

Nonparty Tortfeasors in Indiana: The Early Cases

LEONARD E. EILBACHER*

I. INTRODUCTION

The fairness of any system of comparative fault, as the beauty of a rose, is in the eye of the beholder. There is no objective standard by which to judge the fairness of a given system of comparative fault. The standard necessarily is subjective, because it includes a balancing of several objectives. In order to conclude whether a given system is substantially fair or, on the other hand, unreasonably harsh, one must first define and assign a priority to the goals to be accomplished in the implementation of a comparative fault scheme.

There are two competing primary objectives of comparative fault. One is the adherence to the cornerstone principal of comparative fault. That is, each person contributing to cause an injury must bear the burden of reparation in exact proportion to his share of the total fault. The other primary objective is the maximum of full compensation to the injured plaintiff.¹ To give priority to one goal is to diminish the other.

*Partner with the firm of Hunt, Suedhoff, Borrer & Eilbacher—Fort Wayne, Indiana. B.S., Indiana University, 1962; J.D. Indiana University, 1965.

¹Other objectives, of nearly equal importance, are simplicity of application, or "workability," encouragement of settlements and predictability of results at trial. The Indiana system of comparative fault seems to have survived the early reported decisions without reported criticism with respect to each lesser objective. The importance of the early cases construing the Indiana Act was recognized by one eminent commentator: "The litigation which will unfold in the near future over the Act will be the best indicator of its workability, and of the changes that can be made to improve the Act." Woods, *Comparative Fault and Product Liability in Indiana*, 17 IND. L. REV. 999, 1028 (1984).

The opinions which have been reported have not presented particularly difficult issues. The interpretations of the Act have been simple and straightforward, with the single exception in *Hill v. Metropolitan Trucking, Inc.*, 659 F. Supp. 430 (N.D. Ind. 1987). This apparent lapse in careful analysis, however, seems to be *dictum*. See *infra* text accompanying note 21. The courts have resisted the inclination to twist the meaning or application of the Act in order to achieve an illogical or unintended result. Notions of harsh or unfair results, however, were bothersome to at least one court:

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 modify some of the Act's potential harshness. *Huber v. Henley*, 656 F. Supp. 508, 512 (S.D. Ind. 1987) (emphasis added). It is apparent that the harshness which the *Huber* court had in mind was the prospective apportionment at trial of some percentage of fault attributed to a nonparty tortfeasor against whom no recovery could be had by plaintiff because of the expiration of the time within which such claim could be perfected. See *infra* text accompanying note 29.

The evidence of such competition between the primary objectives is implicit in the placement of the financial burden attributable to certain nonparty tortfeasors.²

Perhaps the most vivid and commonly encountered example of the relationship between the competing objectives lies in the method employed by a given system to deal with the burden created by the insolvent tortfeasor. If preeminence is given to the objective of insuring full compensation to the injured plaintiff, the burden of the insolvent tortfeasor's share of liability must be borne by the remaining defendants, likely through the doctrine of joint and several liability. Such was the incidence of the burden of insolvency under the traditional tort system, which included the doctrine of joint and several liability. The plaintiff made no sacrifice of recovery by omitting insolvent tortfeasors from the

²The Indiana Comparative Fault Act, IND. CODE §§ 34-4-33-1 to -14 (Supp. 1987), places this burden largely on the plaintiff, thereby assigning a priority to the principle of loss distribution according to fault at the sacrifice of full satisfaction of plaintiff's damages:

First, 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. 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. at 511. Such placement is the result of the consideration of the fault of nonparty tortfeasors in the apportionment scheme, coupled with the abolition of the doctrine of joint and several liability. *Id.* at 510.

The comparative negligence common law of Kansas likely influenced the drafters of the Indiana Act. H. WOODS, COMPARATIVE FAULT 585 app. (2d. ed. 1987). The Supreme Court of Kansas, in a benchmark comparative fault case, accepted the "harsh result" as a part of its system:

The ill fortune of being injured by an immune or judgment-proof person now falls upon plaintiffs rather than upon the other defendants, as was the practice in this state prior to the enactment of [the comparative negligence statute]. The risk of such ill fortune is the price plaintiffs must pay for being relieved of the burden formerly placed on them by the complete bar to recovery based upon contributory negligence.

Miles v. West, 224 Kan. 284, 580 P.2d 876 (1978). The provision of the plan allowing nonparties to be included in the apportionment scheme was judicially adopted in Kansas, although the Kansas statute, since 1976, has provided that "on motion of *any* party, . . . any other person whose causal negligence is claimed to have contributed to such death, personal injury or property damage shall be joined as an additional party to the action." KAN. STAT. ANN. § 60-258a(c) (1976) (emphasis added); *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978).

suit, or by levying his judgment on the solvent judgment debtors.³ While such tactics tended to maximize full recovery to plaintiff, the burden of reparation was distributed without regard to relative fault.⁴

In contrast, in a system of comparative fault which gives preeminence to the objective of contribution in proportion to fault, the doctrine of joint and several liability is abolished. Therefore, the plaintiff bears the burden of the insolvent defendant. Indiana has adopted such a system. One must bear in mind, however, that in the comparative fault model, the plaintiff may also be a tortfeasor. In judging the fairness of comparative fault in Indiana, there is no inherent reason to favor such a plaintiff.⁵

³Similarly, plaintiff was permitted under the former practice to enter into loan receipt agreements (a variation of the so-called "Mary Carter" agreements) with certain cooperative tortfeasors, both before and during suit, thus hastening his partial recovery of damages and bringing extraordinary leverage to bear on other recalcitrant tortfeasors. Eilbacher, *Comparative Fault and the Nonparty Tortfeasor*, 17 IND. L. REV. 903, 910 (1984).

The use of such agreements can be insidious under comparative fault as it was under the former practice. See Note, *Mary Carter in Arkansas: Settlements, Secret Agreements and Some Serious Problems*, 36 ARK. L. REV. 576 (1983). The use of loan receipt agreements is favored under Indiana law, provided the existence of the agreement is disclosed to the other parties and is not so collusive as to undermine the adversarial nature of the trial where the lender remains a party. *N. Ind. Pub. Serv. Co. v. Otis*, 145 Ind. App. 159, 250 N.E.2d 378 (1970). See Annotation, *Validity and Effect of Agreement with One Cotortfeasor Setting His Maximum Liability and Providing for Reduction or Extinguishment Thereof Relative to Recovery Against Nonagreeing Cotortfeasor*, 65 A.L.R.3D 602 (1975).

⁴Allocation of financial burden according to fault is not necessarily inconsistent with the doctrine of joint and several liability.

Taking the view that the effect of a rule of joint and several liability is unfair and inconsistent with the principle of liability in proportion to fault, several jurisdictions, Indiana now included, have abolished or restricted joint and several liability. Most states, however, retain the doctrine and alleviate the perceived unfairness by providing for contribution among joint tortfeasors—either on a pro rata basis or on the basis of relative fault of the parties. The Uniform Act provides for joint and several liability and gives defendants a right of contribution in proportion to a degrees of fault.

Smith & Wade, *Fairness: A Comparative Analysis of the Indiana and Uniform Comparative Fault Acts*, 17 IND. L. REV. 969, 973-74 (1984). The authors strongly argue the merits of "proportional allocation of the fault of absent tortfeasors and insolvent parties among all parties to the action." *Id.* at 997. However, the legislature clearly rejected this concept in the drafting of the Indiana Act. See IND. CODE § 34-4-33-5 (Supp. 1987).

⁵The Indiana Act does not use the term "tortfeasor" to describe either plaintiffs, defendants, or nonparties, each of whom may be guilty of fault in a given case. It is intellectually dangerous to associate wrongdoing only with the defendant and nonparties.

Under such a system [of comparative negligence] it no longer appears proper to label the defendant as a "tortfeasor," with the stigma and various undesirable connotations attached to the word, when in fact the plaintiff may be the more

Moreover, under Indiana's modified system of comparative fault, not only may a successful plaintiff be a tortfeasor, his share of the causal fault may be *greater* than that of a defendant from whom the plaintiff recovers.⁶

For example, assume the percentage of fault of the plaintiff to be 40%, and the percentage of fault of each of three defendants to be 20%. The plaintiff is entitled, under Indiana law, to recover 20% of his total damages from each defendant. While it seems eminently unfair to permit a plaintiff tortfeasor to recover from a defendant tortfeasor who is only half as much at fault as the plaintiff, such result is precisely consistent with the principle that each tortfeasor must bear the financial burden of an injury in exact proportion to his share of the total fault. Indeed, the plaintiff has borne 40% of the burden of his own injury. Although such an allocation of the burden is contrary to the traditional tort system's maxim that any contributory negligence on the part of the plaintiff was a complete bar to his recovery,⁷ the allocation is not unfair to any one participant.

culpable party in terms of contributory fault.

Goldenberg & Nicholas, *Comparative Liability Among Joint Tortfeasors: The Aftermath of Li v. Yellow Cab Co.*, 8 U. WEST L.A. L. REV. 23, 29 (1976).

⁶Indiana has what is commonly known as a "51%" system. See generally Wilkins, *The Comparative Fault Act at First (Lingering) Glance*, 17 IND. L. REV. 687 (1984). One commentator lists Indiana among the majority of states which have adopted a New Hampshire plan, which signifies a state where a plaintiff may recover so long as the percentage of fault attributable to him is not greater than that of *all* defendants. H. WOODS, *supra* note 2, at 28-29.

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. IND. CODE § 34-4-33-4(a) (Supp. 1987). In a few states which have adopted "51%" systems, such as Wisconsin, the contributory fault of the plaintiff is compared to the fault of *each* defendant, and recovery is permitted only if the plaintiff's fault is not greater than the fault of the person against whom recovery is sought. See WIS. STAT. ANN. § 895.045 (West 1985). For a discussion of the practical significance of such a provision, see C.R. HEFT & C.J. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* § 1.40 (1978 Rev.) [hereinafter HEFT & HEFT].

The comparison of the plaintiff's fault with the aggregate fault of *all* tortfeasors, including nonparties, caused one commentator to describe the Indiana plan as "among those most favorable to claimants in the aspect of when recovery is allowable." Bayliff, *Drafting and Legislative History of the Comparative Fault Act*, 17 IND. L. REV. 863, 866 (1984).

⁷It may be supposed at first glance that the provision of the Indiana Act which bars plaintiff's recovery if his share of the assigned fault is greater than 50% was a gesture toward the traditional tort sense of accountability. Such motivation is denied by one commentator who was a key participant in drafting the proposed act and shepherding it through the legislature. Bayliff reports that the "greater than" bar was, in fact, a response to the concern of the insurance lobby with the prospect of plaintiffs and defendants

By abolishing the doctrine of joint and several liability and including a provision for allocation of fault to nonparty tortfeasors,⁸ the Indiana legislature has unequivocally assigned the highest priority to the objective of allocating reparation according to fault.⁹ In the early cases, the courts have recognized such priority, and have demonstrated unwavering fealty to that objective.¹⁰

The Indiana Act permits the fault of all liable parties to be considered in the apportionment scheme, whether or not they are parties to the suit.¹¹ Consequently, all but one of the early cases have in some fashion dealt with the treatment of the conduct of the nonparty claimed to have been guilty of some causal fault for the plaintiff's injury.¹² These cases have adhered to the principle that each person contributing to cause an injury must bear the burden of reparation, therefore, in exact proportion

both being able to recover from each other in the same action. *Id.* at 863.

Such an explanation prompts the question of why the threshold for a complete bar to recovery was not set at 50% of the total fault. The existing provision still permits a recovery by both plaintiff and defendant, against each other, when the fault of each is exactly 50%. This single possibility for reciprocal recovery would have been eliminated had the statutory language barred the plaintiff from recovery if his contributory fault were *equal to or greater than* the fault of the other tortfeasors.

⁸IND. CODE § 34-4-33-5 (Supp. 1987).

⁹See *supra* text accompanying note 2. The Indiana Act deviates from such priority as evidenced by its treatment of the immune tortfeasor and those whose liability is limited by the exclusive remedy provision of the Workmen's Compensation Act. See Discussion of immune tortfeasors, Section II *infra*. The Act also deviates somewhat in its requirement that a legal nonparty to whom fault is allocated must be identified by name. IND. CODE § 34-4-33-6 (Supp. 1987). See generally Eilbacher, *supra* note 3, at 920.

¹⁰See *infra* notes and accompanying text.

¹¹The Indiana Act requires that the jury be instructed *seriatim* as to the apportionment of fault and the calculation of the verdict against each defendant and liable nonparty. IND. CODE § 34-4-33-5 (Supp. 1987). Indiana is the first state to provide by statute for the inclusion of fault of nonparties in the apportionment of fault by the trier of fact. See generally HEFT & HEFT, *supra* note 6, ch. 3.

¹²As of this writing five reported decisions have construed the act, which became applicable to civil action accruing on or after January 1, 1985. Act of March 5, 1984, Pub. L. No. 174-1984, § 9, 1984 Ind. Acts 1468, 1473. They are, in chronological order, *Walters v. Dean*, 497 N.E.2d 247 (Ind. Ct. App. 1986); *State v. Schuetter*, 503 N.E.2d 418 (Ind. Ct. App. 1987); *Huber v. Henley*, 656 F. Supp. 508 (S.D. Ind. 1987); *Hill v. Metropolitan Trucking, Inc.*, 659 F. Supp. 430 (N.D. Ind. 1987), and *Persinger v. Lucas*, 512 N.E.2d 865 (Ind. Ct. App. 1987). Of these, only the *Persinger* case did not involve the construction of the nonparty provision of the Act. It dealt with the mitigation of damages defense. See *supra* text accompanying note 39. At the time this Article was going to print, two additional decisions construing the Indiana Comparative Fault Act were reported: *Huber v. Henley*, 669 F. Supp. 1474 (S.D. Ind. 1987) (*Huber II*); and *Farmers & Merchants State Bank v. Norfolk & W. Ry. Co.*, 673 F. Supp. 946 (N.D. Ind. 1987). Because these cases are outside the survey period, they have not been incorporated in the discussion; however, the cases have been footnoted where relevant.

to his share of the total fault. The courts have applied the letter of the Act, ever mindful that the principle of proportional liability reflects the intent of the legislature, and have left the cure for any injustices to the Indiana General Assembly.

II. THE IMMUNE TORTFEASORS

If one accepts the proposition that the goal of fairness is best served by adherence to the principle requiring contribution according to fault, then one of the more disquieting results under the Indiana system occurs in cases involving tortfeasors who have been statutorily exempted in the drafting of the act and by common law, i.e., the immune tortfeasor and the employer. The burden of fault of the insolvent tortfeasor has been placed squarely on the plaintiff through the abolition of joint and several liability coupled with the statutory retention of the prohibition of contribution among tortfeasors.¹³ With respect to immune tortfeasors, the act has perpetuated the shifting of the burden of their fault to other participants in the casualty by its requirement that a nonparty, for purposes of allocation of fault, must be "a person who is, or may be, liable" to the plaintiff.¹⁴ Because an immune tortfeasor cannot be liable to the plaintiff, the fault of such tortfeasor may not be considered by the trier of fact. Therefore, no damages may be assessed against such participant in the casualty.

There are three commonly encountered classes of tortfeasors who are immune or who are insulated from tort liability under Indiana's act:

1. Parents for claims by an unemancipated child;¹⁵

¹³In Indiana, there has never been a right of contribution or indemnity in favor of a negligent tortfeasor. *McClish v. Niagara Machine & Tool Works*, 266 F. Supp. 987 (S.D. Ind. 1967). This common law prohibition was incorporated into the Act as follows:

In an action under this chapter, there is no right of contribution among joint tortfeasors. However, this section does not affect any rights of indemnity.

IND. CODE § 34-4-33-7 (Supp. 1987). The statute preserves the right of indemnity of one who is constructively liable only, for the wrongful conduct of another. *Coca-Cola Bottling Co. v. Vendo Co.*, 455 N.E.2d 370 (Ind. Ct. App. 1983).

¹⁴IND. CODE § 34-4-33-2(a) (1984).

¹⁵It is firmly established in the Indiana common law that a parent is immune in tort actions brought by his or her child, but the immunity appears to be limited to torts committed before emancipation of the child. *Vaughn v. Vaughn*, 161 Ind. App. 497, 316 N.E.2d 455 (1974).

An earlier Indiana case reviewed the reason for the immunity:

From our knowledge of the social life of today, and the tendencies of the unrestrained youth of this generation, there appears to be much reason for the continuance of parental control during the child's minority, and that such control should not be embarrassed by conferring upon the child a right to civil redress against the parent In our opinion, much reason exists for maintaining the

2. Employers and co-employees, for bodily injury claims by employees;¹⁶

sound public policy, which, as stated, underlies the rule which denies such redress.

Smith v. Smith, 81 Ind. App. 566, 569-70, 142 N.E. 128, 129 (1924). Because the parent cannot be liable to the child, the parent cannot be a nonparty for purposes of allocation of fault in a suit by the child against others. However, in an action against others by a child who was emancipated at the time of the injury, any fault of the parent which caused the injury must be included in the apportionment scheme. Also, there is no immunity for the noncustodial parent in actions by the child. *Buffalo v. Buffalo*, 441 N.E.2d 711 (Ind. Ct. App. 1982).

In the converse relationship, there probably is no immunity of an unemancipated child in a tort action by a parent. *Young v. Wiley*, 183 Ind. 449, 107 N.E. 278 (1914); *McKern v. Beck*, 73 Ind. App. 91, 126 N.E. 641 (1920). Thus, in an action by a parent against others, the fault of a child who contributed to cause the injury should be included in the apportionment scheme. The most common accident scenario is where a parent is a passenger in an automobile being operated by the child and a collision occurs. If the collision was caused jointly by the fault of the child-driver and a second driver, the fault of the child would have to be considered in the parent's action for damages against the second driver.

The withering of the parent-child immunities was suggested by the 1984 General Assembly in its amendment to the statute dealing with liability to guest passengers which provided:

The owner, operator or person responsible for the operation of a motor vehicle is not liable for loss or damage arising from injuries to or the death of:

(1) His parent;

* * *

(3) His child or stepchild; resulting from the operation of the motor vehicle while the parent . . . child or stepchild . . . was being transported without payment therefor . . . unless the injuries or death are caused by the wanton or willful misconduct of the operator, owner, or person responsible for the operation of the motor vehicle.

IND. CODE § 9-3-3-1 (Supp. 1987). The effect of the guest statute on parent-child immunity and comparative fault was discussed in *Farmers & Merchants State Bank v. Norfolk & W. Ry. Co.*, 673 F. Supp. 946, (N.D. Ind. 1987) ("parent *may* be liable to a guest child who is injured when the parent driving the car willfully or wantonly causes such injury." (emphasis in original)).

The interplay between the apportionment scheme of comparative negligence and interspousal and intrafamily immunities of the common law was the critical issue in two leading Kansas cases. *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978), and *Miles v. West*, 224 Kan. 284, 580 P.2d 876 (1978). In *Miles*, the minor plaintiffs argued that the negligence of their father, as the operator of an automobile which collided with defendant's vehicle, could not be considered in the determination of comparative negligence. *Id.* at 287, 580 P.2d at 879. The Supreme Court of Kansas in rejecting this argument, stated: The goal of determining fault of all the parties responsible for causing or contributing to the collision or occurrence is to allow each party to be joined in action, even if he is immune or judgment-proof.

The foregoing effectively disposes of plaintiffs' arguments on interspousal tort immunity and intrafamily immunity as they apply to this case. Recognizing

3. Governmental entities and their employees, for claims arising out of certain acts, including discretionary acts, and conditions.¹⁷

Because these classes of immune tortfeasors cannot be considered in the allocation of fault, all the nonimmune joint tortfeasors, including a plaintiff tortfeasor, share the burden of the fault of an immune tortfeasor in proportion to their respective percentages of fault.¹⁸ Such allocation emanates from the Indiana provision that the fault of all tortfeasors, whether they are parties or nonparties, is to be considered in the allocation of fault by the trier of fact, except that the fault of immune tortfeasors may not be considered.¹⁹

One of the first reported opinions addressed the effect of the involvement of immune tortfeasors on the apportionment of fault. In the consolidated cases of *Hill v. Metropolitan Trucking, Inc.* and *Clemons v. Metropolitan Trucking, Inc.*,²⁰ the court ruled that co-employees of the plaintiffs could not be pleaded as nonparty tortfeasors, and could not be the subject of an apportionment of fault.²¹ The defendants, whose truck struck two state highway department workers, attempted to assert the fault of each worker in the suit by the other. In both actions the defendants attempted to assert the negligence of a third worker and a state trooper who were at the scene of the accident. The court easily

the existence of interspousal tort immunity [citation omitted], and assuming, but not admitting, the existence of intrafamily immunity in this state, plaintiffs' arguments have no merit.

Id. at 288, 580 P.2d at 879-80. The Court affirmed the diminution of the jury awards to the minor children by 40%, the percentage of fault which the jury assigned to their father. Remarkably, the Kansas court resisted the temptation to abolish intrafamily immunity, if indeed such immunity existed, and simply ignored such immunity in the comparative fault allocation.

¹⁶The Indiana Workmen's Compensation Act bars civil actions by an employee against his employer and against co-employees. IND. CODE § 22-3-2-6 and § 22-3-2-13 (1982). Also, the employer is expressly excluded as a nonparty by the Comparative Fault Act. IND. CODE § 34-4-33-2(a) (Supp. 1987).

¹⁷Indiana has adopted a comprehensive Tort Claims Act barring claims against governmental entities and their employees with respect to the performance of discretionary functions and other specified acts and conditions. IND. CODE § 34-4-16.5-3 (1982). Sovereign immunity generally does not exist with respect to the ministerial acts of the government and its employees. *Department of Mental Health v. Allen*, 427 N.E.2d 2 (Ind. Ct. App. 1981). See Discussion of the State as tortfeasor, Section III *infra*.

¹⁸For example, in the hypothetical case in which the plaintiff is 20% at fault, the nongovernmental tortfeasor is 30% at fault, and the immune governmental tortfeasor 50% at fault, the plaintiff's damages theoretically would be reduced by 40%, and the nongovernmental tortfeasor would be liable for 60% of such damages.

¹⁹See *supra* note 12 and accompanying text.

²⁰659 F. Supp. 430 (N.D. Ind. 1987).

²¹*Id.* at 435.

disposed of such purported nonparty defenses, reasoning that none of the nonparty employees, including the state trooper, were within the statutory definition of nonparty because none were or could be liable to the claimants.²² The court looked to the Indiana Workmen's Compensation Act, which provides the exclusive remedy for a claim for injury or death against both an employer and a co-employee. Since there was no civil remedy available to the plaintiffs against the other state highway employees, or against the co-employee state trooper, they were immune from civil liability. Therefore, they could not be "liable to the claimant" and did not qualify as nonparties within the contemplation of the Comparative Fault Act.²³

The opinion of the District Court in *Hill*, with respect to immunity from civil suit by reason of the exclusive remedy provision of the Workmen's Compensation Act, is consistent with both the letter and the rationale of the Act.²⁴ That is not to say that it is consistent with the spirit of comparative fault, for such result shifts the burden of the fault of the alleged immune tortfeasors to either the plaintiff, or the defendant, or both, depending upon their culpability relative to each other.

For example, if the plaintiffs' decedents were entirely free from fault, the non-immune defendant was guilty of 10% of the total fault, and the immune tortfeasors were collectively guilty of 90% of the total fault, the defendant would be liable for 100% of plaintiffs' damages. Such result would be a gross deviation from the objective of allocation of financial burden in proportion to fault, but would satisfy the objective of providing for full compensation to the plaintiff. On the other hand, if the plaintiffs' decedents were found to be 20% at fault, and the non-immune defendants were also 20% at fault, then they would share equally the burden caused by the 60% fault of the immune tortfeasors. Although

²²*Id.* at 434-35.

²³*Id.*

²⁴The court in *Hill* perfunctorily contemplated a second reason for the exclusion of the state employees from the apportionment scheme. It observed that the governmental employees were within the protection of the 180-day notice provision of the Tort Claims Act, and stated:

The record does not suggest that the [plaintiffs] gave such notice; accordingly, the record does not reflect that the would-be nonparties are or may ever be liable to the plaintiffs.

659 F. Supp. at 435. The recitation infers the reasoning that if a plaintiff cannot perfect a claim against an otherwise qualified nonparty by reason of having allowed a limitations period to expire, such potential defendant or nonparty cannot be considered in the apportionment of fault by the trier of fact. The conclusion is in direct conflict with the better-reasoned opinion of the Southern District in *Huber v. Henley*. See *infra* text accompanying note 31.

this result seems to be more just, it remains violative of the spirit of comparative fault.

Whether the deprivation of the statutory nonparty defenses²⁵ is justifiable involves a judgment as to the social utility of such immunities, and the propriety of universal adherence to the basic principle of fault allocation. As evidenced by the Tort Claims Act and the Workmen's Compensation Act, the Indiana General Assembly presumably has concluded that sound public policy dictates the retention of the immunities of governmental entities and their employees for certain acts, and the immunity of the employer and co-employees from civil actions. Neither the legislature nor the courts have directly addressed the retention of parental immunity in the context of comparative fault. Parental immunity remains in the common law of Indiana, but the critical issue is whether it should be engrafted onto the comparative fault system. If indeed preeminence is to be given to the basic principle of fault allocation, then the fault of familial nonparties must be included in the fault apportionment system.²⁶

It must be stressed that the allocation of fault to immune tortfeasors would not require the abolition of such immunities. The burden of such immunities would merely shift to the plaintiff. Although this shift in the burden obviously would not accomplish the goal of full compensation to the injured plaintiff, it would comport with the principle of fault allocation because the immune parties would be considered by the trier of fact. On the other hand, the exclusion of immune tortfeasors from the apportionment scheme shifts the burden of their fault to all the other tortfeasors, including the plaintiff tortfeasors, in the same ratio of their relative fault to each other. Under this scenario, neither of the primary objectives of comparative fault is realized.

III. TREATMENT OF THE STATE AS A TORTFEASOR

The state, its political subdivisions, and their employees are expressly exempted from the provisions of the Indiana Comparative Fault Act, but remain liable for their nonimmune torts.²⁷ The traditional defenses

²⁵IND. CODE § 34-4-33-10 (Supp. 1987).

²⁶See *supra* note 13.

²⁷Section 8 of the Act provides, "This chapter does not apply in any manner to tort claims against governmental entities or public employees under IC § 34-4-16.5." IND. CODE § 34-4-33-8 (Supp. 1983).

The reference in the statute is to the Indiana Tort Claims Act, which, in its salient provisions, defines the immunities for discretionary acts and certain other acts and conditions, and recodifies the requirement for filing a notice of tort claim within 180 days of the alleged tort. IND. CODE § 34-4-16.5-7 (1982). Such notice is a condition precedent to the right of recovery against the political subdivision and its employees. In effect, it provides a 180-day limitation period on claims against governmental tortfeasors. See *infra* note 36 and accompanying text.

of contributory negligence and incurred risk remain available and constitute a complete bar to claims both by and against governmental tortfeasors.²⁸

The immediate concern of the practicing bar upon enactment of the comparative fault system was whether the fault of governmental tortfeasors could be pleaded by a nongovernmental defendant in order to reduce that defendant's apportioned share of the plaintiff's damages, even though governmental tortfeasors are expressly excluded from the comparative fault scheme. This concern grew mostly out of the recognition that automobile injury cases have comprised a substantial share of tort litigation, and that substandard highway design and maintenance are often alleged to be causal factors in automobile accidents.

The plaintiffs' bar wanted to read the provision excluding governmental tortfeasors to prohibit a defendant from pleading the fault of the government as a nonparty tortfeasor, because to permit such consideration by the trier of fact would require the cumbersome inclusion by the plaintiff of a "contributory defense" defendant and a "comparative defense" defendant in the same action, and perhaps even in the same trial. Moreover, highway design and maintenance cases against the government are usually more complicated to prove, often requiring special expert testimony and evidence, in contrast to the relatively simple automobile negligence case against a defendant motorist. Furthermore, the inclusion of the state in the apportionment system would deprive the plaintiff of a substantial part of his recovery if he did not act within the 180-day notice period set out in the Indiana Tort Claims Act.²⁹ Finally, such inclusion would permit the nongovernmental defendant to reduce his judgment exposure by the percentage of fault attributed to both the governmental tortfeasor and the plaintiff; yet, any percentage of fault on the part of the plaintiff would completely bar a recovery by plaintiff of those damages which are attributable to the fault of the government. In light of these considerations, the plaintiffs' bar would have preferred to ignore the governmental tortfeasors in the comparative fault case, especially in the apportionment of fault by the trier of fact. Indeed, each of these fears was justified, since the application of the act would be made exceedingly more complicated by the inclusion of the governmental tortfeasor in a case in which there were private defendants.

Of course, the defense bar and insurance industry argued that the exclusionary provision should be interpreted consistently with the basic principle of comparative fault. That is, the fault of the government

²⁸See Wilkins, *supra* note 6, at 729.

²⁹See *supra* note 22.

should indeed be apportioned along with all the other tortfeasors. To ignore the fault of the government, whether or not it could be a defendant, would cause the burden of the governmental tortfeasor's fault to be borne, in whole or in part, by each liable defendant;³⁰ yet, the plaintiff could recover damages against the governmental tortfeasors, perhaps in a separate action. Such result would have been an obvious violation of the fundamental principle of apportionment of liability according to fault. The defense bar was not concerned that the inclusion of the government's conduct in the apportionment scheme, while measuring its liability for damages by traditional tort rules, would present very special problems for the plaintiff. While the defendants' argument for inclusion of the governmental defendant for fault apportionment purposes would serve the basic principle of comparative fault, it would deprive a plaintiff tortfeasor of that percentage of his damages attributable to the fault of the governmental tortfeasors.³¹

While the respective arguments of the plaintiffs' bar and the defense bar came into focus early, the state's initial perception of the exclusionary provision was not so clear. The State of Indiana simply argued in the legislature that it would be subjected to unreasonably burdensome costs were it to be included in the comparative fault system, and managed to have itself written out of the act.³²

The state's position came into focus in the second reported opinion under the Act, *State v. Schuetter*,³³ a motor vehicle collision/highway

³⁰If the government's fault were ignored in the apportionment scheme, the burden of the government's fault would also be shared by a plaintiff tortfeasor in the same ratio that plaintiff's fault bore to the total fault of all other liable tortfeasors. Theoretically, assuming 50% of the fault were attributable to the state, but were ignored in the apportionment scheme, a plaintiff 20% at fault would bear 20% of the government's fault and a defendant 30% at fault would bear 30%. Plaintiff's actual recovery on a finding of \$100,000 total damages would be \$60,000.

³¹Assume that the trier of fact were to apportion 10% of the total fault to the plaintiff, 40% to the private defendant, and 50% to the governmental defendant. The plaintiff would recover only 40% of his total damages, since the finding of contributory fault on the part of the plaintiff would bar recovery of any damages against the governmental defendant.

³²The proposed act was subjected to many compromises during the legislative process. The opposition by the State of Indiana was voiced after the bill had already passed the Senate, and had cleared the second-reading amendment stage on the floor of the House. At that point, the Attorney General informed the House Speaker that "passage of the bill would cost the State of Indiana millions of dollars each year." On the strength of that unsupported assertion, and as a matter of political expediency, governmental entities were legislatively excluded from its coverage. Bayliff, *supra* note 6, at 865.

³³503 N.E.2d 418 (Ind. Ct. App. 1987). The claim of plaintiff arose from property damage to plaintiff's truck, sustained in a two-vehicle collision with defendant's automobile on an interstate highway. The defendant asserted by answer to the complaint that the

design case. The state argued that it could not even be sued in the same legal action with the defendant motorists because the plaintiff's right of recovery against those defendants was governed by comparative fault, which plan was not to apply "in any manner" to the State.³⁴ The court of appeals swept the state's argument aside and held that there is no prohibition against inclusion of both a private defendant and a governmental defendant in the same action. The court recognized that the action was one against joint tortfeasors, differing only in the manner in which their alleged negligence is to be treated at trial.³⁵ The fears of the plaintiffs' bar thus became a reality. The impact upon the government is not so clear.

The second issue in *Schuetter* was whether the granting of a separate trial of the claim against the governmental defendant was permissible. The court of appeals held that the granting of separate trials is within the discretion of the trial court and that since there was no showing of an abuse of that discretion, the separate trial ruling should stand.³⁶

The trial posture of *Schuetter* following the appeal vividly illustrates the unworkability of excluding governmental tortfeasors from the comparative fault system and may even serve to increase the number of suits against governmental tortfeasors. If separately trying claims against governmental tortfeasors develops into a trend, it is possible that the parties within the comparative fault system will benefit from the exclusion of governmental tortfeasors. Given the virtual impossibility of intelligibly instructing the jury when both governmental and nongovernmental defendants are joined at trial, it is likely that courts will look favorably upon separate trials. As a result, the ground is fertile for a plaintiff who is free from fault to recover *all* his damages from a governmental defendant.³⁷

A likely scenario under which recovery of all damages against the government would occur is where a faultless plaintiff, with the cooperation of the nongovernmental defendant, causes the suit against the governmental defendant to be tried first. If the plaintiff is successful

collision was caused, in whole or in part, by the state's failure to keep the roadway clear of sand and debris, and by its failure to provide adequate access onto the state highway. Thereupon, plaintiff amended the complaint to include the state as a defendant. The state moved to dismiss and, in the alternative, for a separate trial. Upon denial of its motion to dismiss, the State perfected an interlocutory appeal. *Id.* at 419.

³⁴*Id.* at 420. See IND. CODE § 34-4-33-8 (Supp. 1987).

³⁵503 N.E.2d at 420.

³⁶*Id.* at 421.

³⁷The political subdivision and its employees enjoy a liability cap of \$300,000 for injury or death of one person in any occurrence, which would frustrate collection of all damages from the governmental tortfeasor in cases of catastrophic loss. IND. CODE § 34-4-16.5-4 (1982).

in that suit, he can then collect his entire judgment against the government through the application of the doctrine of joint and several liability. A variation of the scenario occurs where the nongovernmental defendant, a joint tortfeasor with the government, lends an agreed sum to the plaintiff in return for a covenant not to sue. Under such an agreement, plaintiff would be obligated to repay the loan only upon collection of a settlement or judgment against the government.³⁸

In light of the opportunity for such abusive tactics against the state, it is curious that it was the state which moved for the separate trial in *Schuetter*.³⁹ The only logical justification is that the state believed that the plaintiff would not proceed to trial due to the state's minimal exposure to liability.

It is apparent that the lofty goals of the comparative fault system are frustrated where a governmental entity is a joint tortfeasor with a nongovernmental defendant. The exclusionary clause in the Indiana Act⁴⁰ provides no assurance of either apportionment of the liability in proportion to fault, or of full compensation to the plaintiff for his injuries. The system is unnecessarily complicated, and multiplicity of trials is encouraged. Moreover, since one must be skeptical of the validity of excluding the state from the comparative fault system on the ground that it would be unreasonably costly, there is scant justification for the exclusion. Further, the consensus of the trial bar seems to be that the abrogation of joint and several liability by the comparative fault system is more valuable to a defendant than such traditional tort defenses which

³⁸For a discussion of the use of loan receipt agreements, see note 3 *supra*.

One might be tempted to reason that the state's motion for a separate trial in *Schuetter* was motivated by the presence of a meritorious contributory negligence defense against the plaintiff, but considerations of litigation costs aside, joint trial would enhance the contributory negligence defense. Since the jury is required to specially find the percentage of negligence of the plaintiff with respect to the claim against the non-governmental defendant, the advantage of a finding of only a small percentage of the total fault on the part of the plaintiff would establish the contributory negligence defense and result in a verdict in favor of the government.

In contrast, in the separate trial scenario, where the claim against the non-governmental defendant happens to be tried first, the government should not be able to take advantage of an allocation by the jury in the first trial of some percentage of comparative fault to the plaintiff. Obviously, the element of mutuality of estoppel is lacking between the two trials. Otherwise, the government would not be estopped from resisting the proof of its negligence at trial, even though the jury in the first trial may have assigned some fault to the nonparty government.

Mutuality of estoppel is an essential element of the "claim preclusion" branch of the doctrine of *res judicata*. *State v. Speidel*, 181 Ind. App. 448, 392 N.E.2d 1172 (1979).

³⁹503 N.E.2d at 419.

⁴⁰See *supra* note 22.

have been retained by the governmental defendants.⁴¹ The state would be well advised to make the same trade.

The ills visited upon the tort system by excluding governmental tortfeasors from the comparative fault system are numerous. Coupled with the lack of any proof to merit such exclusion, it is not difficult to conclude that the Act should be amended to include governmental tortfeasors in Indiana's comparative fault system.

IV. THE INADVERTENTLY OMITTED TORTFEASORS

The failure in a comparative fault suit to include a joint tortfeasor who is liable to the plaintiff is one of the most dreaded omissions of the plaintiff's lawyer. Under the traditional tort system, the availability of joint and several liability rendered such omission inconsequential so long as one joint tortfeasor was successfully sued. Under the unique provision of the Indiana Comparative Fault Act, however, such omission causes a diminution in the plaintiff's recovery in precisely that percentage of plaintiff's total damages which is attributed to the fault of the omitted nonparty tortfeasor.⁴² Once the period of limitations for suing that tortfeasor has expired, that share of plaintiff's damages is forever lost.

This was precisely the outcome in the recent case of *Huber v. Henley*.⁴³ In *Huber*, one defendant pleaded that the fault of the co-defendants and the fault of the nonparty Indiana Department of Highways caused the injuries to the plaintiff. Unfortunately for the plaintiff, the defendant asserted this defense in an amended answer filed after the expiration of the 180-day notice period to the state, a condition precedent to recovery on claims against the state imposed by the Indiana Tort Claims Act.⁴⁴ The primary issue presented in *Huber* was whether a defendant should be permitted to amend an answer in which he asserts for the first time the fault of a nonparty tortfeasor who is no longer amenable to suit.⁴⁵ The Southern District ruled that such amendment is permissible because the Act provides that, while a defendant must plead

⁴¹See Eilbacher, *supra* note 3, at 907.

⁴²IND. CODE § 34-4-33-5(a)(4) & (b)(4) (Supp. 1987).

⁴³656 F. Supp. 508 (S.D. Ind. 1987).

⁴⁴*Id.* at 509. See *supra* note 22. See also *Huber v. Henley*, 669 F. Supp. 1474, 1477-79 (S.D. Ind. 1987) (*Huber II*). In *Huber II*, the court contrasted a plaintiff who had failed to give notice to the state under the Indiana Tort Claims Act, thereby forfeiting his right to recovery with a plaintiff whose suit against the state was barred by a statute of repose. The court correctly noted that in the first instance the state could be a nonparty under the Comparative Fault Act; however, the state in the second instance could not be a nonparty because it was not "a person who is, or may be, liable" to the plaintiff. 669 F. Supp. at 1479.

⁴⁵656 F. Supp. at 510.

the statutory nonparty defense in the original answer if it is known, the defense may be pleaded by amended answer "with reasonable promptness,"⁴⁶ once the defendant has actual knowledge of the defense.⁴⁷

Ordinarily, the operative provision for the naming of a nonparty tortfeasor is the provision which recites that, if the defendant is served with summons more than 150 days prior to the expiration of the period of limitations, the nonparty defense must be pleaded not later than 45 days before such expiration.⁴⁸ Such scheme is calculated to give the plaintiff time to evaluate the claim against the alleged nonparty tortfeasor and to join such tortfeasor as a party defendant. However, such provision was not at issue in *Huber*, since the assertion by the amended answer was made more than 45 days before the expiration of the applicable two-year period of limitations, although after the expiration of the 180-day claim notice period.⁴⁹

The other significant issue in *Huber* is whether the comparative fault of the state could be asserted at all, since the state could no longer be "liable to the claimant," because of the expiration of the 180-day notice period.⁵⁰ The court had no difficulty in identifying the distinction between a tortfeasor who cannot be joined if the applicable limitation period had not expired and the tortfeasor who cannot be joined because of an immunity. Accordingly, the court held that the state, although immune from liability to the plaintiff, must be included in the apportionment scheme as a nonparty tortfeasor under the Comparative Fault Act.⁵¹ Interestingly, the court justified its conclusion by noting that the pro-

⁴⁶The act allows for the defense by amended answer:

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.

IND. CODE § 34-4-33-10(c) (Supp. 1987). The provision limits the pleading of the nonparty defense at a time close to the expiration of the period of limitations applicable to the claim against such nonparties, granting discretion to the trial court to alter the time limitations to achieve a fair result to both parties.

⁴⁷656 F. Supp. at 512. The court's decision to allow such an amendment was not difficult because the 180-day notice period had already expired at the time of filing the original answer. *Id.*

⁴⁸IND. CODE § 34-4-33-10(c) (Supp. 1987).

⁴⁹656 F. Supp. at 512 n.5.

⁵⁰*Id.* at 510-11. The plaintiff argued that the state was "immune" since it could no longer be sued, because the plaintiff had not given notice of the tort claim to the state within 180 days of the injury. As to the lack of common identity between an immune tortfeasor and a statutory nonparty, *see supra* note 20 and accompanying text. By definition, the terms are mutually exclusive. However, the state is not immune as to its ministerial acts of negligence in highway maintenance. IND. CODE § 34-4-16.5-3 (1982).

⁵¹656 F. Supp. at 511. *See supra* discussion of *Huber II*, note 44.

visions of the Act evidenced a legislative intent to favor the principle of strict apportionment of fault among all tortfeasors over the objective of fully compensating plaintiffs.⁵²

A contrary conclusion was reached by the Northern District in *Hill v. Metropolitan Trucking Inc.*,⁵³ which reasoned that, if an applicable limitation period has expired as to a tortfeasor who has not been sued, then such tortfeasor may not be included in the apportionment of fault by the trier of fact. As in *Huber*, the plaintiffs apparently had not given the required 180-day notice to the governmental tortfeasors. The *Hill* court observed that, since such tortfeasors could never again be liable to the plaintiffs because of such omission, none qualified as a nonparty who "is or may be liable to the claimants," and, therefore, must be ignored in the apportionment of fault.⁵⁴ The court failed to make the *Huber* court's distinction between a tortfeasor who is or may be liable at the time of the tortious conduct, but subsequently becomes free from liability because the plaintiff, either intentionally or inadvertently, permitted the limitation period to expire and a tortfeasor who can never be liable to the plaintiff because of a statutory or common law immunity.⁵⁵

The reasoning in *Hill* is faulty. The court ignored the mandate of the legislature that the primary objective of the Comparative Fault Act is to allocate fault among all tortfeasors in direct proportion to the fault of each. To ignore a tortfeasor in the apportionment process simply because the applicable period of limitations or notice has expired would permit the plaintiff to manipulate the apportionment process and allow an otherwise liable tortfeasor to escape the assignment of fault. Whether the omission of timely notice was intentional or inadvertent, the result would be to shift the burden of the absent tortfeasor's fault to the other parties to the suit, contrary to the objective of the Act. Indeed, if the plaintiff's failure to give timely notice or to bring suit within the limitation period was inadvertent, the exclusion of such tortfeasor from fault apportionment would shift the burden of plaintiff's error to the defendant. Traditional notions of fairness compel the rejection of this result.

In contrast, the ruling in *Huber* allowing a defendant to name a tortfeasor as a nonparty after the expiration of some limiting period is sound. This result was obviously anticipated by the legislature, not necessarily with respect to the 180-day tort notice provision, but in the interplay with any applicable period of limitations. The plaintiff can

⁵²*Id.* See also, *supra* note 2.

⁵³659 F. Supp. 431, 434-35.

⁵⁴*Id.* at 435.

⁵⁵Compare *Hill*, 659 F. Supp at 434-35 with *Huber*, 656 F. Supp. at 510-11.

protect against the inadvertent omission of tortfeasors by filing his suit more than 150 days before the limitation period expires. In such case defendant would be compelled to name all nonparty tortfeasors at least 45 days before expiration, thus giving plaintiff time to gather all liable tortfeasors into the legal action.⁵⁶

Unfortunately, such protection for the plaintiff against the inadvertent omission does not exist with respect to the 180-day notice provision of tort claims against governmental tortfeasors. The potential deprivation to plaintiff of a part of his damages attributable to the government's share of the total fault is an injustice. However, the injustice is not in the provisions of the Comparative Fault Act. The injustice springs from the unrealistic 180-day notice provision of the Tort Claims Act.⁵⁷ The remedy does not lie in modification of the comparative fault system, but by re-evaluating the necessity for the tort claim notice provision.⁵⁸ As any defense counsel who has been employed by an insurance company to defend a governmental tortfeasor must concede, there is no substantial justification for the retention of the tort claim notice provision. The state or the municipal corporation has no greater need for such advance notice than does any other corporate defendant. The provision is too often simply a shield against liability for meritorious claims of citizen plaintiffs who have no knowledge of the notice requirement, or have been unable to identify the liability of the government in so short a time period. The need to satisfy *both* primary objectives of comparative fault—fair allocation of financial responsibility among all tortfeasors and fully compensating the injured plaintiff justifies the legislative abandonment of the notice provision of the Tort Claims Act, if not the immunities provided by it.

V. AVOIDABLE CONSEQUENCES DEFENSE

The Indiana Act borrows liberally from the Uniform Comparative Fault Act.⁵⁹ The definition of "fault" is essentially taken from the Uniform Act, except that the concepts of strict liability, breach of

⁵⁶IND. CODE § 34-4-33-10(c) (Supp. 1987).

⁵⁷See *supra* note 22.

⁵⁸The Indiana courts have repeatedly held that the failure of a claimant to give notice of a tort claim against a political subdivision is a complete bar to suit, even in instances in which the governmental entity had had actual notice of the incident giving rise to the tort claim, and conducted its own investigation of the incident. *Geyer v. City of Logansport*, 267 Ind. 334, 370 N.E.2d 333 (1977); *City of Indianapolis v. Uland*, 212 Ind. 616, 10 N.E.2d 907 (1937); *Teague v. Boone*, 442 N.E.2d 1119 (Ind. Ct. App. 1982).

⁵⁹UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 39 (1979).

warranty, and the misuse defense are omitted to reflect their exclusion from the Indiana comparative fault scheme.⁶⁰

Among the array of acts and omissions which constitute "fault" is the "unreasonable failure to avoid an injury or to mitigate damages."⁶¹ The phrase suggests two distinct defenses. The failure to avoid an injury refers to pre-tort conduct, while the defense of failure to mitigate damages looks to post-tort conduct, formerly a distinction which provided for a cumbersome analysis.⁶² The latter was traditionally known as the avoidable consequences doctrine,⁶³ and was pleaded as an affirmative defense

⁶⁰The original version of the Indiana Act was more comprehensive. By the 1984 amendment, claims based upon the legal theories of strict liability and breach of warranty were expressly excluded from the Act. IND. CODE § 34-4-33-13 (Supp 1987). The act is rendered far more difficult in its application by such exclusion in the products liability trial which often is based upon those two theories, as well as a negligence theory. See, e.g., Davidson v. John Deere & Co., 644 F. Supp. 707 (N.D. Ind. 1986). The ability to instruct the jury intelligibly is questionable when those three theories are combined.

⁶¹The full definition of fault is as follows:

(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.

IND. CODE § 34-4-33-2 (Supp. 1987).

⁶²See State v. Ingram, 427 N.E.2d 444 (Ind. 1981), a case in which the availability of the "defense" of failure to wear seat belts is analyzed. The court seemed to struggle with whether the failure to wear restraints supported a defense of failure to mitigate damages, because such failure was a pre-tort act. *Id.* at 448. A pre-tort act or omission ordinarily gives rise to an affirmative defense, which, in the former practice, constituted a complete bar to recovery under the traditional defenses of contributory negligence or incurred risk. In contrast, a post-tort error would simply result in a reduction of damages to the plaintiff on the theory that avoidable damages are not proximately caused by the defendant's wrongdoing. The distinction is now meaningless, since both pre-tort and post-tort errors are combined in the definition of fault, the natural function of which is to reduce damages.

⁶³*Id.* at 447. The court stated:

The rule of avoidable consequences comes into play *after a legal wrong has occurred*, but while some damages may still be averted, and bars recovery for such damages.

Id. (emphasis in original) (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS, ch. 11, § 65 at 243 (4th ed. 1971).

The definition of the avoidable consequences doctrine, as established at Restatement (Second) of Torts § 918 (1971), was recognized:

Avoidable consequences. (1) Except as stated in Subsection (2), one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after commission of the tort.

It was concluded by the court that such doctrine was not applicable to the so-called seat belt defense, which arises out of a pre-tort omission. 427 N.E.2d at 447.

as a matter of avoidance under Trial Rule 8.⁶⁴

Since the defense of unreasonable failure to mitigate damages now appears simply as "fault," it fits quite neatly into the comparative fault procedure reducing those damages of a plaintiff which are attributable to his own acts and omissions, irrespective of whether such act or omission was pre-tort or post-tort. Such defense was addressed by the court of appeals in the recent case of *Persinger v. Lucas*.⁶⁵ The defendant in *Persinger* argued that the accrual of storage charges for a damaged automobile which had been rendered a total economic loss in a collision constituted an unreasonable failure to mitigate damages. The court agreed that a plaintiff has a duty to mitigate storage cost damages and that an unreasonable failure to mitigate constitutes fault under the Act, to be compared with other forms of fault contributing to the injury.⁶⁶ The *Persinger* case is not remarkably instructional in terms of explanation of the Indiana Act because the issue involving comparative fault was given to easy disposition.⁶⁷ However, the case reinforces the conclusion that the Indiana comparative fault scheme is simple in application because it deals more easily with doctrines which tended to be analytically elusive under the former practice.

VI. PLEADINGS AND SPECIAL FINDINGS

In *Walters v. Dean*,⁶⁸ the first reported decision after adoption of the Act, the issue on appeal was whether the trial court properly applied the provisions of the Comparative Fault Act. The trial court found that the plaintiff was 100% at fault for the damages to his own automobile although the defendant had not pleaded the fault of the plaintiff in his answer. The defendant did, however, file an affirmative defense asserting that the *sole* cause of the collision was the fault of a nonparty tortfeasor—the plaintiff's son.⁶⁹ In focusing on the quantum of proof to support

⁶⁴IND. R. TR. P. 8.

⁶⁵512 N.E.2d 865 (Ind. Ct. App. 1987).

⁶⁶*Id.* at 871.

⁶⁷The court of appeals, while finding that the plaintiff had a duty to mitigate storage cost damages for the demolished automobile, affirmed the finding of 0% comparative fault on the part of the plaintiff on the evidence that the plaintiff was financially unable to make other arrangements for the disposition of the automobile. The court correctly reasoned that the burden of proof of failure to mitigate was that of the defendant, and the defendant failed to show what plaintiff could have done to mitigate damages that would not have required the expenditure of unavailable funds. *Id.*

⁶⁸497 N.E.2d 247, 249 (Ind. Ct. App. 1986).

⁶⁹*Id.* at 249. The issue of the existence of a possible immunity of the son was not raised. See discussion of intrafamily immunities in Indiana *supra* note 13.

It is not necessary to plead that the *sole* cause of an injury is the fault of a person

the judgment, the court did not comment on the apparent pleading discrepancy and no such error was assigned by the plaintiff. In affirming the judgment the court of appeals held, seemingly reluctantly, that the trial court could have found under the evidence that the plaintiff was negligent and that plaintiff's son and the defendant were entirely free from fault.⁷⁰

There are two important procedural considerations raised in *Walters*. First, it may be fairly inferred from the opinion that it is unnecessary for the defendant to plead in his answer the comparative fault of the plaintiff in order to put the plaintiff's fault in issue.⁷¹ Such is not the case, however, with respect to the comparative fault of a nonparty tortfeasor.⁷² The court in *Walters* observed, "it is our opinion that allocation of nonparty fault is to be made only in those cases where the nonparty defense is specially pleaded by a named defendant."⁷³

The court of appeals did not make a similar observation with respect to the assertion of the fault of the plaintiff as an affirmative defense; yet, it considered appropriate a finding of 100% fault on the part of plaintiff. Such a distinction between the two defenses probably does not represent a departure from the pleading requirements set forth in the Indiana Rules of Trial Procedure. Rule 8(C) omits both contributory negligence and assumption of risk from the array of affirmative defenses which must be specially pleaded, and Rule 9.1(A) provides that in a negligence action, such defenses may be pleaded by the denial of the allegation.⁷⁴ The Federal Rules of Civil Procedure, on the other hand, expressly require that assumption of risk and contributory negligence be asserted as affirmative defenses.⁷⁵ Thus, *Walters* seems to stand for the proposition that the defendant need not specially plead the fault of the plaintiff in an Indiana court.⁷⁶ In contrast, the defense must still be pleaded in a federal action in which Indiana substantive law is applied.⁷⁷

who is neither a party nor a statutory nonparty. Such a contention encompassed in the general denial of the allegations that the conduct of the defendant was the proximate cause of plaintiff's injury. *Hill v. Metropolitan Trucking Inc.*, 659 F. Supp. 430, 435 (N.D. Ind. 1987).

⁷⁰497 N.E.2d at 254.

⁷¹See *supra* note 45.

⁷²The Act expressly provides that a nonparty defense must be pleaded in defendant's answer. IND. CODE § 34-4-33-10(c) (Supp. 1987).

⁷³497 N.E.2d at 253.

⁷⁴IND. R. TR. P. 8(C).

⁷⁵FED. R. CIV. P. 8(C).

⁷⁶Due caution dictates that the matter of contributory fault be raised at the pre-trial conference, when "simplification of the issues" is undertaken, and included in the pre-trial order. See IND. R. TR. P. 16.

⁷⁷See *supra* note 48 and accompanying text.

Another important procedural issue raised by the opinion in *Walters* is whether, in a bench trial, the court should include in its judgment the mathematical calculation of its apportionment of fault, in the absence of a request for special findings by a litigant. Of course, in *Walters*, the judgment was negative.⁷⁸ If the trial court had not included in its ruling on the motion to correct errors its finding that "the plaintiff was 100% at fault,"⁷⁹ it appears doubtful that the case would have been remanded for further findings. The court of appeals probably would have affirmed on the basis that there was sufficient evidence for the trial court to conclude that one of the following was found: (1) the defendant was not liable; (2) plaintiff's son was 100% at fault; or (3) plaintiff was at least 51% at fault. The court could have justified any of these findings under the oft-cited rule that a judgment will be affirmed on appeal, if it is supportable on any ground.⁸⁰

There is no admonition in the Act that in a bench trial, the court make a specific finding of the percentages of fault.⁸¹ In a jury trial, however, the Act expressly provides that the jury be furnished with verdict forms which require the disclosure of both the percentage of fault charged against each party and the calculations made in arriving at their final verdict.⁸²

The issue then becomes whether the court, in a hypothetical bench trial, may secretly find that the plaintiff's damages are \$100,000, that the plaintiff is 50% at fault, that the defendant is 25% at fault, and that the nonparty tortfeasor is 25% at fault, and simply enter a general judgment for the plaintiff for \$25,000. Based upon traditional rules, such general judgment may not be reversed if neither party had requested the court to find the facts specially,⁸³ and if there was sufficient evidence to support the judgment.⁸⁴ Such a general finding was permissible before

⁷⁸497 N.E.2d at 254.

⁷⁹*Id.* at 252.

⁸⁰*Devine v. Grace Construction and Supply Co.*, 243 Ind. 98, 181 N.E.2d 862 (1962). If an inference of fact *could* be inferred from the evidence, and proceeds logically from the evidence, the judgment will not be overturned on appeal. *Hyman v. Davies*, 453 N.E.2d 336 (Ind. Ct. App. 1983).

⁸¹The act merely requires that the trial court "shall make its award of damages according to the *principle* applicable to the jury trials." IND. CODE § 34-4-33-5(c) (1984) (emphasis added).

⁸²IND. CODE § 34-4-33-6 (1984).

⁸³Rule 52(A), of the Indiana Rules of Trial Procedure, provides that the trial court is not required to find the facts specially and state its conclusions therefor, unless requested in writing by a party.

⁸⁴The virtual impossibility of reversal of a trial court upon general findings is well established. The Indiana Court of Appeals stated:

We are not at liberty to re-weigh the evidence or to substitute our opinion for

the adoption of comparative fault, and there is nothing in the Act which precludes such a general finding in a comparative fault bench trial. However, it cannot be denied that a trial court would do a great disservice to the litigants by such a scant judgment order. Rule 52 contemplates that a court may make special findings on its own motion.⁸⁵ It is clear that the Act must be amended to require a trial court, sitting without a jury, to make at least the same findings that are required of a jury. In the interim, the trial lawyer must remember to protect the record by filing a request for special findings.

Another interesting pleading issue was presented in *Hill v. Metropolitan Trucking, Inc.*,⁸⁶ and a most sensible ruling resulted. As stated above, the primary issue in *Hill* was whether a defendant could assert the fault of an immune tortfeasor in diminution of that defendant's relative fault. The court granted the motion to strike such nonparty defenses because immune tortfeasors do not meet the test of a "person who is, or may be, liable to the claimant."⁸⁷

The defendants further argued that even if they were not permitted to proceed with their statutory nonparty defenses, they should be permitted to assert that the immune tortfeasors' fault was the *sole* proximate cause of the casualty.⁸⁸ The court agreed that such assertion is available to the defendants, but that such was not an affirmative defense which must be pleaded.⁸⁹ The *Hill* court reasoned that under comparative fault the plaintiff retains the traditional burden of proving that the defendants' actions caused their injuries. Consequently, the defendants' general denial that they were a proximate cause encompasses the contention that plaintiff's injuries were the sole result of the fault of others. The court suggested that the contention is appropriately left to the evidence and to argument, and is not to be the subject of an affirmative defense.⁹⁰

The discussion in *Hill* concerning the issue of proximate cause suggests a caveat in drafting the jury verdict form in an Indiana comparative

that of the finder of fact. . . . Where no findings of fact are made by the court, the general judgment is presumed to be based upon findings which are supported by the evidence. . . . We may not weigh conflicting evidence, but may consider only that evidence most favorable to the prevailing party. If there is evidence of probative value to sustain the judgment of the court, the judgment will not be disturbed. . . . Furthermore, when confronted with a general finding in favor of the plaintiff, we must affirm the judgment of the court if it is sustainable upon any legal theory which is supported by the evidence. . . .

Van Orman v. State, 416 N.E.2d 1301, 1304 (Ind. Ct. App. 1981) (citations omitted).

⁸⁵IND. R. TR. P. 52(D).

⁸⁶659 F. Supp. 430 (N.D. Ind. 1987).

⁸⁷See *supra* note 19 and accompanying text.

⁸⁸659 F. Supp. at 435.

⁸⁹*Id.*

⁹⁰*Id.*

fault case. The language of the Act seems to assume that the collective fault of the parties and liable nonparties caused plaintiff's injuries.⁹¹ Such is not always the case, however, and the jury should not be compelled to find that only the fault of named tortfeasors caused plaintiff's injuries. The verdict form must allow a finding that no party, as well as a nonparty, was at fault. That is, the injury was caused by an "act of God," or by conduct which did not constitute legal fault. The courts must include in the critical jury instruction setting forth the methodology of applying the comparative fault principles, the following provision:

In deciding this case you must first determine whether the defendant was at fault. If you find that the defendant was not at fault, or that any fault of the defendant was not a proximate cause of plaintiff's injuries, you must enter a verdict for the defendant and you need deliberate no further.

⁹¹The Indiana Act is uniquely explicit as to the *seriatim* method to be employed by the jury in reaching its verdict. For example, in the case of a single defendant, the statute provides that the court *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 (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.

IND. CODE § 34-4-33-5 (Supp. 1987). In contrast, the Uniform Act merely provides that the court shall instruct the jury to answer special interrogatories as to (1) the total amount of plaintiff's damages, disregarding fault, and (2) the percentage of fault of all of the parties. The court then determines the award of damages. UNIF. COMPARATIVE FAULT ACT § 2, 12 U.L.A. 39, 41-42.

One respected commentator eschews special verdicts in comparative fault cases: More than twenty years of trial experience under both the pure and modified systems of comparative negligence, and having cases submitted on both general verdicts and interrogatories have convinced the writer that in many cases a general verdict is preferable. Juries have less trouble with a general verdict than with interrogatories. It more nearly effectuates their wishes.

H. WOODS, *supra* note 2, § 18.1 (2d ed. 1987). Such option is not available in Indiana.

Some injuries occur in the absence of legal fault by any entity. The jury should appreciate the availability of such a finding in the proper case. The suggested language would meet the needs of the defendants in the *Hill* case, and allow for the proximate cause argument.

VI. CONCLUSION

Only five cases construing Indiana's Comparative Fault Act have been reported since the Act took effect. As one robin does not a summer make, the effectiveness and the fairness of the Act cannot be judged upon the impact of these few cases. However, the signs are encouraging. In none of the cases was the court tempted to torture the provisions of the Act to achieve its own notion of substantial fairness.⁹² Those shortcomings of the Indiana comparative fault system which have been identified arise typically not from the system itself, but from the interplay between the Act and some extraneous provision of Indiana law, such as the retention of certain immunities. Even if those injustices were cured, however, no easy solution is apparent with respect to handling the burden created by the insolvent tortfeasor.⁹³ Even the most callous of analysts must harbor a nagging guilt over placing the weight of that burden solely on the shoulders of the plaintiff. We must continue to re-examine the problem of the insolvent tortfeasor, and seek a more equitable solution if, indeed, one is available.⁹⁴

⁹²The only interpretation which can be criticized as being contrary to the intent of the legislature is the comment in *dictum* in *Hill v. Metropolitan Trucking Inc.*, 659 F. Supp. 430, 435 (N.D. Ind. 1987). *See supra* note 21.

⁹³It is not clear that the incidence of insolvent and uninsured tortfeasors is as burdensome as it would appear in most academic discussions. For example, in automobile accident injury litigation, such burden is substantially eliminated by the availability of uninsured, or underinsured, motorist coverages. *See* IND. CODE §§ 27-7-5-2 to -6 (Supp. 1987). Nor is there seemingly a burden for tortious injuries arising out of the condition of business premises and business activities, since such businesses rarely are insolvent, and usually are collectible without regard to the existence of insurance. Further, the entire field of product liability injury litigation is not encompassed within the comparative fault act, at least with respect to the theories of strict liability in tort and breach of warranty, and the doctrine of joint and several liability remains applicable in those claims. *See supra* note 38. Finally, medical malpractice actions are not governed by the comparative fault act, and traditional tort doctrines, including that of joint and several liability, remain applicable. IND. CODE § 34-4-33-1(a) (Supp. 1987).

⁹⁴The Kansas Supreme Court concluded that no system of tort reparation is exactly fair:

Numerous examples of unfairness have been cited by both parties in this case to support their respective positions. The law governing tort liability will never be a panacea. There have been occasions in the past when the bar of contributory negligence and the concept of joint and several liability resulted in inequities. There will continue to be occasions under the present comparative negligence

While there is some bad in the Indiana comparative fault system, there is mostly good. The courts should continue to preserve those basic principles signaled by the legislature, in order to achieve a balanced fairness and a predictable outcome among litigants.

statute where unfairness will result.

Brown v. Keill, 224 Kan. 195, 204, 580 P.2d 867, 874 (1978). It is claimed that the reallocation provision of the Uniform Comparative Fault Act provides an equitable solution. In the section which deals with the apportionment of damages, the reallocation of the share of an uncollectible tortfeasor is addressed:

Upon motion made not more than [one year] after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

UNIF. COMPARATIVE FAULT ACT § 2(d), 12 U.L.A. 39, 42 (1979). The Commissioners argue the equity of the solution:

Reallocation takes place among all parties at fault. This includes a claimant who is contributorily at fault. It avoids the unfairness both of the common law rule at joint-and-several liability, which would cast the total risk of uncollectibility upon the solvent defendants, and of a rule abolishing joint-and-several liability, which would cast the total risk of uncollectibility upon the claimant.

Id. Commissioners' Comment at 43. Certainly, such solution is equitable if the standard of fairness is that all tortfeasors share in the burden created by the uncollectible tortfeasor in shares proportionate to their fault. However, if preeminence is given to the objective of reparation proportionate to fault, then such objective is compromised by making any tortfeasor respond in damages in a sum disproportionate to his share of the total fault. The Indiana legislature clearly assigned such preeminence to such objective, which is inconsistent with the reallocation scheme of the Uniform Comparative Fault Act. See *supra* note 2.