

Appendix

Chapter 33. Comparative Fault

Effective January 1, 1985

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34-4-33-1 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.

(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.

As added by P.L.317-1983, SEC.1.

34-4-33-2 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.

(b) For purposes of sections 4 and 5 of this chapter, a defendant may be treated along with another defendant as a single party where recovery is sought against that defendant not based upon his own alleged act or omission but upon his relationship to the other defendant. *As added by P.L.317-1983, SEC.1. Amended by P.L.174-1984, SEC.1.*

34-4-33-3 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. *As added by P.L.317-1983, SEC.1.*

34-4-33-4 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 the 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. *As added by P.L.317-1983, SEC.1. Amended by P.L.174-1984, SEC.2.*

34-4-33-5 Instructions to jury; award of damages

Sec. 5. (a) In an action based on fault that is brought against one (1) defendant or two (2) or more defendants who may be treated as a single party, 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 defendant, 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 damage, the jury shall return a verdict for the defendant 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 then shall 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 the defendant by the amount of damages determined under subdivision (3) and shall then enter a verdict for the claimant in the amount of the product of that multiplication.

(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 damage, 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. *As added by P.L.317-1983, SEC.1. Amended by P.L.174-1984, SEC.3.*

34-4-33-6 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;
- (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. *As added by P.L.317-1983, SEC.1.*

34-4-33-7 Contribution; indemnity

Sec. 7. In an action under this chapter, there is no right of contribution among tortfeasors. However, this section does not affect any rights of indemnity. *As added by P.L.317-1983, SEC.1.*

34-4-33-8 Government entities or public employees excepted

Sec. 8. This chapter does not apply in any manner to tort claims against governmental entities or public employees under IC 34-4-16.5. *As added by P.L.317-1983, SEC.1.*

34-4-33-9 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.

As added by P.L.174-1984, SEC.4.

34-4-33-10 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 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.

(d) This section applies to a claim filed with the insurance commissioner under IC 16-9.5 against a qualified health care provider, with the exception that the pleading of a nonparty defense, as required by subsections (b) and (c), must occur not later than ninety (90) days after the filing of the claim with the insurance commissioner. However, this time limitation may be enlarged or shortened by a court having jurisdiction over the claim in such matter as will give:

- (1) the qualified health care provider reasonable opportunity to discovery [sic] the existence of a nonparty defense; and
- (2) the claimant reasonable opportunity to assert a claim against the nonparty before the expiration of the period of limitation application to the claim.

As added by P.L.174-1984, SEC.5.

34-4-33-11 Actions against defendants who are qualified health care providers and who are not qualified health care providers; delay; joinder

Sec. 11. When an action based on fault is brought by the claimant against one (1) or more defendants who are qualified health care providers under IC 16-9.5, and, also is brought by suit against one (1) or more defendants who are not qualified health care providers, upon application of the claimant, the trial court shall grant reasonable delays in the action brought against those defendants who are not qualified health care providers until the medical review panel procedure can be completed as to the qualified health care providers. When an action is permitted to be filed against the qualified health care providers, the trial court shall permit a joinder of the qualified health care providers as additional defendants in the action on file against the nonhealth care providers. *As added by P.L.174-1984, SEC.6.*

34-4-33-12 Liens or claims to diminish in same proportion as claimant's recovery is diminished

Sec. 12. If a subrogation claim or other lien or claim, other than a lien under IC 22-3-2-13 or IC 22-3-7-36, that arose out of the payment of medical expenses or other benefits exists in respect to a claim for personal injuries or death and the claimant's recovery is diminished:

- (1) by comparative fault; or
- (2) by reason of the uncollectibility of the full value of the claim for personal injuries or death resulting from limited liability insurance or from any other cause;

the lien or claim shall be diminished in the same proportion as the claimant's recovery is diminished. *As added by P.L.174-1984, SEC.7.*

34-4-33-13 Application

Sec. 13. This chapter does not apply in any manner to strict liability actions under IC 33-1-1.5 or to breach of warranty actions. *As added by P.L.174-1984, SEC.8.*



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By
Victor E. Schwartz*

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