Section 8: Government Entity and Public Employee Exceptions	29
	Н.	Section 10: The "Empty Chair Defense" 7	32
	<i>I</i> .	Section 11: Coordination Between the Comparative	
	J.	Fault and Medical Malpractice Acts	39
	J.		40
III.	Сомн	PARATIVE FAULT AND ASSUMED/INCURRED RISK 7	56
	A.	Introduction and Background 7	56
	В.	"Reasonable" and "Unreasonable" Assumption of	'60
	<i>C</i> .		69
	D.	Problems of Interpretation Raised by the Indiana	779
	E.	200800000000000000000000000000000000000	785

The INDIANA LAW REVIEW (ISSN 0090-4198) is the property of Indiana University and is published quarterly by the Indiana University School of Law—Indianapolis, which assumes complete editorial responsibility therefore. Subscription rates: one year \$15.00; foreign \$18.50. Back issues are available from Fred B. Rothman & Co., 10368 W. Centennial Rd., Littleton, Co. 80127. Please notify us one month in advance of any change of address and include both old and new addresses with zip codes to ensure delivery of all issues. Send all correspondence to Editorial Assistant, Indiana Law Review, Indiana University School of Law—Indianapolis, 735 West New York Street, Indianapolis, Indiana 46202. Publication office: 735 West New York Street, Indianapolis, Indiana 46201.

Summer 1984

Number 3

Volume 17

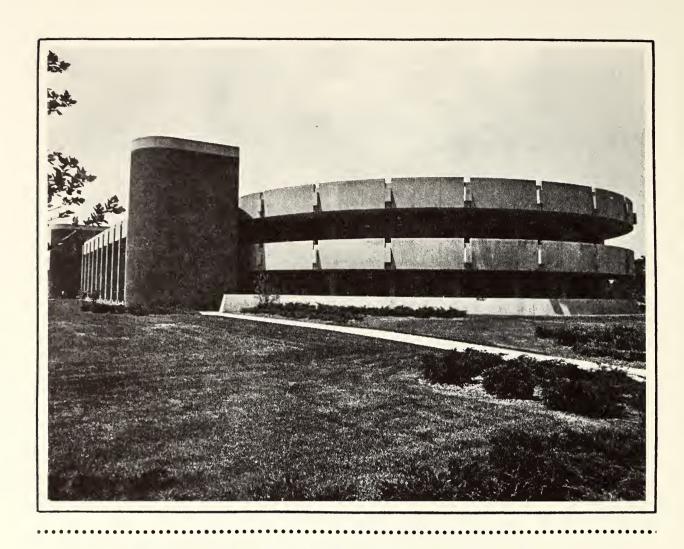
POSTMASTER: Send address changes to INDIANA LAW REVIEW, 735 West New York Street, Indianapolis, Indiana 46202.

V.	Some Important Omissions
	A. Set-Off of Counterclaims
	B. Last Clear Chance
VI.	Conclusion
raftin	g and Legislative History of the Comparative Fault
ct	Edgar W. Bayliff
I.	Passage of the Act
~ *	A. Historical Background
	B. Key Provisions of the 1983 Bill
	C. Procedural History
П.	FEATURES OF THE ACT
	A. Threshold of Fault Required to Preclude Recovery
	B. Partial Abrogation of Joint and Several Liability
	Principles
	C. Nonparty Practice or the "Empty Chair" Problem
	D. Temporary Inclusion of Strict Liability and Breach
	of Warranty Cases
	E. Exclusion of State Tort Claims
	F. Forms of Verdicts
III.	1984 Amendments to the Act
	A. Passage of Senate Bill 419
	B. Removal of Claims for Strict Liability and Breach of
	Warranty From the Act
	C. Tactical Considerations Arising From Exclusion of
	Strict Liability and Breach of Warranty Actions from
	the Act
	D. Elimination of "Primary Defendant" Concept
	E. Inconsistent Verdicts
	F. Combined Claims Against Qualified Health Care Providers and Nonhealth Care Providers
	G. Liens and Claims for Payment of Medical Expenses
	H. Nonparty Practice
	•
IV.	Conclusion
diana'	's Comparative Fault Law: A Legislator's View
	iana Comparative Fault Act: How Does It Compare With
ner J	urisdictions?
	THOMUS V FUSIPINIV

I.	Introduction	883
II.	Overview A. Pure Comparative Negligence B. Modified Comparative Negligence C. Slight-Gross Comparative Negligence D. Indiana Comparative Negligence	883 884 885 888 888
III.	DEFENSES	890 891 894
	Multiple Defendants A. Joint and Several Liability B. Contribution Conclusion	897 898 900 901
-	rative Fault and the Nonparty Tortfeasor	
	Leonard E. Eilbacher	903
I.	Introduction	903
II.	Doctrine of Joint and Several Liability Abolished	906
III.	Culpable Nonparties A. The Settling Tortfeasor B. The Inadvertently Omitted Tortfeasor C. The Intentionally Omitted Tortfeasor D. The Judgment-Proof Tortfeasor E. The Unavoidable Tortfeasor Beyond Jurisdiction	908 908 912 912 913 915
IV.	Tortfeasors Who Cannot be Nonparties	916 916 917
V.	THE "Name" REQUIREMENT	920
VI.	Pleading, Amendment, and Discovery	921
VII.	Conclusion	922
The Im	pact of Comparative Fault in Indiana	
		925
I.	Introduction	925
II.	THE SCOPE OF INDIANA'S COMPARATIVE FAULT ACT	927
III.	Causation Under a Comparative Fault System A. Current Status of the Law B. The Impact of Comparative Fault on Causation .	929 929 931
IV.	Comparative Fault's Impact on Other Doctrines A. Last Clear Chance	939 939

B. No-Duty Rules	942
V. Conclusion	954
Comparative Negligence in Indiana: A Unique Statute That Will Reshape the Law	957
I. Introduction	957
II. Overview of Indiana's Comparative Fault Act	958
III. THE NATURE OF INDIANA'S COMPARATIVE FAULT	959
IV. THE INTERSECTION WITH THE LAW OF PRODUCT LIABILITY	961
V. The Interface Among the 50% Rule, Joint and Several Liability, and Contribution and Indemnity VI. Strategic Considerations for the Advocate	963 966
VII. Conclusion	967
Fairness: A Comparative Analysis of the Indiana and Uniform Comparative Fault Acts	969
I. Overview	970
A. Abolition of Joint and Several Liability	973
B. The Fault-Free Plaintiff	976 978
D. Contribution and Indemnity	982
E. The Effect of Settlement	983
F. Set-Off	985
G. Definition of Fault	988
II. Effect of Comparative Fault on Other Tort Doctrines	990
A. Punitive Damages	991
B. Last Clear Chance	991
C. Imputed Negligence D. Worker's Compensation	991 992
III. Procedural Questions	993 993
B. Multiple or Single Actions and Joinder of Parties	994
C. Burden of Proof	995
IV. Conclusion	996
Comparative Fault and Product Liability in Indiana	
	999
I. Introduction	999

II. Product Negligence Cases	1000
III. Strict Liability in Indiana A. Defenses to Strict Liability B. Strict Liability and Economic Loss	1001 1004 1013
IV. Warranty	1015
V. Fraud and Deceit	1017
VI. Indemnity	1017
VII. THE INDIANA COMPARATIVE FAULT ACT A. Definition of Fault B. Comparative Fault Systems C. Multiple Parties D. Settlements VIII. MULTIPLE THEORIES	1018 1019 1020 1023 1024
IX. Conclusion	1027
Annendix	1029



Please enter my subscription to the INDIANA LAW REVIEW

NAME		
ADDRESS _		
-		
	Enclosed is \$ for subscriptions.	
	Bill me for subscriptions.	
	Mail to:	
	INDIANA I AM DEWIEW	

INDIANA LAW REVIEW
INDIANA UNIVERSITY
SCHOOL OF LAW-INDIANAPOLIS
735 West New York Street
Indianapolis, Indiana 46202

Subscription Rates (one year):

Regular, \$15.00; Foreign, \$18.50; Survey, \$9.00

Indiana Law Review

Volume 17

1984

HARRY TODD Editor-in-Chief

DIANE DILGER JONES

Articles and Production

SHARON B. HEARN

Note and Development

Executive Editors

DONNA J. BAYS-BEINART KATHRYN L. HAGENBUCH STEVEN C. SHOCKLEY TIMOTHY L. STEWART

Articles Editors

MARY TERSCHLUSE IRWIN

Business Editor

JAN CARROLL
SHARON L. HULBE

SHARON L. HULBERT SUSAN LUTHRA RICHARD L. RANDALL

JOHN SHELLER
JAMES L. TURNER

Note and Development Editors

MICHAEL ANDERSON

DONALD R. BARRETT, JR.

JEFFREY BEEN

TIMOTHY BENDER BRIAN BOSMA

RICHARD CLAPP

MARK COY

SHERYL A. DONNELLA

DONNA HILTON FISHER

G. Frederick Glass

DEBRA HINSHAW

MICHAEL C. ICE

STEVEN H. JOHNSONBAUGH

LU CAROLE KING

JANICE E. KREUSCHER

GREGORY L. LAKER

DIANNE TONEY McGILL

JEFFREY OWEN MEUNIER

DEBRA HANLEY MILLER

GLENN MOFFETT

JAMES P. MOLOY

LINDA S. NICHOLS

KARON E. PERKINS

SUSAN RIVAS

SANDRA ROTHBAUM

BRIAN D. SALWOWSKI

JAMES N. SCAHILL

P. JAYNE STEPHENS

PHILIP THOMPSON

DONALD JOHN VERPLANCKEN

MARY HAMILTON WATTS

CHERYL JUDGE WENDLING

Associate Editors

PAUL J. GALANTI Faculty Advisor

MARY J. CLER Editorial Assistant

Indiana University School of Law-Indianapolis

1983-84 ADMINISTRATIVE OFFICERS AND FACULTY

Administrative Officers

JOHN W. RYAN, Ph.D., President of the University

GLENN W. IRWIN, JR., M.D., Vice-President

GERALD L. BEPKO, LL.M., Dean

G. Kent Frandsen, J.D., Associate Dean for Student Affairs

JEFFREY W. GROVE, J.D., Associate Dean for Academic Affairs

Faculty

Thomas B. Allington, Professor. B.S., University of Nebraska, 1964; J.D., 1966; LL.M., New York University, 1971.

Edward P. Archer, Professor. B.M.E., Rensselaer Polytechnic Institute, 1958; J.D., Georgetown University, 1962; LL.M., 1964.

James F. Bailey, III., Associate Professor and Director of Law Library. A.B., University of Mighigan, 1961; J.D., 1964; M.A.L.S., 1970.

GERALD L. BEPKO, Dean and Professor. B.S., Northern Illinois University, 1962; J.D., IIT/Chicago-Kent College of Law, 1965; LL.M., Yale University 1972.

CLYDE HARRISON CROCKETT, Professor. A.B., University of Texas, 1962; J.D., 1965; LL.M., University of London (The London School of Economics and Political Science), 1972.

Debra A. Falender, Associate Professor. A.B., Mount Holyoke College, 1979; J.D., Indiana University, 1975.

WANDA D. FOSTER, Assistant Professor. A.B., University of Michigan, 1973; J.D., Georgetown University, 1976.

G. Kent Frandsen, Associate Dean for Student Affairs and Associate Professor. B.S., Bradley University, 1950; J.D., Indiana University, 1965.

David A. Funk, Professor. A.B., College of Wooster, 1949; J.D., Case Western Reserve University, 1951; M.A., The Ohio State University 1968; LL.M., Case Western Reserve University, 1972; LL.M., Columbia University, 1973.

Paul J. Galanti, Professor. A.B., Bowdoin College, 1960; J.D., University of Chicago,

HELEN P. GARFIELD, Professor. B.S.J., Northwestern University, 1945; J.D., University of Colorado, 1967.

Harold Greenberg, Associate Professor. A.B., Temple University, 1959; J.D., University of Pennsylvania, 1962.

JEFFREY W. GROVE, Associate Dean for Academic Affairs and Professor, A.B.,

Juniata College, 1965; J.D., George Washington University, 1969.
WILLIAM F. HARVEY, Carl M. Gray Professor of Law. A.B., University of Missouri, 1954; J.D., Georgetown University, 1959; LL.M., 1961.

W. WILLIAM HODES, Associate Professor. A.B., Harvard College, 1966; J.D., Rutgers, Newark, 1969.

LAWRENCE A. JEGEN, III., Thomas F. Sheehan Professor of Tax Law and Policy, 1982. A.B., Beloit College, 1956; J.D., The University of Michigan 1959; M.B.A., 1960; LL.M., New York University, 1963.

HENRY C. KARLSON, Associate Professor. A.B., University of Illinois, 1965; J.D., 1968; LL.M., 1977.

WILLIAM ANDREW KERR, Professor. A.B., West Virginia University, 1955; J.D., 1957; LL.M., Harvard University, 1958; B.D., Duke University, 1968.

Walter W. Krieger, Associate Professor. A.B., Bellarmine College, 1959; J.D., University of Louisville, 1962; LL.M., George Washington University, 1969.

DAVID P. LEONARD, Assistant Professor. B.A., University of California at San Diego, 1974; J.D., UCLA School of Law, 1977.

WILLIAM E. MARSH, Professor. B.S., University of Nebraska, 1965; J.D., 1958.

Susanah M. Mead, Assistant Professor. B.A., Smith College, 1969; J.D., Indiana University, 1976.

Mary H. Mitchell, Assistant Professor. A.B., Butler University, 1975; J.D., Cornell Law School, 1978.

- RITA M. NOVAK, Assistant Professor. B.A., Albion College, 1972; J.D., De Paul University, 1978; LL.M., Columbia University, 1981.
- DAVID R. Papke, Assistant Professor. A.B., Harvard College, 1969; J.D., Yale Law School, 1973; M.A. in American Studies, Yale University, 1973; M. Phil., in American Studies, The University of Michigan, 1980; Ph.D., 1983.
- Melvin C. Poland, Cleon H. Foust Professor of Law, 1982. B.S., Kansas State University, 1940 LL.B., Washburn University, 1949; LL.M., The University of Michigan, 1950.
- Ronald W. Polston, Professor. B.S., Eastern Illinois University, 1953; LL.B., University of Illinois, 1958.
- BRYAN M. Schneider, Assistant Professor. B.A., Amherst College, 1973; J.D., University of South Carolina School of Law, 1976; LL.M., Yale Law School, 1980.
- KENNETH M. STROUD, Professor. A.B., Indiana University, 1958; J.D., 1961.
- James W. Torke, Professor. B.S. University of Wisconsin, 1963; J.D., 1968.
- James Patrick White, Professor (on special assignment). A.B., University of Iowa, 1953; J.D., 1956; LL.M., George Washington University, 1959.
- LAWRENCE P. WILKINS, Professor. B.A., The Ohio State University, 1968; J.D., Capital University Law School, 1973; LL.M., University of Texas School of Law, 1974.
- HAROLD R. WOODARD, Professorial Lecturer. B.S., Harvard University, 1933; J.D., 1936.
- WILLIAM J. WOODWARD, Associate Professor. B.A., University of Pennsylvania, 1968; J.D., Rutgers-Camden, 1975.

Emeriti

- AGNES P. BARRETT, Associate Professor Emeritus. B.S., Indiana University, 1942; J.D., 1964.
- CLEON H. FOUST, Professor Emeritus. A.B., Wabash College, 1928; J.D., University of Arizona, 1933.
- John S. Grimes, Professor Jurisprudence Emeritus. A.B., Indiana University, 1929; J.D., 1931.
- R. Bruce Townsend, Cleon H. Foust Professor of Law Emeritus. A.B., Coe College, 1938; J.D., University of Iowa, 1940.

Legal Writing Instructors

- Daniel B. Dovenbarger, Lecturer. B.A., Wabash College, 1979; M.A., Vanderbilt University, 1981; J.D.. Indiana University, 1983.
- Pamela P. Price, Lecturer. B.A., North Carolina State University, 1977; J.D. Valparaiso University, 1980.
- Jacklyn Leas Ringhausen, Lecturer. A.B., Indiana University, 1976; J.D., Indiana University, 1979.
- Joan Ruhtenberg, Lecturer. B.A., Mississippi University for Women, 1959; J.D., Indiana University, 1980.

Law Library Staff

- Wendell E. Johnting, Technical Services Librarian. A.B., Taylor University, 1974; M.L.S., Indiana University, 1975.
- Laura Kimberly, Acquisitions/Serials Librarian. B.A., Flordia State University, 1977; M.S., 1980.
- Constance Matts, Associate Librarian. B.A., 1973, Case Western Reserve University; MSLS, 1974, Case Western Reserve University; MAIR, 1976, Creighton University.
- CHRISTINE L. STEVENS, Reference Librarian. A.B., Western Michigan University, 1970: M.L.S., Indiana University, 1971.
- Kathy J. Welker, Assistant Director. A.B., Huntington College, 1969; M.L.S. Indiana University, 1972.

