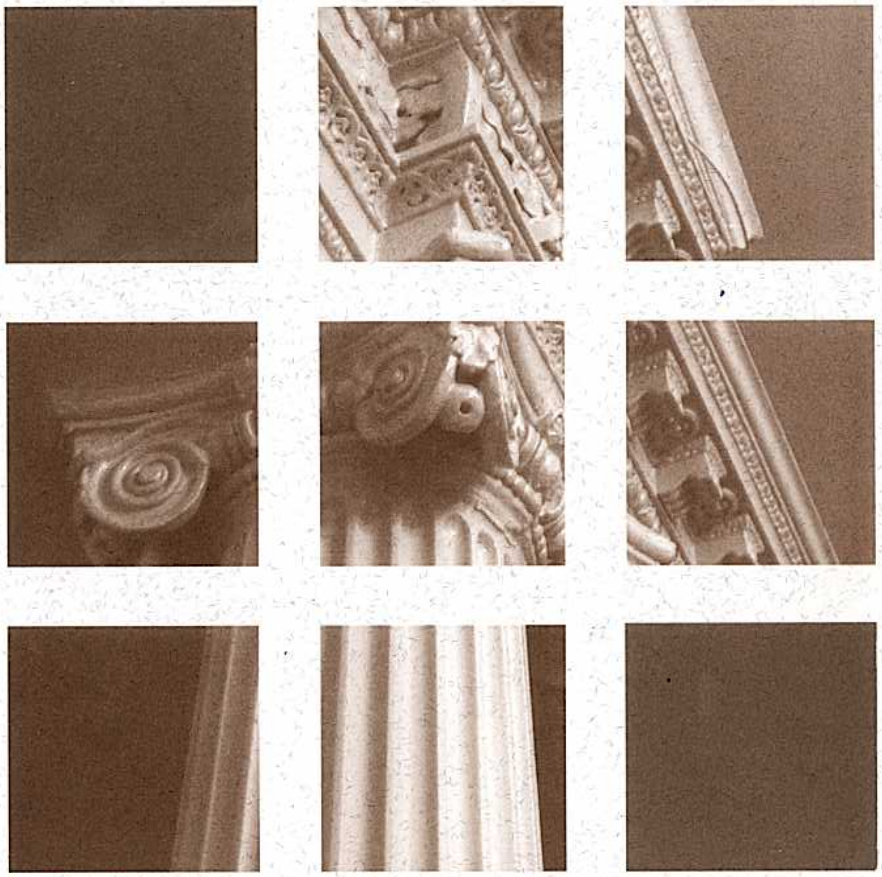
Negligence Systems:
Contributory Negligence, Comparative Fault, and Joint and Several Liability



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Negligence Systems: Contributory Negligence, Comparative Fault, and Joint and Several Liability

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January 12, 2004

Members of the General Assembly:

This report, "Negligence Systems: Contributory Negligence, Comparative Fault, and Joint and Several Liability," was prepared by the Department of Legislative Services, Office of Policy Analysis, in response to the continuing legislative interest in the law of torts. The report discusses the various types of negligence systems used by Maryland and other U.S. jurisdictions and compares several aspects of comparative fault tort systems.

This report was written by John Joyce, Susan McNamee, Karen Morgan, Douglas Nestor, Rita Reimer, Nicole Ripken, and Susan Russell of the Office of Policy Analysis; Donald Gifford, Professor of Law, University of Maryland School of Law; and Laina Herbert and Justin Patrick, students at the University of Maryland School of Law, and edited by Karen Morgan, Douglas Nestor, and Susan Russell. Barbara Speyser of the Office of Policy Analysis provided research assistance in the preparation of the report.

I trust this information will be of assistance to you.

Sincerely,

Karl S. Aro
Executive Director

KSA/DRN/cdm

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Chapter 1. Background

What Is Tort Law?

The law of torts, usually judicially created, governs "whether the costs of an accident should be shifted from the party that originally sustained them to another party that was a cause of the accident."[1] Tort liability occurs in a wide variety of factual contexts, including careless driving resulting in an automobile accident, medical malpractice, a product that injures a consumer, an environmental nuisance, or a defamatory newspaper publication.

Tort law has several functions. First, tort actions provide compensation to the injured party. For instance, tort law enables a pedestrian hit by a speeding driver to file suit against the driver seeking reimbursement for medical bills incurred as a result of the accident. Often the party causing an injury is either insured or is a business capable of distributing the costs of accidents by including such costs in the prices of its goods or services. The second goal of tort law is to prevent and discourage accidents by forcing injurers (or their insurers) to pay for the costs of accidents they cause. Third, tort law places financial responsibility for losses on the party who, in justice or on grounds of fairness, ought to bear it.

In order to be held liable for a tort, the injuring party or defendant need not have committed a crime or violated a statute. A tort action is a civil action, filed by the injured party and the injured party's attorney, not by the state or county on behalf of the injured party. Sometimes the defendant's actions will be both a tort and a crime. Often, however, the defendant may be required to compensate an injured victim even though the defendant has not committed a crime or violated any statute.

What Is Negligence?

Most often, a party seeking to recover damages under tort law must prove that the injuring party has acted with negligence. Negligence is "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."[2] When a person is negligent, the person has failed to conform to the standard of conduct that society demands for the safety of others.[3] Negligence is not based on an intention to cause harm.[4] A driver who intentionally runs over a pedestrian has committed an intentional tort, a separate category of torts not addressed in this report. However, a driver who runs over a pedestrian because the driver is not paying attention has been negligent.

The Reasonable Person Standard

The injurer's actions are judged against the standard of the reasonably prudent person. The best efforts or good faith of the injuring party may not prevent the party from being held liable for negligence if the party is clumsier or less intelligent than the reasonable person. The reasonable person behaves according to the community ideal of reasonable behavior and

possesses qualities of "attention, knowledge, intelligence, and judgment which society requires of its members for protection of their own interest and the interests of others."[5] An individual is negligent when the individual fails to act like the reasonable person of ordinary prudence.

Components of a Negligence Action

Under Maryland law, a person has a right to recover for negligence by proving four elements: duty, breach, causation, and injury.[6] First, there must be a duty or obligation to do something or to not do something according to the reasonable person standard. For example, a driver may have a duty not to speed on icy roads or a store manager may have a duty to warn customers that the floors have just been mopped. Second, this duty must be breached: a person has done something that the person should not have done or failed to do something that the person should. To continue the first example, the driver breached the driver's duty by driving 100 miles per hour on the icy road. Or, in the other example, the store manager might fail to place a "warning" sign by a wet and slippery floor. Third, there must be a reasonably close causal connection between the breach of the duty and a resulting injury. If the driver had not been speeding, the car accident would not have occurred. If there had been a "warning" sign, the customer would not have slipped and fallen. Finally, there must be damage resulting to the interests of another. Damages can include medical bills, property damage, pain and suffering, loss of companionship, loss of reputation, lost wages for time spent away from work, and other types of losses.

What Is Contributory Negligence?

Contributory negligence is conduct on the part of the injured party "which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm."[7] Traditionally at common law, and under Maryland law today, the plaintiff's contributory negligence totally precludes any recovery by the plaintiff for damages.[8]

Consider the role of contributory negligence in the following scenario. Two cars approach an intersection from opposite directions. The first driver runs a red light while the other driver makes an illegal left turn. Under the contributory negligence defense, neither driver could sue the other successfully even though an accident occurred and both drivers were injured. In this hypothetical, both drivers were negligent, and the contributory negligence of each driver in causing his or her own injuries is a complete bar to either driver's recovery. The same result occurs even if the first driver is speeding at night, fails to turn the headlights on, and runs a red light. The contributory negligence defense does not attempt to weigh the fault of the parties.

The contributory negligence defense has been criticized for being too harsh on the plaintiff, the party seeking recovery. Even the slightest amount of contributory negligence by the plaintiff that contributes causally to an accident bars all recovery for even the most blatantly negligent acts by defendants. In a Maryland case,[9] a plaintiff was barred from recovery due to

the "boulevard rule," which mandates that a driver crossing a major road must yield the right-of-way to drivers on that major road. The plaintiff, after halting at the stop sign and looking for traffic, proceeded through an intersection with a major road. As the plaintiff's vehicle crossed the intersection, it was struck by the defendant's vehicle, which was speeding with unlit headlights. As a result of the accident, the plaintiff was paralyzed from the neck down. Despite facts indicating that the defendant was clearly more at fault than the plaintiff, the violation of the "boulevard rule," amounting to contributory negligence, barred the plaintiff from recovering any amount of damages.

Exceptions to the Rule of Contributory Negligence

Courts have sought to mitigate the harsh results of the contributory negligence defense by establishing limits and exceptions to its application. The defense is usually not applicable when the defendant's conduct is so egregious that it constitutes willful, wanton, or reckless conduct.[10] In these situations, the plaintiff is only barred from recovery if the plaintiff's contributory negligence is similarly aggravated.

The "last clear chance" exception provides that when the defendant is negligent and the plaintiff is contributorily negligent, but the defendant has "a fresh opportunity (of which he fails to avail himself) to avert the consequences of his original negligence and the plaintiff's contributory negligence,"[11] the defendant will be liable despite the plaintiff's contributory negligence. Therefore, under a last clear chance exception, the defendant would become responsible for the entire loss of the plaintiff, regardless of the plaintiff's own contribution. In a Maryland case,[12] the exception allowed a plaintiff injured by sitting on the hood of a running car to recover from the driver. The plaintiff, after being offered a ride up the street, sat on the car's hood. The driver accelerated quickly, throwing the plaintiff to the pavement. Though the plaintiff was held to be contributorily negligent, recovery by the plaintiff was still allowed because the defendant had the last clear chance to avoid the accident.

What Is Comparative Fault?

The terms comparative fault and comparative negligence refer to a system of apportioning damages between negligent parties according to their proportionate shares of fault. Under a comparative fault system, a plaintiff's negligence that contributes to causing the plaintiff's damages will not prevent recovery, but instead only will reduce the amount of damages the plaintiff can recover. Comparative fault replaces the traditional contributory negligence defense. There are three major versions of comparative fault: "pure" comparative fault, "modified" comparative fault, and "slight/gross" comparative fault.

Pure Comparative Fault

Under a pure comparative fault system, each party is held responsible for damages in proportion to the party's fault.[13] Regardless of the level of the plaintiff's own negligence, the

plaintiff can still recover something from a negligent defendant. It makes no difference whose fault was greater. In some states, the relative degrees of fault of the plaintiff and of the defendant are determined by comparing the respective levels of culpability of the plaintiff and of the defendant; other jurisdictions apportion liability according to the extent to which each party's fault contributed to the plaintiff's injury.[14]

Consider the pure comparative fault system in the following scenarios: First, imagine the plaintiff incurs $10,000 in medical bills from a car accident caused by the defendant. The jury finds the plaintiff 20 percent at fault and the defendant 80 percent at fault. Therefore, the plaintiff is allowed to recover $8,000, the total amount of damages reduced in proportion to the plaintiff's own fault. In our second hypothetical, imagine the plaintiff is using a power tool in an extremely dangerous manner and severely hurts himself. The plaintiff incurs $20,000 worth of damages and sues the power tool manufacturer. The jury finds that the plaintiff was 90 percent at fault in causing the accident. However, the jury holds the manufacturer 10 percent at fault, due to a defective product design. Though the plaintiff's fault is greater than that of the defendant, the plaintiff will still be able to recover $2,000 from the manufacturer, 10 percent of the total damages, in a pure comparative fault system.

The pure comparative fault system has been criticized for allowing a plaintiff who is mainly at fault to recover some portion of the plaintiff's own damages. For example, a plaintiff who is 95 percent at fault could recover 5 percent of his or her damages from a defendant who was only slightly at fault relative to the fault of the plaintiff.

Modified Comparative Fault

Under a modified comparative fault system, each party is held responsible for damages in proportion to his or her fault, unless the plaintiff's negligence reaches a certain designated percentage of fault.[15] If the plaintiff's own negligence reaches this percentage bar, then the plaintiff cannot recover any damages. Under a "less than" system, an injured plaintiff can recover only if the degree of fault attributable to the plaintiff's own conduct is less than the degree of fault assigned by the judge or jury to the defendant. If the plaintiff's negligence is equal to or greater than the defendant's, all recovery is barred. In the previous hypothetical involving the power tool manufacturer, under a "less than" or "not as great as" system of comparative fault, the plaintiff would not be able to recover any of the plaintiff's damages, even though the jury found the company to be 10 percent at fault. Under a "less than or equal to" system, the plaintiff would be allowed to recover if the plaintiff and the defendant are equally at fault, or if the defendant is more at fault than the plaintiff, but not if the plaintiff's fault is greater than that of the defendant.

Both the "less than" and the "less than or equal to" modified comparative fault systems have been criticized for the possibility of unfair results. Compare the following examples: One plaintiff, found to be 49 percent at fault, is allowed to recover 51 percent of the plaintiff's damages, while another is found to be to be 51 percent at fault and is not allowed to recover anything.

Also, in "less than" comparative fault jurisdictions, a jury may allocate the fault equally among the parties and unwittingly bar all recovery by the plaintiff because the jury may, or may not, be informed of the existence of the percentage bar to recovery. The question of whether or not to inform the jury about the percentage bar to recovery is important because a single percentage may make the difference between recovery and no recovery.[16] Under a "sunshine rule," the jury is informed of the existence of the percentage bar. Proponents of the "sunshine rule" argue that since jurors are required to make judgments comparing the respective degrees of fault of the parties, they should know the consequences of their determination. Under a "blindfold rule," the jury is not informed of the existence of the percentage bar. Proponents of this rule argue that the rule is necessary to reduce or eliminate any role jury sympathy or bias may have on the jury's determination of the respective degree of fault of each party.

Jurisdictions applying a modified comparative fault system must also choose how fault is compared in lawsuits involving multiple parties. Some jurisdictions compare the plaintiff's negligence to each defendant's separately.[17] For example, if the plaintiff is found to be 40 percent at fault and each of three defendants are found to be 20 percent at fault, the plaintiff is barred from recovery. Other jurisdictions compare the plaintiff's negligence with the cumulative negligence of all the defendants. Under this approach, the plaintiff's fault of 40 percent would be compared to the total fault of all the defendants, 60 percent, and the plaintiff would be able to recover 60 percent of the plaintiff's damages.

Slight/Gross Comparative Fault

Comparative fault may also be applied using a "slight/gross" system. Under this system, the fault of the plaintiff and the defendant is only compared if the plaintiff's negligence is "slight" and the defendant's negligence is "gross." In all other scenarios, the plaintiff cannot recover anything. This particular "modified" system is currently used only in South Dakota. "Slight/gross" comparative fault has been viewed as a compromise between the traditional contributory negligence defense and the more common comparative fault alternatives. However, the system has been criticized due to the difficulties in defining a precise standard for "slight" and "gross" negligence.

Comparative Fault and Special Verdicts

Comparative fault systems may use a special verdict, or answers by the jury to specific questions, to apportion damages.[18] In comparative fault jurisdictions, a special verdict may be used to ask the jury questions to determine the apportionment of damages. The court may then make the apportionment according to the responses. Other jurisdictions simply ask the jury for a single sum once the jury has determined the plaintiff's total damages and the respective degrees of fault of each party.

Comparative Fault and the Doctrine of "Last Clear Chance"

Most jurisdictions that have adopted comparative fault have abandoned the "last clear chance" doctrine[19] because the doctrine functions to mitigate the harsh effects of contributory negligence. However, a minority of jurisdictions has retained the "last clear chance" exception, despite adopting comparative fault. The result is that damages are not divided in cases where the defendant had the last clear chance to avoid the accident, even if the plaintiff was also negligent.

What Is Joint and Several Liability?

In many situations, a tort action may involve multiple defendants. Under the doctrine of joint and several liability, "each of two or more defendants who is found liable for a single and indivisible harm to the plaintiff is subject to liability to the plaintiff for the entire harm. The plaintiff has the choice of collecting the entire judgment from one defendant, the entire judgment from another defendant, or recovering portions of the judgment from various defendants, as long as the plaintiff's entire recovery does not exceed the amount of the judgment."[20]

Concerted Action

Under traditional English and American law, joint and several liability applied when the defendants acted "in concert" or together to cause a plaintiff's harm.[21] Concerted action is action taken with knowledge towards a common goal. Examples of "acting in concert" would include (1) two drivers who agree to a "drag race" on a public highway and injure the driver of an oncoming motorcycle and (2) manufacturers of pharmaceutical products who rely on each other's inadequate safety testing of a newly marketed pharmaceutical product.

Indivisible Harm

Joint and several liability may also be applied if two or more defendants cause an indivisible harm to the plaintiff. A plaintiff's harm is indivisible if specific portions of the damages cannot be traced to a single defendant. For instance, in the car accident example, the motorcyclist's separate injuries cannot be attributed a specific driver. Instead, both drivers contributed to causing the entire sum of the motorcyclist's damages. However, if the plaintiff's harms are divisible, joint and several liability does not apply (unless, of course, the defendants acted in concert). Instead, each defendant will be held liable for the damage that each defendant's particular actions caused to the plaintiff.

Joint and Several Liability and Rules of Contribution

The doctrine of joint and several liability governs only the rights of the injured party or plaintiff against any of the defendants. Traditionally, a defendant that paid damages to a plaintiff in order to satisfy a judgment could not seek any financial reimbursement or "contribution" from

any other co-defendant.[22] Hence, if our hypothetical motorcyclist sued the first driver and recovered all damages, the first driver would not be able to sue the second driver to contribute to the recovery. Instead, the first driver would have to pay the entire amount of the plaintiff's damages without any right of contribution from the other injurer.

Today most states recognize a right to contribution among co-defendants by one tortfeasor who has paid more than that tortfeasor's fair share of a judgment against the co-defendants.[23] When contribution was first adopted, usually by statute, the "fair share" recoverable by the defendant that had paid the judgment usually was determined on a *pro rata* (equal shares) basis. More recently, most states now allow contribution based upon the relative degrees of fault of each defendant. Under a *pro rata* division, the first driver would be able to sue the second for contribution for half of the motorcyclist's damages. Under a relative degree division, the first driver would be able to sue the second driver for contribution according to the second driver's proportion of fault. Suppose the jury found the first driver 60 percent at fault and the second driver 40 percent at fault. Under a relative degree division, the first driver would be able to sue the second driver for contribution of 40 percent of the total amount the first driver paid to the motorcyclist.

Problem of Unknown, Indigent, or Unreachable Co-Defendant

Even under various contribution schemes, courts are still faced with scenarios in which a defendant is judgment-proof (which means that the defendant cannot pay the amount owed to the plaintiff), is beyond the jurisdiction of the court (such as a foreign manufacturer without contacts sufficient to establish jurisdiction), or whose identity is not known. A defendant may be judgment-proof because of bankruptcy or some type of legally enforced immunity.

Joint and several liability allows the injured party to receive full compensation for the injured party's damages from the other defendants whose tortious acts were necessary causes of the injuries despite the absence or inability of another defendant to pay its fair share. In our hypothetical, if the motorcyclist sues both drivers and the second driver is both uninsured and bankrupt, the motorcyclist will be able to collect the full amount of damages from the first driver. The first driver, instead of the injured plaintiff, bears the risk that the second driver is judgment-proof. Compare this scenario to a situation where there is only one driver. If the motorcyclist sues and recovers for the driver's negligence, and that driver is uninsured and bankrupt, the plaintiff will not be able to collect any amount of the judgment entered.

Alternatives to Joint and Several Liability

Since the mid-1980s, many state legislatures have modified or eliminated the traditional doctrine of joint and several liability. There is considerable variety in the alternatives adopted to joint and several liability.[24] (See Chapter 3.) The polar opposite approach to joint and several liability is sometimes called "several liability," or, more accurately, proportionate liability. Here

a defendant is financially liable only for the percentage of damages attributable to that defendant's own fault. Using our hypothetical, the injured motorcyclist, and not the negligent first driver, bears the risk that the second driver is judgment-proof.

Legislatures often have reached a variety of compromise positions. For example, Florida has adopted an elaborate sliding scale retaining joint and several liability for economic damages below specified limits, depending on the percentage of fault attributed to the defendant in question.[25] The American Law Institute has recommended the following compromise as consistent with the concept that each party should bear the amount of damages proportionate to its allocation of fault:

> ... if a defendant establishes that a judgment for contribution cannot be collected fully from another defendant, the court reallocates the uncollectible portion of the damages to all other parties, including the plaintiff, in proportion to the percentages of comparative responsibility assigned to the other parties.[26]

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[1] H. Shulman, F. James, O. Gray and D. Gifford. *Cases and Materials on the Law of Torts* 1 (4th ed. 2003).

[2] Restatement (Second) of Torts § 282 (1965); see also F. Harper, F. James & O. Gray, *The Law of Torts* § 16.1 (2d ed. 1986). The Restatement (Second) of Torts is an influential compilation by the American Law Institute that outlines the doctrines that courts follow when they decide tort cases.

[3] Ashburn v. Anne Arundel County, 306 Md. 617, 627, 510 A.2d 1078, 1083 (1983) ("[N]egligence is the breach of some duty that one person owes to another ...").

[4] Restatement (Second) of Torts § 282, cmt. d (1976).

[5] *Id*. at § 283, cmt. b (1965); see also Shulman et al., *supra* note 1, at 169-70.

[6] Valentine v. On Target, Inc., 353 Md. 544, 727 A.2d 947 (1999) (gun-store owner did not owe duty to third parties to exercise reasonable care in the display and sale of handguns to prevent theft and illegal use by others against third parties).

[7] Restatement (Second) of Torts § 463 (1965); see also McQuay v. Schertle, 126 Md. App. 556, 730 A.2d 714 (Md. App. 1999).

[8] Harrison v. Montgomery Cnty. Bd. of Educ., 295 Md. 442, 456 A.2d 894 (1983) (reaffirming that contributory negligence is a complete bar to recovery in Maryland).

[9] Hensel v. Beckward, 273 Md. 426, 330 A.2d 196 (1974).

[10] Restatement (Second) of Torts §§ 482(1), 500 & 503(1) (1965).

[11] Smiley v. Atkinson, 12 Md. App. 543, 553, 280 A.2d 277, 283 (1971); see also Restatement (Second) of Torts §§ 479-80 (1965).

[12] Ritter v. Portera, 59 Md. App. 65, 474 A.2d 556 (1984).

[13] E.g., Li v. Yellow Cab Co. of California, 13 Cal.3d 804, 532 P.2d 1226 (1975).

[14] See Shulman et al., *supra* note 1, 441.

[15] *Id*. at 442.

[16] *Id*. at 442-43.

[17] *Id*. at 443.

[18] *Id*. at 442-43.

[19] See Harper et al., *supra* note 2, § 22.14 n.32.

[20] Shulman et al., *supra* note 1, at 302.

[21] Harper et al., *supra* note 2 § 10.1.

[22] Merryweather v. Nixon, 8 Term Rep. 186, 101 Eng. Rep. 1337 (1799), see generally Harper et al, *supra* note 19, s § 10.2 (2d ed. 1986).

[23] Shulman et al., *supra* note 1, at 500.

[24] *Id*. at 498.

[25] Fla. Stat. Ann. § 768.81 (West Supp. 2002).

[26] Restatement (Third) of Torts: Apportionment of Liability § 21 (1999).

Chapter 2. History of the Doctrines of Contributory Negligence, Comparative Fault, and Joint and Several Liability

Contributory Negligence

The origins of the contributory negligence defense actually pre-date the idea that an injured party was required to plead and prove negligence in order to recover for his injuries. Under English common law and early American law (derived from English common law), a defendant who caused injury to another party was held strictly liable without a showing that the defendant had been negligent or otherwise at fault.[1] Contributory negligence first appeared as a defense to these strict liability actions.

The defense of contributory negligence originated in England in a 1809 case, *Butterfield v. Forrester*.[2] There the defendant had placed a pole across a public road. The plaintiff, riding "violently" down the road on horseback, collided with the pole and was injured. However, the plaintiff would have discovered the pole at 100 yards if he had not been riding so fast. The judge directed the jury that "if a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding hard and without ordinary care, then they should find for the defendant." Contributory negligence was adopted throughout the United States during the first half of the nineteenth century, and by 1854 one court even claimed (incorrectly) that the contributory negligence defense had been "the rule from time immemorial, and ... is not likely to be changed in all time to come."[3]

The swift acceptance of contributory negligence has been attributed to economic, social, and philosophical factors.[4] The defense was especially effective in protecting developing industry, including railroads and employers of injured workers, from liability for damages, the payment of which might have made their fledging enterprises unprofitable. Because the actions of injured persons often had contributed to their injuries, judges dismissed their legal claims without allowing them to be heard or decided by juries whose natural sympathies might have favored the injured consumer or worker at the expense of the corporate or other business defendant. Contributory negligence also reflected the notion that a plaintiff seeking the aid of the court must do so "with clean hands."[5] Further, courts traditionally did not believe that juries were capable of determining the relative degrees of fault of the parties, something that would have been required under the alternative doctrine of comparative fault if the plaintiff's own carelessness did not bar the action entirely.

Maryland first applied contributory negligence in 1847, in the case of *Irwin v. Spriggs*.[6] In that case, the plaintiff fell into an opening by the defendant's cellar window and suffered a broken leg. The defendant argued successfully that if the plaintiff had used reasonable care, the fall would have been avoided.

Under traditional English and American common law, the "last clear chance" doctrine created a narrow exception to the rule that the plaintiff's own carelessness barred recovery. In the 1842 English case *Davies v. Mann*,[7] the defendant negligently drove horses and a wagon into a donkey that had been left fettered in the highway. Though the plaintiff had been contributorily negligent in leaving the donkey in the highway, the plaintiff was allowed to recover the animal's value since the defendant had the last clear chance to avoid the collision. In 1868, Maryland adopted the last clear chance exception, noting that the plaintiff would be entitled to recover "if the defendant might have avoided the consequences of the neglect or carelessness."[8]

Comparative Fault

The concept of comparative fault was used as early as Roman times[9] and was adopted in the admiralty law of the United Kingdom and most other nations (but not the United States) as early as 1911.[10] A couple of American states attempted unsuccessfully to introduce the concept of comparative fault into American tort law during the nineteenth century. In 1888, an Illinois appellate court attempted to apply a system that made no attempt to divide damages, but allowed full recovery by the plaintiff if the plaintiff's negligence was "slight" and the defendant's negligence was "gross."[11] This system proved to be unsatisfactory in operation and was discarded after 27 years. Kansas judicially adopted a comparative fault rule briefly during the 1880s.[12]

In 1908, the United States Congress passed the Federal Employer's Liability Act,[13] a comparative fault statute covering injuries sustained by railroad employees involved in interstate commerce. This statute adopted a system of pure comparative negligence that allowed the plaintiff to recover from a negligent railroad regardless of the extent of the plaintiff's own negligence.

From 1900 through the 1950s, a few states adopted comparative fault. In 1910, Mississippi adopted a pure comparative negligence statute applicable to all suits for personal injuries.[14] The Supreme Court of Georgia adopted a general comparative fault system using a modified system under which the plaintiff's negligence had to be less than that of the defendant.[15] In 1913, Nebraska enacted a statute that allowed the comparison of fault if the plaintiff's negligence was "slight" and the defendant's negligence was "gross," but later legislatively enacted a plan similar to Georgia's.[16] This "slight/gross" distinction, which traces back to the idea that there are "degrees" of negligence, was also adopted by South Dakota in 1941.[17] Later, Wisconsin adopted a general modified comparative negligence statute under which a plaintiff cannot recover unless the plaintiff's negligence was "not as great as the negligence against whom the recovery is sought."[18] Wisconsin's statute required the use of a special verdict, in which the jury was to provide answers to written questions prepared by the court.[19] The next state to adopt comparative fault was Arkansas, which first adopted a pure form in 1955,[20] but switched to a modified form in 1957. This permitted a negligent plaintiff to recover only if his negligence was "of a lesser degree than that of the defendant."[21]

Beginning in 1969, there was a sharp increase in the adoption of comparative fault, both by statute and by judicial decision. Today 46 U.S. jurisdictions have adopted comparative fault.[22] Currently, contributory negligence is the law in only five U.S. jurisdictions – Alabama, Maryland, North Carolina, Virginia, and the District of Columbia.

Many courts have taken the position that the adoption of comparative fault should occur through legislative action, while other courts, often noting that contributory negligence itself was created judicially, have adopted and applied a rule of comparative negligence by judicial decision. The Court of Appeals of Maryland has specifically rejected the notion of judicial adoption of comparative negligence.[23] Since 1969, 12 jurisdictions made the change from contributory negligence to comparative negligence through judicial decisions. In the remaining jurisdictions the change was made legislatively. Some jurisdictions that initially had adopted a comparative negligence system through judicial decision later codified that system through legislation. Currently, only six jurisdictions continue to authorize comparative negligence by judicial decision, and 40 jurisdictions have codified comparative negligence through legislation.

Joint and Several Liability

Joint and several liability originated nearly 400 years ago in England with *Sir John Heydon's Case*,[24] where the judge observed that since all the defendants had acted unlawfully, "the act of one is the act of all." The doctrine covered injuries resulting from tortious conduct of two or more individuals acting in concert, that is, two or more defendants acting pursuant to a common plan. It also applied to situations where two or more parties, together, caused a single indivisible harm, even when each wrongdoer acted independently of the others.

During the 1980s, many states – encouraged by proponents of "tort reform" from the business and insurance communities – passed laws modifying joint and several liability in order to limit the tort liability of potential defendants.[25] Maryland currently is among the jurisdictions that continue to apply the traditional rule of joint and several liability.[26]

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[1] See H. Shulman, F. James, O. Gray and D. Gifford. *Cases and Materials on the Law of Torts* 36-37 (4th ed. 2003).

[2] 11 East's Report 59, 103 Eng. Rep. 926 (K.B.1809).

[3] Penn. R. Co. v. Aspell, 23 Pa. 147, 149 (1854).

[4] F. Harper, F. James and O. Gray. *The Law of Torts* § 22.1 (2d ed. 1986).

[5] W. Prosser. "Comparative Negligence." 41 *Cal. L. Rev.* 1, 3-4 (1953).

[6] 6 Gill 200 (1847).

[7] 10 M. & W. 546, 548, 152 Eng. Rep. 588 (Ex. 1842).

[8] N. Cent. Ry. Co. v. State, Use of Price, 29 Md. 420, 436 (1868).

[9] The Great Digest of Justinian, completed in 533 A.D., reported that Roman law provided that a party should assume damages in proportion to fault.

[10] Maritime Conventions Act, 1911, 1 & 2 Geo. 5, ch. 57, § 1(1)(a).

[11] Chicago, M. & St. P. Ry. Co. v. Mason, 27 Ill. App. 450 (1888).

[12] Wichita & W.R. Co. v. Davis, 37 Kan. 743, 16 P. 78 (1887); but see Chicago, K. & N. Ry. Co. v. Brown, 44 Kan. 384, 24 P. 497 (1890) (rejecting comparative fault where plaintiff is negligent, even slightly).

[13] 35 Stat. 65, 45 U.S.C. §§ 51-60 (2000).

[14] Mississippi Laws, 1910 Ch. 185; Miss. Code Ann. 1972 § 11-7-15 (1972).

[15] Christian v. Macon R. & L. Co., Ga. 314, 47 S.E. 923 (1904).

[16] Neb. Rev. Stat. § 25-21,185.09 (1995).

[17] S.D. Codified Laws § 20-9-2 (1995).

[18] Wis. Stat. Ann. § 895.045 (1997).

[19] Wis. Stat. Ann. § 805.12 (1994).

[20] Ark. Acts 1955, No. 191.

[21] Ark. Acts 1957, No. 296, § 2 at 874 (repealed 1961).

[22] Harper et al., *supra* note 4, § 22.15.

[23] Harrison v. Montgomery County Bd. of Educ., 295 Md. 442, 456 A.2d 894 (1983); see also Brady v. Parsons Co., 82 Md. App. 519, 572 A.2d 1115 (1990).

[24] 11 Co. Rep. 5, 77 Eng. Rep. 1150 (1612).

[25] See Shulman et al., *supra* note 1, at 498.

[26] Morgan v. Cohen, 309 Md. 304 (1987) (a negligent actor is liable not only for the harm he directly causes but for any additional harm resulting from the normal efforts of third persons rendering aid regardless of whether care was properly or negligently given).

Chapter 3. Review of Negligence Systems in U.S. Jurisdictions

This chapter reviews the current negligence systems of the 50 states and the District of Columbia. The review compares several key features of the various negligence systems.

Contributory, Pure Comparative, and Modified Comparative Negligence

Five jurisdictions continue to maintain contributory negligence systems. The remaining 46 jurisdictions have comparative negligence systems of various types. Of the comparative negligence jurisdictions, 14 jurisdictions have a "pure" comparative negligence system, and the other 32 jurisdictions use some type of "modified" comparative negligence system. (See **Appendix 1**.)

As discussed in Chapter 1, modified comparative negligence systems generally are divided into (1) those that only allow recovery when the plaintiff's fault is found to be equal to or less than the defendant's ("equal to or less than 50 percent") and (2) those that require the plaintiff to be less at fault than the defendant to recover ("less than 50 percent"). Appendix 1 shows that modified comparative fault jurisdictions are almost equally divided between these two categories; there are presently 17 "equal to or less than 50 percent" and 14 "less than 50 percent" jurisdictions.

One jurisdiction (South Dakota) and some types of cases within other jurisdictions (*e.g.*, negligence actions involving employees of common carriers in the District of Columbia, see Appendix 1, fn. 2) use the "slight/gross" type of modified comparative negligence system discussed in Chapter 1. In such cases, a plaintiff may recover damages if the plaintiff's fault is "slight" in comparison to the defendant's "gross" fault.

However, dividing comparative negligence systems into these general categories does not take into account the considerable amount of variety among and within comparative negligence jurisdictions. For example, Michigan has a pure comparative negligence system for deciding liability for economic damages (*e.g.*, medical bills, destroyed property) but uses a modified "equal to or less than 50 percent" system for noneconomic damages (*e.g.*, pain and suffering). (See Appendix 1, fn. 7.)

Comparative Negligence and Strict Product Liability Cases

The Restatement (Second) of Torts is a prominent legal treatise that has helped guide the nationwide development of tort law. Section 402A of the Restatement, which recognized strict liability for a defendant for harm caused by a defective product, was promulgated in 1964 when the overwhelming majority of jurisdictions were contributory negligence jurisdictions. Because a plaintiff's negligence was a complete bar to recovery in the majority of jurisdictions at that

time, the Restatement generally did not apply the contributory negligence defense to strict product liability cases and stressed assumption of risk as the primary affirmative defense available in those cases. However, contributory negligence was applied under the Restatement if the plaintiff's conduct, in contributing to harm caused by the defective product, was egregious.

However, since the adoption of Section 402A the Restatement in 1964, only five states have maintained contributory negligence as a defense. Generally, 34 of the comparative negligence jurisdictions apply comparative negligence principles to strict product liability actions. Furthermore, these jurisdictions do not limit the relevance of the fault of the plaintiff to conduct considered assumption of risk, as did the Restatement. The remaining 12 comparative negligence jurisdictions either do not apply comparative negligence principles to strict product liability cases or limit the application of comparative negligence principles to cases in which the plaintiff has unreasonably and voluntarily assumed a known risk.

Some jurisdictions treat various types of plaintiff conduct differently in determining whether the principles of comparative negligence should apply to a case. Some jurisdictions have determined that if a plaintiff negligently fails to discover a product defect, a reduction of damages based on apportioning responsibility is inappropriate because a consumer has the right to expect that a product will be free of defects and should not have the burden of inspecting it. Similarly, some jurisdictions have determined that apportioning responsibility is inappropriate when a product lacked a safety feature that would have prevented the injury to the plaintiff, holding that a defendant's responsibility should not be reduced when a plaintiff engages in behavior that the product design should have prevented.

In contrast, some jurisdictions have determined that a plaintiff's assumption of the risk acts as a complete bar to recovery. Product alteration, modification, and misuse by consumers are treated as a form of fault that should be compared with the fault of the other parties to reduce damages and by other jurisdictions as conduct that warrants a complete bar to recovery under the defense of assumption of risk.

Comparative Negligence and Multiple Defendants

There are differences among the comparative negligence jurisdictions in the manner in which they apply comparative negligence in cases involving multiple defendants. In most comparative negligence jurisdictions, the plaintiff's fault is compared to the combined fault of all defendants. (Jurisdictions are split on whether they include, with the named defendants, other identifiable tortfeasors who are not parties in the case for the purpose of comparing the plaintiff's fault.) In a handful of jurisdictions, however, the plaintiff's negligence is compared with each defendant individually to determine the respective liability of each. In still others, the issue has yet to be decided. (See, *e.g.*, Appendix 1, fn. 5.)

Comparative Negligence and Joint and Several Liability

The apportionment of liability among multiple tort defendants has become as important an area of statutory and judicial change as the doctrine of comparative negligence. Clearly, the tort doctrine of joint and several liability has been profoundly impacted by the development of comparative negligence. When U.S. jurisdictions moved toward comparative negligence, many of them also began to reexamine their adherence to the doctrine of joint and several liability. See Chapter 1 for a discussion of joint and several liability and several liability.

The clear trend over the past several decades has been to limit traditional joint and several liability. Of the 46 jurisdictions that have adopted comparative negligence, 38 jurisdictions have abolished completely or partially joint and several liability in response to adopting comparative negligence. Thirteen jurisdictions, that is, the remaining eight comparative negligence jurisdictions and the five contributory negligence jurisdictions (Alabama, District of Columbia, Maryland, North Carolina, and Virginia), have retained "pure" joint and several liability. The comparative negligence jurisdictions with pure joint and several liability are Arkansas, Delaware, Illinois, Maine, Massachusetts, Rhode Island, South Carolina, and South Dakota. In addition, five jurisdictions retain joint and several liability in cases where the plaintiff has no responsibility or fault for the plaintiff's injuries. These jurisdictions are Georgia, Missouri, Oklahoma, Vermont, and Washington. (See **Appendix 2**.)

Joint Liability, Several Liability, and Variations in the Jurisdictions

There is no majority position among the jurisdictions on the apportionment of liability between multiple defendants. Of the 38 jurisdictions that have limited pure joint and several liability, only 10 jurisdictions have adopted pure several liability where each defendant is responsible for paying only that defendant's portion of the damages. Those jurisdictions are Alaska, Arizona, Colorado, Kansas, Kentucky, Louisiana, Nevada, North Dakota, Tennessee, and Wyoming. (See Appendix 2.)

The other 28 jurisdictions apply either joint and several liability or several liability, depending on the kind of tort, the kind of damages sought, the percentage of responsibility, and other factors. (See Appendices 2 and 3 and footnotes.) These jurisdictions are California, Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Michigan, Minnesota, Mississippi, Montana, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin. The combinations of methods of apportioning liability vary greatly from jurisdiction to jurisdiction. For example, in Indiana, several liability applies in all cases except medical malpractice cases where joint and several liability applies. On the other hand, recent legislation in West Virginia established several liability in medical malpractice cases with joint and several liability in all other cases.

In Nebraska, liability for noneconomic damages is several and liability for economic damages is joint and several. New York treats economic and noneconomic damages similarly

except that its law also adds a threshold amount for noneconomic damages. New Mexico generally employs several liability but imposes joint and several liability for products claims and other claims where there is a sound basis in public policy for the imposition of joint and several liability.

Some jurisdictions, like Idaho, Washington, and Wisconsin, retain joint and several liability where the defendants have acted in concert. Pennsylvania and Ohio maintain joint and several liability for intentional torts. Oregon and Pennsylvania are two jurisdictions that retain joint and several liability for torts resulting in environmental harm or torts involving the release of hazardous materials. Also, Pennsylvania retains joint and several liability for torts that relate to the liquor code.

Hybrid Jurisdictions

In addition to abrogating joint and several liability wholly or partially for certain types of torts or damages sought, some jurisdictions have developed compromise or "hybrid" approaches in comparative negligence situations. In a hybrid called the threshold approach, a jurisdiction may impose joint and several liability on a defendant whose percentage of comparative responsibility exceeds a certain level or threshold. The second hybrid approach, reallocation, accounts for the co-defendant who is unknown, indigent, or unreachable. Jurisdictions that adopt reallocation may allocate the responsibility of the unavailable co-defendant to the other responsible parties, including the plaintiff. (See **Appendix 3**.)

Thresholds

Thirteen jurisdictions do not hold a defendant jointly and severally liable if the defendant's fault falls below a certain threshold. For example, Pennsylvania law states that a defendant who is less than 60 percent negligent is severally liable. (See Appendix 3, fn. 13.) When there are multiple defendants in a negligence case in Ohio, a defendant found to be more than 50 percent liable is jointly and severally liable for the economic loss of the plaintiff while the defendant found less than 50 percent liable is severally liable for economic loss. All defendants in Ohio are severally liable for noneconomic damages. (See Appendix 3, fn. 11.)

In South Dakota, a defendant who is less than 50 percent negligent may not be jointly liable for more than twice the percentage of fault. (See Appendix 3, fn. 14.) Mississippi has a complex threshold law. A defendant who is less than 30 percent at fault is liable severally for economic damages. If a defendant is more than 30 percent liable, the liability is joint and several but only to the extent necessary for the plaintiff to recover 50 percent of recoverable damages. (See Appendix 3, fn. 6.)

Reallocation

Eight jurisdictions use the hybrid approach of reallocation to satisfy a judgment against multiple defendants if one defendant is immune from tort liability as a matter of law (for example, a defendant who is immune under sovereign or charitable immunity), is judgment proof, or if, for some other reason, the amount of the judgment is uncollectible. In this approach, the uncollectible amount may be reallocated to the other available responsible parties, including a responsible plaintiff.

Jurisdictions have varied approaches to reallocation. For example, in medical malpractice cases in Michigan, if the plaintiff is determined to have fault, reallocation applies. In Oregon, there is no reallocation if a defendant's liability is less than 25 percent or less than the plaintiff's liability. Finally, in Utah, if the total percentage of comparative responsibility assigned to all parties immune from liability in a case is less than 40 percent, the court shall reallocate that percentage to the other responsible parties proportionately to their comparative share. (See Appendix 3, fns. 3, 11, and 15.)

Chapter 4. Economic Effect of Change to Comparative Negligence System

Legislative bodies considering a change from contributory to comparative negligence may understandably be concerned about the possible economic effect, particularly in the area of liability insurance costs. However, there has been no definitive study of this issue, largely because a state's negligence standard is only one of many factors that interact to determine insurance premiums and related costs.

Relatively few studies have attempted to address this subject. Some have found no or a small overall impact, while others have concluded that a switch from contributory to comparative leads to substantially higher costs. Regardless of result, these studies have been criticized for lack of academic rigor, and/or for not having taken into account other factors that could have contributed to increased costs, in studies that reached this conclusion. In the absence of any comprehensive study, it is impossible to state with any certainty the direct and indirect consequences of changing to a comparative negligence system.

Summaries of the major studies cited in this chapter can be found in **Appendix 4**.

Formatting a Survey

It can be difficult both to format surveys to measure the impact of changing from a contributory to a comparative negligence system and to obtain the relevant data. Two early Arkansas surveys (Rosenberg (1959); Note, Ark. L. Rev. (1969)) relied on anecdotal evidence from Arkansas lawyers and judges based on their direct experience in handling negligence claims. An unpublished study by Wittman (1984), discussed in Shanley (1985), studied rear-end auto accidents one year before and after California adopted comparative negligence. A study on joint and several liability (Schmitt et al., 1991) examined LEXIS cases from 1963 through 1988 in which that term is mentioned. LEXIS is a legal reporting service that includes only those cases that result in reported decisions. These are almost always cases where an original judicial opinion or jury verdict has been appealed, a small percentage of the total number of cases. These studies, while informative, do not definitively answer any aspect of this question.

It can also be difficult to obtain the necessary information on insurance rates. The Maryland Trial Lawyers Association (MTLA), which supports the move to comparative negligence, has analyzed statistics that support its view that any financial impact will be minimal. (According to the MTLA, insurance companies are reluctant to share this information, which it believes further bolsters the association's claim.) Researchers attempting to determine how joint and several liability reform affects the rate of tort filings (Lee et al., 1994) relied on information from the 19 states that responded to a National Center for State Courts (NCSC) request for this information. Many pertinent studies reach tentative conclusions, explaining why more definitive findings are not appropriate and/or suggest additional data that would be helpful in further evaluating this situation.

Finally, the change from contributory to comparative can lead to increased claim settlements, either before a case is filed or after a case is filed but before a verdict is rendered. A settlement, especially a pre-trial settlement, likely results in reduced litigation costs. Since records of many settlements are not readily accessible, this factor is not reflected in any of the surveys.

In 1987, Joseph F. Delfico of the General Accounting Office testified before the U.S. House of Representatives Committee on Small Business on "Considerations in Measuring the Relationship Between Tort Reform and Insurance Premiums." He stated that it would be possible to determine to what extent tort reforms affect insurance premiums, although the relevant data would have to be collected over several years. It should also account for the other factors that could contribute to changes and be capable of dealing with the potential time lag between passage of tort reforms and subsequent effects on losses and premiums.

Impact on Jury Awards

A number of studies have shown that juries tend to reach "equitable" verdicts even if this means disregarding the judge's instructions on the law to be applied (*e.g.*, the defense of contributory negligence). Shanley, *supra*; Regional Economics Studies Institute (1997). This means that, in contributory negligence states, even if a jury believes a plaintiff was contributorily negligent, it may render a verdict for the plaintiff despite the plaintiff's negligence if it believes that result would be fair. One study (Shanley) found that California juries routinely imposed "double deductions," by both setting a total figure that incorporated plaintiffs' degree of negligence and then reducing it further by that same percentage of negligence.

Kessler (1985) found anecdotal evidence that judges and juries both fail to enforce the letter of the law, which leads to a weaker relationship between fault in an accident and recovery for injuries than the laws would predict. Data from insurance settlements arising out of auto accidents was consistent with this anecdotal evidence. Kessler therefore concluded that the letter of the law may be less important in shaping individuals' behavior than scholars had supposed.

On the other hand, there are cases where a plaintiff was so clearly contributorily negligent that the cases would not be brought under a contributory negligence system, and so would never go to the jury. Because most of these cases are handled on a contingency basis, in which the plaintiff's lawyer is paid only if the plaintiff prevails, a lawyer in a contributory negligence state is unlikely to take a case where the plaintiff's negligence is so clear that the case is likely to be unsuccessful. It is only when there is some question as to the plaintiff's negligence, or that negligence is very small, that most lawyers would be willing to handle the case.

From 1960 through 1987, the Rand Institute for Civil Justice (Peterson) conducted a series of studies on the outcomes of civil jury trials in Cook County, Illinois (which includes the city of Chicago) and San Francisco, California. California adopted a pure comparative negligence system in 1975 and Illinois did so in 1981. The studies showed that, as predicted,

more plaintiffs won their lawsuits, and the median size of most awards decreased after the change. However, other trends made it difficult to determine to what extent this was tied to the change. For example, Cook County plaintiffs won a greater number of jury trials in almost every type of case, including those where plaintiffs' negligence was rarely at issue. San Francisco plaintiffs won more cases in the 1980s, well after California had changed to comparative negligence. Also, an increasing number of trials across the board resulted in million-dollar verdicts, thus increasing the median awards.

Hammitt *et al*. (1985) used cross-sectional data from a 1977 All Industry Research Advisory Council survey to determine the probability of plaintiffs' being compensated under comparative law. The researchers had to stop short of a precise estimate because of problems with missing data and what they termed likely bias from adjustors in contributory states. The Jury Verdicts Reporting Service in Cook County, Illinois (cited in Shanley), after reviewing the first 1,076 jury trials in Cook County and downstate Illinois after comparative was adopted in 1981, showed plaintiff victories increased from 50 to 59 percent, while the size of the awards was reduced by an average of 43 percent. Shanley, however, challenges the accuracy of this survey, both because a possible increase in settlements was not considered and because prior juror conduct was unclear.

Impact on Insurance and Related Costs

As with other aspects of this question, those who support and those who oppose changing from contributory to comparative negligence reach different results on how comparative negligence would affect insurance rates and related costs.

In what appears to have been the first well-documented analysis of this impact, Peck (1960) conducted a cross-sectional study that compared insurance rates in states with contributory and comparative negligence standards. Due to problems with data, Peck reached only a general conclusion, but found that comparative law had less upward pressure on insurance rates than other commonly occurring changes within the states, such as rapidly growing populations, increasing urbanization, or the institution of safety-oriented traffic programs.

In 1990, Mutter discussed questions that the Tennessee General Assembly would face as it considered whether to move from a contributory to a comparative negligence system. (The Supreme Court of Tennessee judicially adopted modified comparative negligence in 1992.) After reviewing the available studies, Mutter found the only firm conclusion was that pure comparative fault would almost certainly cost more than modified comparative. This finding is consistent with other studies. Other than that, the equivocal nature of the studies to date, coupled with the perception by many observers that consequences attributable solely to comparative negligence may be impossible to quantify, made any firm conclusion as to an impact on liability insurance inadvisable.

North Carolina Studies

In 1981, 1983, 1985, 1987, and 1989, a group of University of North Carolina (UNC) professors (Johnson et al.) conducted studies on the impact of changing from a contributory to a comparative negligence system in that state. These unpublished studies, which were presented to the North Carolina General Assembly and may have influenced the assembly's decisions not to adopt comparative negligence, determined that a move to comparative would result in substantially higher insurance rates, especially for automobile insurance. A similar 1991 study by another group of UNC professors (Winkler et al.) reached the same conclusion.

Gardner (1996) states the 1987 study concluded that North Carolina's automobile liability insurance premiums would have been 32.05 to 32.27 percent higher in 1985 if the state had changed to a modified comparative negligence system and 92.71 to 116.58 percent higher if the state had switched to a pure comparative negligence standard. The North Carolina professors reached these results by comparing average premiums in contributory, modified comparative, and pure comparative states. Their other studies reached similar conclusions.

Gardner points out that these studies have been criticized for not taking into account the many other factors that can impact on insurance rates. The National Association of Insurance Commissioners has explained that "[t]he type and amount of coverage purchased by an individual is influenced by various factors, both economic and non-economic," that vary widely among the states. Rates will go up, for example, if a driver causes an accident or purchases a more expensive car or if a teenager in the household obtains a driver's license. A 1994 study (Langford) identified 82 independent variables that determine personal automobile insurance shopping intentions.

In addition to the type of fault system, automobile insurance rates are influenced by such variables as population density, quality of roads, quality of drivers, quality of drivers training, weather, insurance regulations, and competition among insurance companies. Whether a state has a mandatory seatbelt law or an uninsured motorists program or has adopted tort reform measures limiting awards for noneconomic damages can also impact on premiums.

Both California and New York switched from contributory to pure comparative negligence in 1987. At the time of the switch, both states had premium rates that were more than double North Carolina's premium rate and were more than 75 percent higher than the average contributory state. Thus, comparable post-switch figures should not be attributed solely to the change.

Maryland/Delaware Survey

Johnson also prepared a study comparing insurance exposures, claims, and loss payments in Maryland and Delaware from March 1980 through March 1988. Johnson found that the states had roughly comparable insurance premiums from March 1980 through March 1984, when both were contributory negligence states. After Delaware switched to comparative negligence in

1984, its consumers were subjected to an increasingly disparate cost differential as a direct result of the change. For example, pure premium rates for bodily injury increased in Delaware by an average of 11.33 percent per year from March 1980 through March 1984, and by 18.61 percent each year from March 1984 through March 1988. For Maryland, the corresponding figures were 12.12 percent and 9.16 percent.

This study is subject to the same criticisms noted above, that it does not consider the other factors that may influence insurance costs. MTLA notes that Delaware's rate of highway fatalities is 12 percent higher than Maryland's, and injuries are more severe. Seatbelt usage is over 20 percent higher in Maryland than in Delaware. Further, MTLA's statistics show that from 1985 to 1987, Delaware's liability pure premiums rose 6.5 percent, while Maryland's rose 9.6 percent.

RESI Study

In 1997, the Regional Economic Studies Institute (RESI) at Towson State University conducted a study on the economic impact of a change to comparative negligence for the Maryland Chamber of Commerce (which opposes the change). RESI concluded that significantly increased costs would result if Maryland adopted either a pure or a modified comparative negligence standard. In addition to substantially higher insurance costs, the additional number of cases would require three additional circuit court judges, with accompanying administrative costs, for a pure comparative system. Maryland would lose approximately 20,800 jobs over a four-year period after switching to modified and 42,500 jobs after switching to pure. This would result in a loss of tax revenue of $20.4 million (modified) or $41.6 million (pure) over that period.

In contrast, Dr. Edward W. Hill, Professor of Economic Development at Cleveland State University (2001), found no evidence that adopting the rule of comparative negligence would harm Maryland's business climate and make the State a less attractive place to do business. While economic development literature is very deep and rich on the subject of factors that influence business location, Hill could find no credible piece of research stating that the legal standard of negligence had any impact on firm location. Maryland does not market this nearly unique feature of tort law; nor does it have higher workers' compensation insurance payments than its competitor states. Hill concluded that this shows the State attracts the same kinds of firms as do its competitor states.

Joint and Several Liability

Legislative efforts to limit or eliminate joint and several liability in tort cases is a component of a package of tort reforms intended to reduce what has been characterized as an out-of-control increase in tort filings.

Only two comprehensive surveys on this topic were found. Lee et al. (1994) applied sophisticated statistical techniques, reflecting six environmental and six economic variables, as well as a time line (since, as population grows over time, the number of tort filings should increase) to data compiled from 19 states from 1984 through 1989. The researchers were able to document several trends, including that the rate of tort filings increased as population density increased and also as the rate of unemployment rose. They also documented a surge in filings during the last year in which claims could be filed under pre-reform liability rules, but only for those states that did not completely abolish joint and several liability. (Only four of the 33 states that had revised their joint and several liability laws at the time had completely abolished that approach.) However, while their analysis provided weak evidence that state laws modifying joint and several liability rules reduced claim filings, further research that includes more states across more years would be valuable to confirm or disprove this point.

Other studies are notable for the small number of cases involving joint and several liability that were found. Schmitt et al. (1991) examined LEXIS cases from 1963 through 1988 in which "joint and several liability" is mentioned. (LEXIS is a reporting service that includes cases that result in reported decisions; these are almost always cases decided on appeal.) The researchers found that only 0.41 percent of LEXIS cases (534 out of over 130,000) included this term; and, of those, 363, or 68 percent, were contract cases. Despite this small number of cases, the researchers were able to document larger damage values for corporate plaintiffs than for individual plaintiffs and an increase in the size of claimed damages over time.

Schmitt cites two earlier studies that make this same point. The State Bar of Wisconsin studied all jury trials rendering verdicts in Wisconsin in 1985 and 1986. Of 834 cases, only 13 were affected by joint and several liability (and in none was a slightly negligent defendant found responsible for the entire judgment). Similarly, an NCSC study of court filings in 25 states concluded that "a careful examination of available data ... provides no evidence to support the often cited evidence of a 'litigation boom.'"

Hensler et al. (1987) reached the same result but found that the use of joint and several liability in automobile cases had declined, while its use in products liability and medical malpractice cases had increased. A study of the federal caseload in the 1980s (Galanter, 1988) found a substantially increased use in federal courts – an increase he attributed to the domination of asbestos, Dalkon Shield, and Bendectin (morning sickness) cases.

Chapter 5. Pros and Cons of Comparative Fault

This chapter reviews the arguments advanced by proponents of comparative fault in support of abolishing Maryland's system of contributory negligence and adopting comparative fault and the arguments of opponents who advocate against making such a change.

Arguments in Support of Comparative Fault

Fairness

The primary criticism of contributory negligence is that the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault and places on one party the entire burden of a loss for which two or more parties are responsible. One observer presented the argument in this way:

> [T]here is no justification – in either policy or doctrine – for the rule of contributory negligence, except for the feeling that if one person is to be held liable because of fault, then the fault of the victim who seeks to enforce that liability should also be considered. But this notion does not require the all or nothing rule, which would exonerate a very negligent defendant for even the slight fault of his victim. A more nearly logical corollary of the fault principle would be a rule of comparative or proportional negligence, not the traditional all-or-nothing rule. And almost from the very beginning there has been serious dissatisfaction with the Draconian rule sired by a medieval concept of cause out of a heartless laissez-faire.[1]

No Negative Results

Proponents of comparative fault also point out that 46 states have abolished contributory negligence and that, since making the change to a comparative fault system, no state has returned to contributory negligence. Proponents of comparative fault cite the absence of any of these states returning to a system of contributory negligence as strong evidence that, in actual practice, the adoption of comparative fault has improved the tort liability systems in those jurisdictions that have made the change.

Arguments Against Comparative Fault

Personal Accountability

It has been said that contributory negligence is intended to discourage negligent behavior that causes accidents by denying recovery to those who fail to use proper care for their own

safety. Proponents submit that comparative fault will increase safety by giving governments and businesses greater incentive to act responsibly.

Increased Litigation and Larger Damage Awards

Opponents of comparative fault maintain that the current contributory negligence system minimizes the filing of lawsuits and encourages settlement of claims before trial because plaintiffs cannot recover if their own conduct contributed to their injury. If comparative fault is adopted, more lawsuits will be filed, resulting in a backlog in the courts.

Comparative negligence may also result in more complex and costly trials because of the difficulty of comparing plaintiff's and defendant's negligence rather than simply determining whether the plaintiff was at fault.

Opponents also argue that juries already apply a loose form of comparative negligence in practice; therefore, contributory negligence should be retained as a check on the tendency of juries to sympathize with plaintiffs.

However, at least one commentator has opined that the number of claims processed by the tort system probably is not much greater under comparative negligence. Although contributory negligence perhaps helps to minimize the number of claims that are resolved within the tort system, many accident victims file suit despite the possibility of being found contributorily negligent and most of these cases are submitted to a jury. If juries in contributory negligence jurisdictions do apply a rough comparative negligence standard, adoption of comparative fault would make more controllable what now is hidden and help to assure that similar cases are treated similarly.

Proponents, citing statistics from the National Center for State Courts, submit that there is no evidence that comparative fault increases the number of tort filings.

Increased Insurance Rates and Defense Costs

Adoption of comparative fault would broaden the potential liability of such "deep pocket" defendants as the State of Maryland, local governments, physicians, hospitals, and private employers. Even when defendants eventually win lawsuits, they have to expend large amounts of money and time for their defense. These costs, in turn, will be passed on to consumers. Opponents also contend that comparative fault will cause insurance rates to increase.

By exposing the State and local governments to additional suits, government resources will be diverted from service delivery to legal defense costs and increased payments for tort awards and insurance premiums.

Proponents counter that there are many other factors that go into setting insurance rates and that contributory negligence states actually have higher automobile insurance premiums than comparative fault states.

Adverse Business Climate

Opponents of comparative fault argue that states often compete economically with each other. For example, Maryland is often pitted against Virginia, North Carolina, and the District of Columbia for business relocations and the jobs they bring. Together with taxes, regulation of business, education of the work force, and quality of life, a state's civil justice system is another factor in measuring the business climate. The opponents of comparative fault maintain that the contributory negligence doctrine represents one of the few advantages Maryland has over Pennsylvania, New Jersey, Delaware, and other competing states.

Proponents point out that several major companies with locations in Maryland also operate quite successfully in other states with comparative fault. Further, the Department of Business and Economic Development does not recruit businesses based on Maryland's tort system; rather, businesses are attracted to Maryland because of factors such as the quality of life, the quality of the public schools, the many institutions of higher education, and the well-educated population.

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[1] Harper, Fowler V., Fleming James, Jr., and Oscar S. Gray, *The Law of Torts*. Second Edition. Volume 4. Little Brown and Company. 1986. pp. 286-288.

Chapter 6. Legislative History in Maryland

Since at least 1966, the General Assembly has considered legislation that would have abolished or modified the defense of contributory negligence by adopting some form of comparative fault. At least one comparative fault bill has been introduced in 29 of the past 38 regular legislative sessions, but no legislation in this area has been passed by the General Assembly.

The bills usually failed in the committee to which the bill was originally assigned. However, on seven occasions, one chamber of the General Assembly passed a comparative fault bill before it failed ultimately in the opposite chamber. In 1968 and 1970, the House of Delegates passed comparative fault bills, each of which failed in the Senate. After a lapse of 14 years, the Senate passed a comparative fault bill, which failed in the House. In the next four consecutive sessions, the Senate continued to pass comparative fault legislation that met a similar fate. Favorable action by a legislative committee on a comparative fault bill has not occurred since 1988.

Exhibit 6.1 summarizes the main aspects of the 37 comparative fault bills introduced in the General Assembly from 1966 to the present. The bills considered by the General Assembly have included the "pure" form of comparative fault legislation and both types of "modified" forms. However, a pure form of comparative fault legislation has not been introduced in over 20 years. Most of the "modified" forms of comparative fault bills introduced in the General Assembly would have applied only if the plaintiff was less than 50 percent at fault. (See Chapter 1 for a discussion of the forms of comparative fault.) Almost without exception, the bills would have applied only to negligence actions by excluding expressly or impliedly actions based on strict liability in torts, such as product liability suits, from the scope of the proposed comparative fault system.

In some of the bills, the plaintiff's negligence would have been compared to all defendants combined, specifically including third party defendants and persons with whom the plaintiff had entered into a settlement or other agreement. More commonly, the bills would have compared the plaintiff's negligence to the negligence of the person against whom recovery is sought, or the combined negligence of all defendants. In several instances, the bills did not address this issue.

In a few instances, the legislative proposals for comparative fault included provisions to modify or abolish the law of joint and several liability of defendants.

Exhibit 6.1
Maryland Comparative Fault Bills
1966 to 2003

Year	Bill No.	Type of Comparative Negligence	Application of Comparative Negligence to Strict Liability Claims	Plaintiff's Negligence Compared to:	Joint and Several Liability Modified
1966	SB 111	Pure	No	Not specified	No
1967	HB 277	Pure	No	Not specified	No
1968	HB 158	Pure	No	Not specified	No
1969	HB 63	Modified/less than 50%	No	Not specified	No
1970	SB 116/ HB 452	Pure	No	Not specified	No
1970	HB 453	Modified/less than 50%	No	The person against whom recovery is sought	No
1971	HB 546	Modified/less than 50%	No	The person against whom recovery is sought	No
1972	HB 156	Modified/less than 50%	No	The combined negligence of the defendants	No
1973	HB 785	Modified/less than 50%	No	The combined negligence of the defendants	No
1974	N/A	N/A	N/A	N/A	N/A
1975	HB 405	Modified/less than 50%	No	The person against whom recovery is sought	No
1976	SB 106	Modified/equal to or less than 50%	No	The person against whom recovery is sought	No
1976	HB 377	Pure	No	Not specified	No
1977	HB 2004	Modified/equal to or less than 50%	No	The combined negligence of the person or persons against whom recovery is sought	No
1978	N/A	N/A	N/A	N/A	N/A
1979	HB 1386	Modified/equal to or less than 50%	No	The combined negligence of the person or persons against whom recovery is sought	No
1979	HB 1381	Pure	Yes	The fault of all defendants, third party defendants and persons released from liability	Yes

Exhibit 6.1 (continued)

Year	Bill No.	Type of Comparative Negligence	Application of Comparative Negligence to Strict Liability Claims	Plaintiff's Negligence Compared to:	Joint and Several Liability Modified
1980	HB 1484	Pure	Yes	The fault of all defendants, third party defendants, and persons released from liability	Yes
1980	HB 98	Modified/equal to or less than 50%	No	The combined negligence of the person [or persons] against whom recovery is sought	
1981	HB 633	Modified/less than 50%	No	The person against whom recovery is sought	No
1982	SB 1007	Pure	No (Except when plaintiff's conduct is willful or wanton)	The negligence of all parties, including third party defendants and persons released from liability	No
1983	N/A	N/A	N/A	N/A	N/A
1984	SB 12	Modified/less than 50%	No	The negligence of the person against whom recovery is sought	No
1985	SB 21	Modified/less than 50%	No	The negligence of the person against whom recovery is sought	No
1986	SB 589	Modified/less than 50%	No	The persons against whom recovery is sought	No
1987	SB 218/ HB 1198	Modified/less than 50%	No	The persons against whom recovery is sought	No
1988	SB 232	Modified/less than 50%	No	The negligence of the persons against whom recovery is sought	No
1988	HB 1314	Modified/less than 50%	Yes	The combined fault of the persons against whom recovery is sought and nonparties	
1989	N/A	N/A	N/A	N/A	N/A
1990	HB 1013	Modified/less than 50%	No	The negligence of the persons against whom recovery is sought	No
1991	N/A	N/A	N/A	N/A	N/A
1992	N/A	N/A	N/A	N/A	N/A

Exhibit 6.1 (continued)

Year	Bill No.	Type of Comparative Negligence	Application of Comparative Negligence to Strict Liability Claims	Plaintiff's Negligence Compared to:	Joint and Several Liability Modified
1993	SB 226/ HB 846	Modified/equal to or less than 50%	No	The combined fault of the persons against whom recovery is sought	Yes
1994	N/A	N/A	N/A	N/A	N/A
1995	N/A	N/A	N/A	N/A	N/A
1996	HB 836	Modified/less than 50%	No	The combined negligence of the persons against whom recovery is sought	Yes
1997	HB 846	Modified/less than 50%	No	The combined negligence of the persons against whom recovery is sought and all persons with whom the plaintiff has entered into an agreement	Yes
1998	SB 618	Modified/less than 50%	No	The combined negligence of the persons against whom recovery is sought and all persons with whom the plaintiff has entered into an agreement	Yes
1999	HB 551	Modified/less than 50%	No	The combined negligence of the persons against whom recovery is sought and all persons with whom the plaintiff has entered into an agreement	Yes
2000	SB 779	Modified/less than 50%	No	The defendant or the combined negligence of all defendants against whom recovery is sought	No
2001	SB 483	Modified/less than 50%	No	The defendant or the combined negligence of all defendants against whom recovery is sought	No
2002	SB 872	Modified/less than 50%	No	The defendant or the combined negligence of all defendants against whom recovery is sought	No
2003	N/A	N/A	N/A	N/A	N/A

Source: Department of Legislative Services

Appendix 1. State Negligence Systems

Appendix 2. Liability of Multiple Defendants

Appendix 3. Hybrid Systems

Appendix 4. Summaries of Select Surveys on Fiscal Impact of Change from Contributory to Comparative Negligence System

Arkansas Surveys

Rosenberg, Maurice. "Comparative Negligence in Arkansas: A 'Before and After' Survey," 13 *Ark.L. Rev*. 89 (Spring 1959).

Note, "Comparative Negligence – A Survey of the Arkansas Experience," 22 *Ark. L. Rev.* 692 (1969).

These early studies solicited opinions from Arkansas lawyers and judges based on their direct experience in handling negligence claims.

Michael Shanley, in Comparative Negligence and Jury Behavior, Rand Graduate Institute # P-7057-RGI (Feb. 1985), states at 15:

> Results in both studies suggest that legislatures ought to rule out problems of court congestion and administration as potential problems of a comparative law, because they do not appear to have occurred. However, the studies also "refute the commonly expressed view that a shift to comparative negligence does not alter the value of personal injury cases," since both judges and lawyers contend that a greater proportion of plaintiffs win both settlements and trial awards.

Gardner, Steven. Contributory Negligence, Comparative Negligence, and Stare Decisis in North Carolina. 18 *Campbell L. Rev*. 1 (1996).

This article at pp. 47-53 criticizes the methodology utilized by Johnston et al. in the 1981 through 1989 North Carolina surveys of insurance rates in contributory negligence and comparative negligence states. Those studies found that insurance rates would increase substantially if North Carolina changed from a contributory to a comparative negligence system. Gardner criticized the studies on the following grounds:

- It is extremely difficult to compare insurance rates between states, because the auto insurance product is not homogenous across states. The National Association of Insurance Commissioners states: "The type and amount of coverage purchased by an individual is influenced by various factors, both economic and non-economic[,]" that vary widely among the states.

- The studies do not account for the large number of variables across states. These include population density, quality of roads, quality of drivers, quality of drivers training,

weather, character of the population density, insurance regulations, competition between insurance companies, type of fault system, and other laws. For example, New York's premiums were twice North Carolina's when both were contributory negligence states.

- The methodology used to predict an increase in premium rates attributes any difference between the average premium rates of contributory states and the average premium rate of comparative states solely to what type of negligence system the state uses, and uses the entire difference to predict the consequences of switching systems.

Gardner cites two experts (material on file at Campbell L. Rev. office) who criticize this methodology. Dr. J. Finley Lee, a professor at UNC, Chapel Hill, notes "nine potentially important variables" that the studies omitted. Also, larger states "influence the data to a disproportionate extent."

Dr. Bernard L. Webb, a professor at Georgia State University, noted substantial technical criticism of the study, and concluded that "it is apparent that interstate comparisons [upon which the studies solely rely] are not reliable indicators of the cost effects of various negligence standards."

Dr. Edward W. Hill, Professor of Economic Development, Cleveland State University, and Senior Fellow at the Brookings Institution

Letter to Chairman Walter Baker, Judicial Proceedings Committee, re: SB 483, March 5, 2001

Conclusion: There is no evidence that adopting the rule of comparative negligence would harm Maryland's business climate and make the State a less attractive place to do business.

Methodology: Dr. Hill examined two questions: (1) What does economic development literature say about this locational factor in interstate competition for business and employment? (2) What evidence exists to demonstrate that the current system of contributory negligence provides the State of Maryland with an economically meaningful competitive advantage?

Results: (1) While the economic development literature is very deep and rich on the subject of factors that influence business location, Dr. Hill could not find a credible piece of research that stated that the legal standard of negligence – either contributory or comparative – had any impact on firm location. Rather, studies mention such factors as location of customers and suppliers; availability, quality, and cost of labor; operating costs; quality of life factors; and tax costs. This lack of mention is a very strong statement that the existence of comparative negligence does not inhibit the economic development of a state or regional economy.

(2) There is no statistical evidence to demonstrate whether the existence of Maryland's contributory negligence system has any economic outcomes. However, Dr. Hill believes the following indirect evidence shows it does not: first, Maryland does not market this nearly unique feature of tort law; second, Maryland does not have higher workers' compensation insurance

payments than its competitor states. This shows that it attracts the same kinds of firms as do the competitor states.

Johnson, Joseph E. An Analysis of the Relative Cost of the Adoption of Comparative Negligence – A Paired State Study: Delaware and Maryland (1989)

Conclusion: Maryland and Delaware had roughly comparable insurance premiums from March 1980 through March 1984, when both were contributory negligence states. After Delaware switched to comparative negligence in 1984, its consumers were subjected to an increasingly disparate cost differential as a direct result of the change. Loss costs in other areas, such as homeowners, personal liability, business and professional liability, as well as to self-insureds, would reasonably be expected to also increase dramatically if Maryland were to adopt comparative negligence.

Methodology: Dr. Johnson studied data on automobile insurance exposures, claims, and loss payments for the period March 1980 through March 1988 for both Delaware and Maryland for all private automobile insurance lines. This data is reported quarterly. From it, he calculated claim frequency, claim severity, and pure premium information for each quarter ending period for both states. Calculations were made for automobile bodily injury liability, property damage liability, personal injury protection (no-fault), and collision coverages separately, as well as for combined bodily injury/property damage/personal injury protection.

Bodily InjuryResults (% increase per year)	Maryland	Delaware
Pure premium 3/80-3/84	12.12%	11.33%
Pure premium 3/84-3/88	9.16%	18.61%
Claim frequency 3/80-3/84	1.60%	0.43%
Claim frequency 3/84-3/88	1.07%	2.75%
Claim severity 3/80-3/84	10.34%	10.87%
Claim severity 3/84-3/88	8.06%	15.75%

Statistics for personal injury protection show patterns that are similar to those of bodily injury liability.

Property damage liability and collision experience statistics in Maryland and Delaware did not change to any marked extent relative to each other when compared on a pre-1984 and post-1984 basis. Delaware showed a slight increase in the frequency of claims for property damage after 1984.

Combined bodily injury/property damage/personal injury protection increased in Delaware by 8.18 percent and in Maryland by 10.02 percent from 1980 to 1984. From 1984 through 1988, the

figure for Maryland was a 9.02 percent increase per year, while Delaware showed a 17.09 percent increase per year.

Joseph E. Johnson & Associates, Inc. An Investigation of the Relative Costs of Comparative v. Contributory Negligence Standards (1983)

Conclusions: Research establishes conclusively that comparative negligence systems are more costly to the individual insurance purchaser than are contributory systems and that the cost differential increases over time. While it is impossible to define and estimate the noninsurance costs implied in changing from a contributory to a comparative negligence system, it is unquestionable that this would have far-reaching judicial and administrative cost effects beyond those in insurance premiums.

Methodology: The study was undertaken after an April 1981 determination, made in connection with proposed North Carolina legislation, that no broad-based, national, objective empirical study had ever been conducted on the issue of the cost of comparative negligence.

The researchers studied data on exposures, premiums, and losses for private passenger automobile insurance for 47 states from 1971 to 1980. They adopted as their comparative measure "pure premium" cost, which they state is widely recognized as the most accurate measure for loss cost comparisons of this nature. "Pure premium" is the loss cost component of insurance premiums. It does not include sales and administrative expenses, profit, or contingencies.

The researchers also tried to determine the impact of such a switch on judicial operating costs. However, the wide variety of judicial systems and the lack of accurate data made it impossible to find common ground on which to analyze the effect on judicial operating costs of a change in negligence systems.

Results: North Carolina is a contributory negligence state. Based upon 1981 automobile premiums earned in that state, consumers could expect to pay an additional $117,648,000 under a modified comparative system or an additional $244,584,000 under a pure comparative system. When all liability insurance premiums are considered, the expected total additional costs would be $137,484,000 and $285,822,000, respectively.

Lee, Han-Duck, Mark J. Browne and Joan T. Schmitt. How Does Joint and Several Tort Reform Affect the Rate of Tort Filings? Evidence from the State Courts. The Journal of Risk and Insurance, Vol. 61, Issue 2, Tort Reform Symposium (June 1994) 295.

Conclusion: While there was a significant increase in tort filings during the last year in which cases could be brought under pre-reform liability rules, the effectiveness of the reforms, which were intended to reduce filings, is unclear.

Methodology: The researchers studied data on litigation frequency from 1984 through 1989 from the 19 states that responded to a request from the National Center for State Courts for such data. Their analysis reflected not only any changes to the state's joint and several liability laws, but also six environmental variables (e.g., the number of lawyers per capita, population density, traffic density) and three economic variables (e.g., the state unemployment rate) that were postulated to have an impact on litigation frequency; as well as a time line, since, as population grows over time, the number of tort filings should increase. They used this information to develop a one-way fixed effects model, a one-way random effects model, and a random effects first-order autoregressive model. They also used an alternative methodology that more tightly controlled the nontort reform factors.

Results: The researchers were able to document several trends, including that the rate of tort filings increased as population density increased and as the rate of unemployment rose. They also documented a surge in filings during the last year in which claims could be filed under pre-reform liability rules, but only for those states that did not completely abolish joint and several liability. (Only 4 of 33 states nationwide that revised their joint and several liability statutes completely abolished it.) The analysis also provided weak evidence that state laws modifying joint and several liability rules reduced claim filings. Further research that includes more states across more years would be valuable.

Trial Lawyers Information

The Maryland Trial Lawyers Association (MTLA) and the American Trial Lawyers Association studied various statistics on insurance rates to arrive at the following conclusions. The MTLA believes that further study of such statistics would yield similar information; however, it is extremely difficult to obtain these figures.

- Contributory states have 6.1 percent higher premiums than states without a contributory system.

- Delaware v. Maryland

    - An "unsophisticated study" attributes Delaware's high insurance premiums to comparative fault. However:

- Delaware's rate of highway fatalities is 12 percent higher than Maryland's and injuries are more severe; and

- Seatbelt usage is over 20 percent higher in Maryland than in Delaware.

- Delaware switched to comparative negligence in 1984. From 1985 to 1987, Delaware's liability pure premiums rose 6.5 percent, while Maryland's rose 9.6 percent.

- South Carolina moved from a contributory to a comparative negligence system in 1991. Nebraska and Tennessee did so in 1992. Based on 1996 data, general liability costs as a percentage of gross state product dropped and has continued downward since that time in all three states. In addition, premium increases in Nebraska and South Carolina are nearly identical to states that kept contributory negligence.

- The National Center for State Courts surveyed 28 states for growth rates in tort filings, 1990 through 1997, and found no evidence that comparative negligence increases the number of filings. In North Carolina, which retained contributory negligence, there was a 16 percent increase.

Peterson, Mark A. Civil Juries in the 1980s: Trends in Jury Trials and Verdicts in California and Cook County, Illinois. Rand Institute for Civil Justice (ICJ), 1987.

From 1960 through 1987, the ICJ conducted a series of studies on the outcomes of civil jury trials in Cook County, Illinois and San Francisco, California.

California adopted a pure comparative negligence system in 1975 and Illinois did so in 1981. Studies showed that, as predicted, more plaintiffs won their lawsuits and the median size of most awards decreased after the change. However, other trends made it difficult to determine to what extent this was tied to the change.

In both jurisdictions, juries' decisions about liability seemed to be increasingly favorable to plaintiffs. Cook County plaintiffs won a greater number of jury trials in almost every type of case, including those where plaintiffs' negligence was rarely an issue. San Francisco plaintiffs also won more cases in the 1980s, well after California changed to comparative negligence. While the reason for this change is unclear, the author suggests the trials could have involved more serious injuries or might more often have involved "deep pockets" defendants, both features that produce larger jury awards.

Also, an increasing number of trials resulted in million-dollar verdicts, thus increasing the median awards. In Cook County, juries awarded 67 verdicts of at least $1 million between 1980 and 1984, twice the number of the previous five years. Sixty-five percent of money awarded in tort cases and 90 percent of all other monetary awards occurred in these cases. In San Francisco,

while the median award also increased, the total money awarded did not become increasingly concentrated in a few million dollar awards. The total amount of million dollar awards represented the same fraction of all money awarded (58 percent) during both the late 1970s and the early 1980s.

N.B.: Even with these changes, plaintiffs in most jury trials received modest awards. Even in the early 1980s, plaintiffs in 39 percent of jury trials in San Francisco and 36 percent in Cook County received no award. Most awards were still small. Including those who received no money, plaintiffs in 54 percent of San Francisco trials and 68 percent of Cook County trials received less than $18,000.

Regional Economic Studies Institute (RESI), Towson State University. Estimated Economic Impact of Comparative Negligence. Prepared for the Maryland Chamber of Commerce (March 5, 1997).

Conclusions: Adoption by Maryland of comparative negligence in either a pure or a modified form would lead to significantly higher costs. The increase in torts cases under a pure comparative system would require hiring additional circuit court judges and increased administrative costs. Employment would fall under either, as companies scaled back their operations or declined to locate or relocate in the State. Insurance companies' costs would rise, increasing the price of insurance. A substantial number of jobs would be lost, which would mean less tax revenue for the State.

Methodology: The researchers studied 1986 through 1992 data on the number of tort cases for 47 states. They also evaluated 1983 through 1992 data from the Insurance Services Office for 47 states on insurance company losses for automobile insurance, homeowners insurance, and liability insurance other than auto, adjusted to reflect such factors as mandatory insurance requirements, no-fault insurance programs, crime rates, and income. For information on employment and taxes, they studied 10 states (four modified, six pure) that had switched from contributory to comparative negligence between 1978 and 1991.

General Findings: (1) People tend to be more careful under contributory negligence and tend to file fewer lawsuits. (2) Corporations are more likely to be found negligent than individuals under comparative negligence. This is not true for contributory negligence.

Maryland Specific Results: Had Maryland adopted a system of comparative negligence prior to 1996:

- the total number of tort cases in 1996 under pure comparative negligence would have increased from 15,427 to 20,632 (33 percent) (no increase for modified);

- this would have required hiring an additional three circuit court judges, at a cost of $407,215, plus additional administrative costs and fees for public defenders;

- automobile insurance companies' costs would have increased by $272.8 million (17 percent) and homeowners insurance costs by $16.6 million under modified comparative negligence;

- automobile insurance costs would have increased by $528.4 million (33 percent), homeowner insurance companies' costs by $49.9 million, and other nonauto liability losses by $8.5 million under pure comparative negligence;

- Maryland would lose approximately 20,800 jobs over a four-year period after switching to modified (a slowing of the economy by 1 percent per year) and 42,500 jobs after switching to pure (2 percent per year); and

- this would result in a loss of tax revenue of $20.4 million (modified) or $41.6 million (pure) over that period of time.

Schmitt, Joan T., Dan R. Anderson and Timothy I. Oleszchuk. An Analysis of Litigation Claiming Joint and Several Liability. 58 Journal of Risk and Insurance 397 (Sept. 1991).

Conclusion: There was an exponential increase in the number of joint and several liability cases at the federal level between 1963 and 1988, but not at the state level. Contract cases predominated (68 percent). There was a relatively large representation of corporate plaintiffs and individual defendants, minimal involvement of municipalities as defendants, larger damage values for corporate plaintiffs than for individual plaintiffs, and an increase in the size of claimed damages over time. However, the total number and percentage of these cases is very small.

Methodology: The researchers examined those LEXIS cases from 1963 through 1988 in which "joint and several liability" was mentioned. (LEXIS is a reporting service that includes cases that result in reported decisions. These are almost always cases where an original judicial opinion or jury verdict has been appealed.) They then characterized the cases by type of liability: automobile, contract, malpractice, product, and pollution.

Results: Because of statements to the effect that "joint and several liability is the single most serious common law impediment to the underwriting and pricing of insurance," (407, citing Larry Pressler and Kevin Schieffer, "Joint and Several Liability: A Case for Reform," 64 *Denver L. Rev.* 651 (1988)) the authors were surprised to discover that only a tiny percentage of the LEXIS cases (534 out of over 130,000 or 0.41 percent) included this component. Of these, 363 (68 percent) were contract cases. This is consistent with other cited studies. Despite this small number of tort cases, the researchers were able to draw the conclusions noted above.
The increase in federal, but not state, court filings may be attributable to increased asbestos, Dalkon shield, and Bendectin (the "morning sickness" pill) litigation.

Shanley, Michael G. Comparative Negligence and Jury Behavior. Rand Graduate Institute # P-7057-RGI (Feb. 1985).

Conclusion: Although juries mitigated the large potential increase in awards that might have resulted from California's switching from contributory to a pure comparative negligence system in 1975, the actual increase was still considerably higher than what conventional wisdom at the time would have predicted.

Methodology: Dr. Shanley studied 675 auto accident trials in San Francisco County in the 1970s (half before and half after California's adoption of pure comparative). He developed a statistical model based on a plaintiff/defendant negligence scale that he used to predict jury behavior in these cases.

Results: Awards under a properly-followed comparative rule would have been 92 percent higher than under a properly-followed contributory rule. However, the actual increase was only 20 percent, although individual awards varied widely and roughly corresponded to the degree of plaintiff negligence (greater negligence = lower award).

Dr. Shanley attributes this result to the following jury practices:

- Juries consistently refused to bar partially negligent plaintiffs from recovery in contributory cases.

- Juries made awards to all negligent plaintiffs in the comparative era, regardless of how high their percentage of fault.

- Juries seemingly imposed "double deductions," by both setting a total figure that incorporated plaintiffs' degree of negligence and then reducing it further by that same percentage of negligence. Dr. Shanley estimates that, without these "double deductions," the increase would have been 34 percent, rather than 20 percent.

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