Negligence Systems

Contributory Negligence, Comparative Fault, and Joint and Several Liability



DEPARTMENT OF LEGISLATIVE SERVICES 2013

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

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OFFICE OF POLICY ANALYSIS
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March 1, 2013

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.

An earlier version of this report was published in 2004 by the Department of Legislative Services. This report updates the 2004 report and was prepared by Amy Devadas, Lindsay Eastwood, and Karen Morgan. In 2012 this report was updated and revised to reflect more recent developments. Amy Devadas and Douglas Nestor edited the report.

I trust this information will be of assistance to you.

Sincerely,

Warren G. Deschenaux
Director

WGD/DRN/mjp

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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, as opposed to a criminal action, which the state or county files 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

[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 ...").

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 not to 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. 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.

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[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).

What Is Contributory Negligence?

Contributory negligence is conduct on the part of the injured party "which falls below the standard to which the injured party 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]

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[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).

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]

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[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.

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% at fault and the defendant 80% 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% at fault in causing the accident. However, the jury holds the manufacturer 10% 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% 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% at fault could recover 5% 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" 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% 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% at fault, is allowed to recover 51% of the plaintiff's damages, while another is found to be to be 51% 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

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[15] *Id*. at 442.

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% at fault and each of three defendants are found to be 20% 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% would be compared to the total fault of all the defendants, 60%, and the plaintiff would be able to recover 60% 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.

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

[17] *Id*. at 443.

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

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 to 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.

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[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.

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% at fault and the second driver 40% at fault. Under a relative degree division, the first driver would be able to sue the second driver for contribution of 40% 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.

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[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.

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. 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 %ages of comparative responsibility assigned to the other parties.[25]

[24] *Id*. at 498.

[25] 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 an 1809 case, *Butterfield v. Forrester*.[2] The case involved a defendant who 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

[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).

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

[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).

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]

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[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).

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] Thirty-three states made the change from contributory negligence to comparative negligence legislatively, 12 states made the change through judicial decisions, and one state effected the change through a judicial synthesis of two statutes.[24] Some jurisdictions that initially had adopted a comparative negligence system through judicial decision later codified that system through legislation. For more information on state negligence systems, please refer to Appendix 1.

Joint and Several Liability

Joint and several liability originated nearly 400 years ago in England with *Sir John Heydon's Case*,[25] 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

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[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] Standing Committee on Rules of Practice and Procedure, Special Report to Court of Appeals on Aspects of Contributory Negligence and Comparative Fault, 8 (April 15, 2011).

[25] 11 Co. Rep. 5, 77 Eng. Rep. 1150 (1612).

to limit the tort liability of potential defendants.[26] Maryland is among the jurisdictions that continue to apply the traditional rule of joint and several liability.[27]

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

[27] 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, 12 jurisdictions have a "pure" comparative negligence system, and the other 34 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%") and (2) those that require the plaintiff to be less at fault than the defendant to recover ("less than 50%"). Appendix 1 shows that 22 jurisdictions use an "equal to or less than 50%" system and 11 jurisdictions use a "less than 50%" system.

One jurisdiction uses the "slight/gross" type of modified comparative negligence system discussed in Chapter 1. In other jurisdictions, the "slight/gross" system only applies to certain types of cases. For example, in the District of Columbia, the "slight/gross" system is applied to negligence actions involving employees of common carriers.[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 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%" system for noneconomic damages (*e.g.*, damages for pain and suffering).[2]

[1] DC ST. § 35-302 (2012).

[2] Mich. Comp. Laws Service § 600.2959 (2012).

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 of the Restatement, only five jurisdictions have maintained contributory negligence as a defense. Approximately, 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 do not apply comparative negligence principles to strict product liability cases, limit the application of comparative negligence principles to cases in which the plaintiff has unreasonably and voluntarily assumed a known risk, or are undecided as to whether comparative negligence applies to strict product liability cases.

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.

Jurisdictions also differ on the application of assumption of risk in product liability cases. Some jurisdictions treat product alteration, modification, and misuse by a consumer as a form of fault that should be compared with the fault of the defendant(s) to reduce damages, while in other jurisdictions this conduct is 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 three of the 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. 7.)

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. 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, approximately 41 jurisdictions have abolished completely or partially joint and several liability in response to adopting comparative negligence. Ten jurisdictions, that is, the remaining five comparative negligence jurisdictions and the five contributory negligence jurisdictions have retained "pure" joint and several liability.[3] In addition, Washington retains joint and several liability in cases where the plaintiff has no responsibility or fault for the plaintiff's injuries. (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 approximately 41 jurisdictions that have limited pure joint and several liability, only nine jurisdictions have adopted pure several liability where each defendant is responsible for paying only that defendant's portion of the damages.[4] (See Appendix 2.)

The other 32 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

[3] The comparative negligence jurisdictions with pure joint and several liability are Delaware, Maine, Massachusetts, Rhode Island, and South Dakota.

[4] Alaska, Arizona, Georgia, Kansas, Kentucky, Oklahoma, Utah, Vermont, and Wyoming have adopted pure several liability.

other factors. (See Appendices 2 and 3 and footnotes.)[5] The combinations of methods of apportioning liability vary greatly from jurisdiction to jurisdiction. For example, in Indiana, several liability applies in all cases except civil tort claims against governmental entities and medical malpractice cases, where joint and several liability applies. On the other hand, in West Virginia several liability applies in medical malpractice cases, and joint and several liability generally applies in all other cases.

In Nebraska, liability for noneconomic damages is usually several and liability for economic damages is usually joint and several. New Mexico generally employs several liability but imposes joint and several liability for specified types of claims and where there is a sound basis in public policy for the imposition of joint and several liability.

Some jurisdictions retain joint and several liability where the defendants have acted in concert or where the defendants committed and intentional tort or a tort involving environmental harm or the release of hazardous materials. For more information on multiple defendant liability, please refer to Appendix 2.

Hybrid Jurisdictions

In addition to abrogating joint and several liability wholly or partially for certain types of torts or damages sought, approximately 20 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. Approximately four of the 20 jurisdictions use both threshold and reallocation approaches. (See Appendix 3.)

Thresholds

Approximately 16 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% negligent is severally liable. (See Appendix 3.) When there are multiple defendants in a negligence case in Ohio, a defendant found to be more than 50% liable is jointly and severally liable for the economic loss of the plaintiff while the defendant found less than 50% liable is severally liable for economic loss. All defendants in Ohio are severally liable for noneconomic damages. (See Appendix 3.) In South Dakota, a defendant who is less than

[5] These jurisdictions are Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Iowa, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin.

50% negligent may not be jointly liable for more than twice the percentage of fault. (See Appendix 3.)

Reallocation

Approximately 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 be at fault, reallocation applies. In Oregon, there is no reallocation if a defendant's liability is less than 25% 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%, the court shall reallocate that percentage to the other responsible parties proportionately to their comparative share. (See Appendix 3.)

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 little overall impact, while others have concluded that a switch from contributory to comparative negligence leads to substantially higher costs. Regardless of result, these studies have been criticized for lack of academic rigor. Studies that concluded the switch would result in increased costs have also been criticized for not having taken into account other factors that could have contributed to the increase. 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.

Formatting a Survey and Obtaining Data

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.

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.

The change from contributory to comparative negligence 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, often results in reduced litigation costs. Since

records of many settlements are not readily accessible, this factor is not reflected in any of the surveys.

Researchers may also find it difficult to obtain the necessary information on insurance rates. The Maryland Association for Justice (MAJ), formerly the Maryland Trial Lawyers Association, which supports the move to comparative negligence, has analyzed statistics that support its view that any financial impact will be minimal. According to the MAJ, insurance companies are reluctant to share this information, which it believes further bolsters the association's claim.

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. Most lawyers would only be willing to handle the case when there is some question as to the plaintiff's negligence, or that negligence is very small.

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 mean size of most awards increased 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 mean size of 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 negligence was adopted in 1981, showed plaintiff victories increased from 50% to 59%, while the size of the awards was reduced by an average of 43%. 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, 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 negligence 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% higher in 1985 if the state had changed to a modified comparative negligence system and 92.71 to 116.58% 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 may impact 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. Mandatory seatbelt laws, uninsured motorists programs, and 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% 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% per year from March 1980 through March 1984, and by 18.61% each year from March 1984 through March 1988. For Maryland, the corresponding figures were 12.12% and 9.16%.

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

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 a modified standard and 42,500 jobs after switching to a pure standard. By 1997 standards, 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 tort reforms intended to limit the rate of 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% of LEXIS cases (534 out of over 130,000) included this term; and, of those, 363, or 68%, 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.

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]

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.

Litigation Frequency and 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.

[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.

Comparative negligence may also result in more complex and costly trials because of the difficulty of comparing a plaintiff's and a 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.

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.

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.

Business Climate

Opponents of comparative fault argue that states compete economically with each other and are often pitted against one another 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. Though North Carolina, Virginia, and the District of Columbia also adhere to contributory negligence, the opponents of comparative fault maintain that the contributory negligence doctrine still represents one of the few advantages Maryland has over nearby Delaware, New Jersey, and Pennsylvania or other comparative fault states.

Proponents point out that several major companies with locations in Maryland are able to operate quite successfully in other states with comparative fault.

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 30 of the past 47 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 ultimately failed 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 38 comparative fault bills introduced in the General Assembly from 1966 to 2012. 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 30 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% 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 2012

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

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
1991	N/A	N/A	N/A	N/A	N/A
1992	N/A	N/A	N/A	N/A	N/A
1993	SB 266/ HB 1094	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

Exhibit 6.1 (continued)

2003	N/A	N/A	N/A	N/A	N/A
2004	N/A	N/A	N/A	N/A	N/A
2005	N/A	N/A	N/A	N/A	N/A
2006	N/A	N/A	N/A	N/A	N/A
2007	SB 267/ HB110	Modified/less than 50%	N/A	The defendant or the combined negligence of all defendants against whom recovery is sought	No
2008	N/A	N/A	N/A	N/A	N/A
2009	N/A	N/A	N/A	N/A	N/A
2010	N/A	N/A	N/A	N/A	N/A
2011	N/A	N/A	N/A	N/A	N/A
2012	N/A	N/A	N/A	N/A	N/A

Source: Department of Legislative Services

Chapter 7. The Uncertain Future of Tort Reform in Maryland

The introduction of legislative proposals to replace Maryland's system of contributory negligence with comparative fault has been a common occurrence throughout the years, but has become more sporadic after the 1990s. Though only one House bill and one Senate bill that would have established a comparative fault system in Maryland were introduced in the General Assembly in the intervening years since the original publication of this report in 2004, there has been a revival of interest in the topic due to recent actions by the Court of Appeals and a pending court case.

Court of Appeals Memorandum

In November 2010, Robert Bell, the Chief Judge of the Court of Appeals, issued a memorandum to the Standing Committee on Rules of Practice and Procedure (the Rules Committee) that reinvigorated the interest and debate on the doctrines of contributory negligence and comparative fault and general tort reform. The Chief Judge requested that the Rules Committee undertake a comprehensive and objective study of how other states and federal jurisdictions treat the doctrines of comparative fault and contributory negligence and complete an analysis of the legal principles associated with these doctrines.

In addition to reporting how many jurisdictions use the doctrines of comparative fault or contributory negligence, the Chief Judge asked the Rules Committee to provide information regarding:

- how those jurisdictions that changed from contributory negligence to comparative fault systems made the change;
- the form, structure, and aspects of comparative fault adopted by those jurisdictions; and
- any significant judicial and economic consequences that resulted from the change from contributory negligence to comparative fault.

The Chief Judge also asked the Rules Committee to advise whether it would be appropriate to replace the contributory negligence doctrine with a comparative fault doctrine by court rule, rather than by judicial decision (if the Court of Appeals decided to implement that change). The Rules Committee was also asked to recommend the form and content for such a rule and what related legal principles would have to be concurrently considered.

In response, the Rules Committee submitted its report in April 2011 and did not recommend any changes to existing Maryland Rules. The report stated:

> Respectfully, the Committee believes that the doctrines of contributory negligence, comparative fault, and at least some of the various associated doctrines and legal principles associated with those doctrines are matters of substantive law that do not fall within the ambit of practice, procedure or judicial administration. To the extent they are common law doctrines, they can be changed by judicial decision, as they have in several other States, but not, in the Committee's view, by Rule.

Rules Committee Findings

The Rules Committee Chair appointed a special subcommittee, which was charged with developing a draft report for consideration by the full Committee. The subcommittee reviewed recent studies and collected statutes and court opinions from all of the states and jurisdictions that replaced contributory negligence with comparative fault.

After analyzing how the 46 states that have changed to comparative fault accomplished the change, the Rules Committee found that 33 of the states effected the change by statute, 12 states changed their systems through judicial decisions, and one state changed its system by a judicial synthesis of two statutes. No state adopted comparative fault by court rule. The adoption of comparative fault by the federal jurisdictions was entirely by statute.

The Committee found that a shift from contributory negligence to comparative fault is more complex than it would appear, due to the potential need to modify or eliminate a number of associated negligence doctrines that have evolved to mitigate the impact of contributory negligence and some modified comparative fault systems.

The Rules Committee examined uniform legislation proposed in recent years (primarily the 1977 Uniform Comparative Fault Act (UCFA) and the 2002/2003 Uniform Apportionment of Tort Responsibility Act (UATRA)). Though the UCFA proposed a scope of application for comparative fault as well as a definition of "fault," states did not embrace a uniform approach. Thus, the treatment of related legal principles (*e.g.*, strict liability, the last clear chance doctrine, assumption of risk, breach of warranty, and reckless conduct) among comparative fault jurisdictions will depend on a state's definition of "fault" and state-specific statutes and case law.

The Rules Committee noted that there was no clear consensus for the treatment of these doctrines as the issues they pose were not definitively resolved by the states in the manners suggested by the proposed UCFA and reconsidered in the 2003 revision of UATRA. The Rules Committee concluded that short of reading all of the statutes and court cases pertaining to negligence law and torts for the 46 comparative fault states, it was not possible to determine how states resolved the issues presented by the associated legal doctrines. Some states dealt with

some of the issues while others did not. The states that did address these issues chose different ways of addressing them. However, the Rules Committee did note that even though the 2003 UATRA analysis indicates that there is no clear consensus among the states, a state that does decide to adopt comparative fault will have to address the associated legal doctrines to adequately determine the scope and operation of its tort laws.

The Rules Committee also advised that, in a shift from contributory negligence to comparative fault, the apportionment of fault among multiple tortfeasors requires consideration. This includes determining the impact of joint and several liability, as well as the doctrines of contribution and indemnity. Factors that must be resolved include (1) determining the other tortfeasors against which the fault of other tortfeasors is measured; (2) the manner and the extent to which the claimant can recover from each of the tortfeasors; and (3) in what manner the other tortfeasors recover from each other for what they have paid to the claimant. How these issues are resolved depends, in large part, on the definition of "fault" and the treatment of nonparties and tortfeasors who have been released. The Committee's review of the available analyses of state actions in this area yielded mixed results.

The Rules Committee also analyzed how a shift from contributory negligence to comparative fault might impact subrogation claims by workers' compensation employers and insurers. A major issue is the proper attribution of fault to an employer. The Rules Committee noted that UATRA recommended treatment of compensation benefits as a form of settlement, implemented as if the employer received a release. This would require that the employer's share of fault, if any, be determined in the same manner as a tortfeasor who has been released. The employer's subrogation lien would then be reduced by the monetary amount of the employer's percentage of responsibility. The Rules Committee noted that it was unable to determine how many states adopted this approach.

The Committee's analysis concluded that while 46 states have adopted comparative fault systems and rejected the common law doctrine of contributory negligence, there appears to be no significant consensus among them on the implementation of all details of comparative fault.

Recent Legislative Developments

Before the Rules Committee completed its report, House Bill 1129 of 2011, an emergency bill, was introduced. The bill would have mandated that Maryland's contributory negligence system remain an affirmative defense that may be raised by a party who is being sued for damages due to wrongful death, personal injury, or property damage. House Bill 1129 was heard by the House Judiciary Committee, but no further action was taken.

The same proposal was introduced during the Second Special Session of 2012 as House Bill 12. The bill was referred to the House Rules and Executive Nominations Committee, where no further action was taken.

Recent Maryland Court of Appeals Case

On April 20, 2012, the Court of Appeals granted certiorari in *Coleman v. Soccer Association of Columbia, et al.* (No. 9, September Term 2012), a case that presents the Court with the issue of retaining the current contributory negligence standard versus switching to a comparative fault standard.

The plaintiff in the case, James K. Coleman, was a 20-year-old assistant soccer coach for the Soccer Association of Columbia (SAC). In August 2008, Coleman was taking shots on goal while his team was practicing at a soccer field located on the property of a public school. While attempting to retrieve a ball from the goal, Coleman jumped up and grabbed the crossbar of the goal. The goal frame was unanchored and tipped over on top of Coleman. Coleman suffered a fractured orbit (bone structure area around the eyes) and required hospital treatment, including the insertion of a titanium plate.

The case was tried before a jury in the Circuit Court for Howard County. In October 2011, the jury found that SAC was negligent for failing to properly secure the goal frame, but declined to award damages to the plaintiff, because it also found that Mr. Coleman was negligent when he grabbed the crossbar. Mr. Coleman appealed to the Court of Special Appeals, but also filed a direct petition to the Court of Appeals. SAC filed a cross-appeal.

The Court of Appeals, in granting certiorari, stated that the issue was whether the Court should ameliorate or repudiate the doctrine of contributory negligence and replace it with a comparative fault regime.

Oral arguments were held in front of the Court on September 10, 2012. In an unusual step signaling the importance of the case, the Court not only solicited oral arguments from the attorneys for the plaintiff and defendants, but also from those persons and organizations who submitted "friend of the court" briefs. Proponents of a change in negligence systems argued that the all-or-nothing approach of the contributory negligence doctrine is harsh, outdated, and can result in allowing people who have harmed others to escape liability. Opponents argued that a shift to a comparative fault system would increase lawsuits and liability against businesses, and make Maryland less competitive with neighboring states. Opponents also argued that the General Assembly, rather than the courts, is the appropriate venue for a change to comparative fault.

A decision in the *Coleman* case is pending. When the Court of Appeals will reach its decision is unknown.

Appendix 1. State Negligence Systems

State Negligence Systems

State	Negligence System		Application of Comparative Negligence to Strict Product Liability Cases		Plaintiff's Negligence Compared to:	
	Type	Authority	Yes or No	Authority	Each Defendant	All Defendants Combined
Alabama	Contributory	*Williams v. Delta International Machinery Corp.*, 619 So.2d 1330 (Ala.1993); *Alabama Power Co. v. Schotz*, 215 So.2d 447 (Ala. 1968); *Ex parte Goldsen*, 783 So.2d 53 (Ala. 2000).	N/A	N/A	N/A	N/A
Alaska	Comparative – Pure	Alaska Stat. §§ 09.17.060 and 09.17.080 (2012)	Yes	Alaska Stat. § 09.17.900		X
Arizona	Comparative – Pure	Ariz. Rev. Stat. Ann. §§ 12-2505 and 12-2509 (2012)	Yes	*Jimenez v. Sears*, 904 P.2d 861 (1995)		X
Arkansas	Comparative – Modified/less than 50%	Ark. Code Ann. §§ 16-55-216 and 16-64-122 (2012)	Yes[1]	Ark. Code Ann. § 16-64-122		X
California	Comparative – Pure	*Li. v. Yellow Cab*, 532 P.2d 1226 (1975)	Yes	*Daly v. G.M. Corp.*, 575 P.2d 1162 (1984)		X
Colorado	Comparative – Modified/less than 50%	Colo. Rev. Stat. Ann. § 13-21-111 (2012)	Yes	Colo. Rev. Stat. Ann. § 13-21-406		X
Connecticut	Comparative – Modified/equal to or less than 50%	Conn. Gen. Stat. Ann § 52-572h(b) (2012)	Yes	Conn. Gen. Stat. Ann. § 52-527o(a)		X

[1] In Arkansas, fault subject to comparison also includes plaintiff's conduct in a breach of warranty claim.

State	Negligence System		Application of Comparative Negligence to Strict Product Liability Cases		Plaintiff's Negligence Compared to:	
	Type	Authority	Yes or No	Authority	Each Defendant	All Defendants Combined
Delaware	Comparative – Modified/equal to or less than 50%	Del. Code Ann., Title 10, § 8132 (2012)	Yes	Del. Code Ann., Title 6, §§ 2-313 and 2A-210		X
District of Columbia	Contributory[2]	*Wingfield v. People's Drug Store*, 379 A. 2d 685 (D.C. 1994); *Dennis v. Jones*, 928 A. 2d 672 (2007)	N/A	N/A	N/A	N/A
Florida	Comparative – Pure	Fla. Stat. Ann. § 768.81 (2012)	Yes	*West v. Caterpillar*, 336 So.2d 80 (1976)		X
Georgia	Comparative – Modified/ less than 50%[3]	Ga. Code Ann. § 51-12-33 (2012)	No	*Center Chem. v. Parzini*, 234 Ga. 868 (1975)		X
Hawaii	Comparative – Modified/equal to or less than 50%	Haw. Rev. Stat. § 663-31 (2012)	Yes	*Kaneko v. Hilo Coast*, 654 P.2d 343 (1982)		X
Idaho	Comparative – Modified/less than 50%	Idaho Code § 6-801 (2012)	Yes	*Shields v. Morton Chem.*, 578 P.2d 857 (1973)	X	
Illinois	Comparative – Modified/equal to or less than 50%	Ill. Comp. Stat. Ann. 735ILCS §5/2-1116 (from Ch. 110)	Yes	*Coney v. J.L.G. Ind.*, 454 N.E.2d 197 (1983)		X

[2] The District of Columbia is a contributory negligence jurisdiction with the exception of negligence actions involving employees of common carriers, which are governed by the slight/gross standard under comparative negligence.

[3] In Georgia, plaintiff's action is barred if plaintiff could have avoided consequences of the defendant's negligence. (Ga. Code Ann. § 51-11-7 (2012).

State	Negligence System		Application of Comparative Negligence to Strict Product Liability Cases		Plaintiff's Negligence Compared to:	
	Type	Authority	Yes or No	Authority	Each Defendant	All Defendants Combined
Indiana	Comparative – Modified/equal to or less than 50%[4]	Ind. Code Ann. §§ 34-51-2-5 through 34-51-2-8 (2012)	Yes	Ind. Code Ann. § 34-51-2.1		X
Iowa	Comparative – Modified/equal to or less than 50%	Iowa Code Ann. § 668.3(1) (2012)	Yes	Iowa Code Ann. § 668.1		X
Kansas	Comparative – Modified/less than 50%	Kan. Stat. Ann. § 60-258(a) (2012)	Yes	*Lenherr v. NRM Corp.*, 504 F.Supp. 165 (D.Kan. 1980)		X
Kentucky	Comparative – Pure	Ky. Rev. Stat. Ann. § 411.182 (2012)	No	Ky. Rev. Stat. Ann. § 411.320(3)		X
Louisiana	Comparative – Pure[5]	La. Civ. Code § 2323(2012)	Yes[6]	*Bell v. Jet Wheel Blast*, 462 So.2d 166 (1985)		X
Maine	Comparative – Modified/less than 50%	Me. Rev. Stat. Ann., Title 14, § 156 (2012)	Yes	*Austin v. Raybestos-Manhattan, Inc.*, 471 A.2d 280 (1984)	X[7]	
Maryland	Contributory	*Board of County Comm'r of Garrett County v. Bell Atlantic*, 695 A. 2d 171 (Md. 1997)	N/A	N/A	N/A	N/A

[4] In Indiana, contributory negligence still applies to claims arising under the Indiana Tort Claims Act (civil tort claims against governmental entities) and the Indiana Medical Malpractice Act.

[5] In Louisiana, a plaintiff's claim for damages will not be reduced by his/her percentage of fault if the plaintiff suffered injury, death, or loss as a result of his/her negligence and the fault of an intentional tortfeasor. La. Civ. Code §2323 (C).

[6] In Louisiana, comparative negligence may be applied in some cases if it provides consumers an incentive to use a product carefully.

[7] It has been implied in Maine case law that plaintiff's negligence is compared to the negligence of each defendant, but the issue is not settled.

State	Negligence System		Application of Comparative Negligence to Strict Product Liability Cases		Plaintiff's Negligence Compared to:	
	Type	Authority	Yes or No	Authority	Each Defendant	All Defendants Combined
Massachusetts	Comparative – Modified/equal to or less than 50%	Mass. Gen. Laws Ann., Ch. 231, § 85 (2012)	See note[8]	*Colter v. Barber-Greene*, 525 N.E.2d 1305 (1988)		X
Michigan	Comparative – Modified/equal to or less than 50%[9]	Mich. Comp. Laws Service § 600.2959 (2012)	Yes	Mich. Comp. Laws Service § 600.2959 and § 600.6304		X
Minnesota	Comparative – Modified/equal to or less than 50%	Minn. Stat. Ann. § 604.01 (2012)	Yes	Minn. Stat. Ann. § 604.01	X	
Mississippi	Comparative – Pure	Miss. Code Ann. § 11-7-15 (2012)	Yes	*Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (1975)		X
Missouri	Comparative – Pure	*Gustafson v. Benda*, 661 S. W. 2d 11 (Mo. 1983) Mo. Rev. Stat. 537-765 (2012)	Yes	Mo. Ann. Stat. § 537.765		X
Montana	Comparative – Modified/equal to or less than 50%	Mont. Code Ann. § 27-1-702 (2012)	Yes	*Zahrte v. Sturm, Ruger & Co.*, 661 P.2d 17 (1983)		X
Nebraska	Comparative – Modified/less than 50%	Neb. Rev. Stat. § 25-21, 185.09 (2012)	Yes	Neb. Rev. Stat. § 25-21, 185.07		X

[8] Comparative negligence standard applies to torts involving defective products but not to breach of warranty actions. Massachusetts does not allow claims for strict liability for defective products, but has eliminated most contractually based defenses to implied warranty of merchantability. Massachusetts law imposes duties on merchants as a matter of social policy that are as comprehensive as the duties established under the traditional strict liability doctrine as expressed in Restatement of Torts 2d, § 402A. Also note that in Massachusetts, under breach of warranty, a plaintiff's injury from unreasonable use of a product known to be dangerous is viewed as consent to risk and the sole proximate cause of the injury.

[9] Michigan has a modified/equal to or less than 50% comparative negligence system for noneconomic damages and a pure comparative negligence system for economic damages.

State	Negligence System		Application of Comparative Negligence to Strict Product Liability Cases		Plaintiff's Negligence Compared to:	
	Type	Authority	Yes or No	Authority	Each Defendant	All Defendants Combined
Nevada	Comparative – Modified/equal to or less than 50%	Nev. Rev. Stat. Ann. § 41-141 (2012)	No	*Young's Mach. Co. v. Long*, 692 P. 2d 24 (1984) Nev. Rev. Stat. Ann. § 41-141(5)		X
New Hampshire	Comparative – Modified/equal to or less than 50%	NH Rev. Stat. Ann. § 507:7-d (2012)	Yes	*Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843 (1978)		X
New Jersey	Comparative – Modified/equal to or less than 50%	NJ Stat. Ann. § 2A:15-5.1 (2012)	Yes	NJ Stat. Ann. § 2A:15-5.2		X
New Mexico	Comparative – Pure	*Scott v. Rizzo*, 634 P.2d 1234 (1981) NM Stat. Ann. §41-3A-1 (2012)	Yes	*Jaramillo v. Fisher Controls Co.*, 698 P.2d 887 (1985)		X
New York	Comparative – Pure	NY Civ. Prac. L&R § 1411 (2012)	Yes	NY Civ. Prac. L&R § 1602(10)		X
North Carolina	Contributory	Common Law and N.C. Gen. Stat. §99B-4(3) (2012)[10]	N/A	N/A	N/A	N/A
North Dakota	Comparative – Modified/less than 50%	ND Cent. Code § 32-03.2-02 (2012)	Yes	ND Cent. Code § 32-03.2-01		X
Ohio	Comparative – Modified/equal to or less than 50%	Ohio Rev. Code Ann. §§ 2315.33 and 2315.35 (2012)	Yes	Ohio Rev. Code Ann. § 2307.711 (2012)		X
Oklahoma	Comparative – Modified/equal to or less than 50%	Okla. Stat. Ann. §§ 23-13 and 23-14 (2012)	No	*Kirkland v. General Motors Corp.*, 521 P.2d 1353 (1974)		X

[10] North Carolina also applies the contributory negligence doctrine in product liability cases (N.C. Gen. Stat. § 99B-4(3) (2012).)

State	Negligence System		Application of Comparative Negligence to Strict Product Liability Cases		Plaintiff's Negligence Compared to:	
	Type	Authority	Yes or No	Authority	Each Defendant	All Defendants Combined
Oregon	Comparative – Modified/equal to or less than 50%	Or. Rev. Stat. § 31.600 (2012)	Yes	*Sandford v. Chev. Div. of Gen. Motors*, 642 P.2d 624 (1982)		X
Pennsylvania	Comparative – Modified/equal to or less than 50%	42 Penn. Con. Stat. Ann. § 7102	No	*Berkebile v. Brantly Helicopter Corp*., 337 A.2d 893 (1975)		X
Rhode Island	Comparative – Pure	R.I. Gen. Laws § 9-20-4	No	*Roy v. Star Chopper Co*., 584 F.2d 1124 (1978)		X
South Carolina	Comparative – Modified/equal to or less than 50%	*Nelson v. Concrete Supply Co*., 399 S.E.2d 783 (1991)	No	*Nelson v. Concrete Supply Co*., 399 S.E.2d 783 (1991)		X
South Dakota	Comparative – Modified/slight/gross	S.D. Cod. Laws Ann., § 20-9-2 (2012)	No	*Smith v. Smith*, 278 N.W.2d 155 (1979)		X
Tennessee	Comparative – Modified/less than 50%	*McIntyre v. Balentine*, 833 S.W.2d 52 (1992)	No	*Smith v. Detroit Marine Engineering Corp*., 712 S.W.2d 472 (1985)		X
Texas	Comparative – Modified/equal to or less than 50%	Tex. Civ. Prac. & Rem. Code Ann. § 33.001 (2012)	Yes	*General Motors v. Sanchez*, 997 S.W.2d 584 (1999)		X
Utah	Comparative – Modified/less than 50%	Utah Code Ann. § 78B-5-818 (2012)	Yes	Utah Code Ann. § 78B-5-817		X
Vermont	Comparative – Modified/equal to or less than 50%	12 Vt. Stat. Ann. § 1036 (2012)	Undecided[11]	*Jugle v. Volkswagen of America, Inc.*, 975 F. Supp. 576 (1997); *Webb v. Navistar Int'l Transp. Corp.*, 166 Vt. 119 (1996)		X

[11] Vermont courts have applied comparative negligence principles to strict product liability cases but have not created a general rule on when comparative negligence applies to strict product liability cases.

State	Negligence System		Application of Comparative Negligence to Strict Product Liability Cases		Plaintiff's Negligence Compared to:	
	Type	Authority	Yes or No	Authority	Each Defendant	All Defendants Combined
Virginia	Contributory	*Va. Elec. & Power Co. v. Winesett*, 303 S.E.2d 868 (1983); *Baskett v. Banks*, 45 S.E. 2d 173 (Va. 1947); *Rascher v. Friend*, 276 Va. 370 (2010)	N/A	N/A	N/A	N/A
Washington	Comparative – Pure	Wash. Rev. Code Ann. §§ 4.22.005 through .015 (2012)	Yes	Wash. Rev. Code Ann. § 4.22.015		X
West Virginia	Comparative – Modified/less than 50%	*Bradley v. Appalachian Power Co*., 256 S.E.2d 879 (1979)	Yes	*King v. Kayak Mfg. Co*., 387 S.E.2d 511 (1989) W. Va. Code §55-7-24(b)(4)		X
Wisconsin	Comparative – Modified/equal to or less than 50%	Wis. Stat. Ann. § 895.045 (2012)	Yes	*Austin v. Ford Motor Co*., 273 N.W.2d 233 (1979) Wis. Stat. Ann. § 895.045(3)	X	
Wyoming	Comparative – Modified/equal to or less than 50%	Legislative Wy. Stat. Ann. § 1-1-109(b) (2012)	No	*Phillips v. Durolast Roofing*, 806 P.2d 834 (1991)		X

Source: Department of Legislative Services and Administravtive Office of the Courts

Appendix 2. Liability of Multiple Defendants

Liability of Multiple Defendants

State	Negligence System	Multiple Defendant Liability					Authority for Liability of Multiple Defendants
		Joint & Several Liability		Several Liability		Hybrid	
		Pure	Where Plaintiff Has No Comparative Responsibility	Pure	Under Specified Circumstances	(For details see Appendix 3)	
Alabama	Contributory	X					*Matkin v. Smith*, 643 So. 2d 949 (Ala. 1994)
Alaska	Comparative – Pure			X			Alaska Stat. § 09.17.080
Arizona	Comparative – Pure			X[1]			A. R. S. § 12-2506
Arkansas	Comparative – Modified/less than 50%				X[2]		Ark. Code Ann. §§16-55-201 and 16-55-205
California	Comparative – Pure				X[3]		Cal. Civ. Code § 1431.2
Colorado	Comparative – Modified/less than 50%				X[4]		Colo. Rev. Stat. § 13-21-111.5
Connecticut	Comparative – Modified/equal to or less than 50%					X	Conn. Gen. Stat. Ann. § 52-572(h)

[1] In Arizona, joint and several liability applies if the defendants were acting in concert, if one defendant was an agent or servant of another defendant, or in specified federal employer liability cases.

[2] In Arkansas, joint and several liability applies when tortfeasors act in concert to commit an intentional tort or if an agent/servant relationship exists among the tortfeasors. Otherwise, several liability applies.

[3] In a California comparative fault case, liability is several only with respect to noneconomic damages.

[4] In Colorado, joint and several liability applies to defendants who acted in concert to commit a tortious act. Otherwise, several liability applies.

State	Negligence System	Multiple Defendant Liability					Authority for Liability of Multiple Defendants
		Joint & Several Liability		Several Liability		Hybrid	
		Pure	Where Plaintiff Has No Comparative Responsibility	Pure	Under Specified Circumstances	(For details see Appendix 3)	
Delaware	Comparative – Modified/ equal to or less than 50%	X					Del. Code Ann., Title 10, § 6301 et seq.
District of Columbia	Contributory[5]	X					*Judicial National Health Labs v. Ahmadi*, 596 A.2d 555 (1991)
Florida	Comparative – Pure				X[6]		Fla. Stat. § 768.81
Georgia	Comparative – Modified/less than 50%			X			Ga. Code Ann. §51-12-33
Hawaii	Comparative – Modified/equal to or less than 50%					X[7]	Haw. Rev. Stat. § 663-10.9

[5] The District of Columbia is a contributory negligence jurisdiction with the exception of negligence actions involving employees of common carriers, which are governed by the slight/gross standard under comparative negligence.

[6] Florida essentially abolished the doctrine of joint and several liability in 2006. However, joint and several liability still applies to intentional torts and certain statutorily specified causes of action (environmental/toxic torts).

[7] Hawaii has joint and several liability for economic loss involving injury or death to persons. Joint and several liability also applies to economic and non-economic damages in cases involving intentional torts, environmental pollution torts, toxic and asbestos-related torts, aircraft accident torts, strict and product liability torts, and torts relating to most motor vehicle accidents. A defendant in a cause of action other than the ones previously mentioned is jointly and severally liable for non-economic damages if he/she is 25% or more at fault; otherwise, several liability applies.

State	Negligence System	Multiple Defendant Liability					Authority for Liability of Multiple Defendants
		Joint & Several Liability		Several Liability		Hybrid	
		Pure	Where Plaintiff Has No Comparative Responsibility	Pure	Under Specified Circumstances	(For details see Appendix 3)	
Idaho	Comparative – Modified/less than 50%				X[8]		Idaho Code § 6-803
Illinois	Comparative – Modified/ equal to or less than 50%				X[9]	X	735 ILCS 5/2-117 (from Ch. 110)
Indiana	Comparative – Modified/ equal to or less than 50%				X[10]		Ind. Code Ann. § 34-51-2-8
Iowa	Comparative – Modified/ equal to or less than 50%					X	Iowa Code § 668.4
Kansas	Comparative – Modified/ equal to or less than 50%			X			Kan. Stat. Ann. § 60-258a(d)
Kentucky	Comparative – Pure			X			Ky. Rev. Stat. Ann. §411.182
Louisiana	Comparative – Pure				X[11]		La. Civ. Code Ann. § 2324

[8] Idaho is a several liability jurisdiction in all cases except when tortfeasors act in concert or as agents of one another.

[9] In Illinois, joint and several liability applies to medical damages. If a defendant is less than 25% at fault, the defendant is severally liable for non-medical damages. Otherwise, joint and several liability applies to non-medical damages. This statute was reinstated after the several liability only statute in the Civil Justice Reform Amendments of 1995 were held unconstitutional. (*Best v. Taylor Machine Works*, 689 N.E. 2d 1057 (1997)).

[10] In Indiana, joint and several liability applies in medical malpractice cases and civil tort claims against governmental entities; in all other cases, several liability applies. Recent case law indicates that joint and several liability may apply in cases involving intentional torts when the defendants were convicted after a prosecution based on the same evidence.

[11] In Louisiana, joint and several liability applies if the defendants conspired to commit an intentional or willful act. Otherwise, several liability applies.

State	Negligence System	Multiple Defendant Liability					Authority for Liability of Multiple Defendants
		Joint & Several Liability		Several Liability		Hybrid	
		Pure	Where Plaintiff Has No Comparative Responsibility	Pure	Under Specified Circumstances	(For details see Appendix 3)	
Maine	Comparative – Modified/less than 50%	X					Me. Rev. Stat. Ann., Title 14, § 156
Maryland	Contributory	X					*Morgan v. Cohen*, 523 A.2d 1003 (1987)
Massachusetts	Comparative – Modified/ equal to or less than 50%	X					*Shantigar Found. v. Bear Mountain Builders*, 804 N.E. 2d 324 (Mass. 2004)
Michigan	Comparative – Modified/ equal to or less than 50%[12]				X[13]	X[14]	Mich. Comp. Laws Serv. §§ 600.6304 and 600.2956

[12] Michigan has a modified/equal to or less than 50% comparative negligence system for noneconomic damages and a pure comparative negligence system for economic damages.

[13] In Michigan, joint and several liability applies to (1) medical malpractice claims in which the plaintiff is without fault; (2) an employer's vicarious liability for an employee's act or omission; (3) cases where a defendant has been a convicted of a crime, an element of which is gross negligence; and (4) cases in which the defendant has been convicted of a crime involving the use of alcohol or a controlled substance and the use of the alcohol or the controlled substance is a violation of specified statutes.

[14] In Michigan, in medical malpractice cases, if plaintiff has comparative fault, reallocation applies.

State	Negligence System	Multiple Defendant Liability					Authority for Liability of Multiple Defendants
		Joint & Several Liability		Several Liability		Hybrid	
		Pure	Where Plaintiff Has No Comparative Responsibility	Pure	Under Specified Circumstances	(For details see Appendix 3)	
Minnesota	Comparative – Modified/ equal to or less than 50%				X[15]	X	Minn. Stat. Ann. § 604.02
Mississippi	Comparative – Pure				X[16]		Miss. Code Ann. § 85-5-7
Missouri	Comparative – Pure				X[17]	X	Mo. Ann. Stat. § 537.067
Montana	Comparative – Modified/ equal to or less than 50%				X[18]		Mont. Code Ann. § 27-1-703

[15] In Minnesota, a defendant is subject to joint and several liability when that defendant (1) is more than 50% at fault; (2) worked with one or more individuals in a common scheme or plan that resulted in the plaintiff's injuries; (3) committed an intentional tort; or (4) participated in specified environmental/public health torts.

[16] In Mississippi, joint and several liability applies if the defendants acted in concert to cause injury to the plaintiff.

[17] In Missouri, a defendant who is 51% or more at fault is subject to joint and several liability (does not apply to punitive damages). In general, a defendant who is less than 51% at fault is severally liable, unless (1) the other defendant was the defendant's employee; or (2) the case falls under the federal Employers' Liability Act.

[18] In Montana, a defendant who is 50% or less at fault is severally liable. The remaining parties are jointly and severally liable for the total amount of damages remaining after accounting for damages attributable to the severally liable defendant. However, joint and several liability (regardless of the percentage of fault) applies if the defendants acted in concert or if one party acted as an agent of the other party.

State	Negligence System	Multiple Defendant Liability					Authority for Liability of Multiple Defendants
		Joint & Several Liability		Several Liability		Hybrid	
		Pure	Where Plaintiff Has No Comparative Responsibility	Pure	Under Specified Circumstances	(For details see Appendix 3)	
Nebraska	Comparative – Modified/less than 50%				X[19]		Neb. Rev. Stat. § 25-21,185.10
Nevada	Comparative – Modified/ equal to or less than 50%				X[20]		Nev. Rev. Stat. Ann. § 41.141
New Hampshire	Comparative – Modified/ equal to or less than 50%				X[21]	X	NH Rev. Stat. Ann. § 507:7-e
New Jersey	Comparative – Modified/ equal to or less than 50%					X	NJ Stat. Ann. § 2A:15-5.3
New Mexico	Comparative – Pure				X[22]		NM Stat. Ann. § 41-3A-1

[19] In Nebraska, joint and several liability applies to economic and non-economic damages when two or more defendants, as part of a common enterprise or plan, act in concert and cause harm. In all other cases, liability for economic damages is joint and several, but liability for non-economic damages is several.

[20] In Nevada, a defendant is subject to joint and several liability in specified circumstances (intentional torts, toxic torts, concerted acts, strict liability, or product liability).

[21] In New Hampshire, several liability applies unless the defendant is 50% or more at fault or acted in concert to cause harm to the plaintiff (regardless of the percentage of fault).

[22] In New Mexico liability is joint and several for claims involving intentional torts, vicarious liability, or strict product liability and claims in which there is a sound basis in public policy for joint and several liability.

State	Negligence System	Multiple Defendant Liability					Authority for Liability of Multiple Defendants
		Joint & Several Liability		Several Liability		Hybrid	
		Pure	Where Plaintiff Has No Comparative Responsibility	Pure	Under Specified Circumstances	(For details see Appendix 3)	
New York	Comparative – Pure					X[23]	NY Civ. Prac. L&R § 1601
North Carolina	Contributory	X					*Charnock v. Taylor*, 26 S.E. 2d 911 (N.C. 1943), N.C. Gen. Stat. Ann. §1B-1 (2012)
North Dakota	Comparative – Modified/less than 50%				X[24]		ND Cent. Code § 32.03.2-02
Ohio	Comparative – Modified/ equal to or less than 50%					X[25]	Ohio Rev. Code Ann. § 2307.22
Oklahoma	Comparative – Modified/ equal to or less than 50%			X[26]			Okla. Stat. Ann. § 23-15

[23] New York is a threshold jurisdiction for noneconomic damages. For economic damages liability is joint and several.

[24] In North Dakota, several liability applies unless the defendants acted in concert to cause injury to the plaintiff. In those cases, joint and several liability applies.

[25] In Ohio, when two or more defendants cause injury, a defendant who is more than 50% liable is joint and severally liable for the economic loss of the plaintiff. If defendant is less than 50% liable, defendant is severally liable for economic loss. Defendants are jointly and severally liable for intentional conduct. Defendants are severally liable for noneconomic damages.

[26] Chapter 15 of 2011 essentially abolished joint and several liability in Oklahoma, so long as the civil action is based on fault, and does not arise out of contract. Chapter 15 does not apply to actions brought by or on behalf of the state.

State	Negligence System	Multiple Defendant Liability					Authority for Liability of Multiple Defendants
		Joint & Several Liability		Several Liability		Hybrid	
		Pure	Where Plaintiff Has No Comparative Responsibility	Pure	Under Specified Circumstances	(For details see Appendix 3)	
Oregon	Comparative – Modified/ equal to or less than 50%				X[27]	X	Or. Rev. Stat. § 31.610
Pennsylvania	Comparative – Modified/ equal to or less than 50%				X	X [28]	42 Penn. Con. Stat. Ann. § 7102
Rhode Island	Comparative – Pure	X					*Roy v. Star Chopper Co*., 584 F.2d 1124 (1978), R.I. Gen. Laws § 10-6-2
South Carolina	Comparative – Modified/ equal to or less than 50%				X[29]	X	S.C. Code Ann. § 15-38-15
South Dakota	Comparative – Modified/ slight/gross	X				X	S.D. Cod. Laws Ann. § 15-8-11 through 22

[27] In general, liability is several only in Oregon. For certain environmental torts, liability is joint and several. § 31.610(6) Or. Rev. Stat.

[28] In Pennsylvania, liability is several except if the defendant is 60% or more at fault or if the case relates to intentional torts, the release of hazardous materials, or liquor code violations.

[29] In South Carolina, in an action to recover damages from personal injury, wrongful death, damage to property, or to recover damages for economic loss or non-economic loss, joint and several liability does not apply to a defendant who is less than 50% at fault. Exceptions to this standard include defendants who acted in concert or when a defendant is vicariously liable for the conduct of another defendant. A court may also determine that two or more persons are to be treated as a single party. Traditional joint and several liability applies to a defendant whose conduct (1) is willful, wanton, reckless, grossly negligent, or intentional; or (2) involves the use, sale, or possession of alcohol or drugs.

State	Negligence System	Multiple Defendant Liability					Authority for Liability of Multiple Defendants
		Joint & Several Liability		Several Liability		Hybrid	
		Pure	Where Plaintiff Has No Comparative Responsibility	Pure	Under Specified Circumstances	(For details see Appendix 3)	
Tennessee	Comparative – Modified/less than 50%				X[30]		*McIntyre v. Balentine*, 833 S.W.2d 52 (1992)
Texas	Comparative – Modified/ equal to or less than 50%				X[31]	X	Tex. Civ. Prac. & Rem. Code Ann. §§ 33.003, .0011, and .0013
Utah	Comparative – Modified/less than 50%			X		X	Utah Code Ann. §§ 78B-5-818 through 820
Vermont	Comparative – Modified/ equal to or less than 50%			X			12 V.S.A § 1036
Virginia	Contributory	X					Va. Code Ann. § 8.01-443

[30] In Tennessee, case law indicates that joint and several liability may apply when the tortfeasors acted in concert, when the defendant is found to have a duty to prevent foreseeable intentional conduct by another defendant, traditional vicarious liability cases, and to parties in a chain of distribution in strict product liability cases.

[31] In Texas, a defendant is jointly and severally liable if he/she is more than 50% at fault or acted in concert with another defendant to commit specified crimes with the specific intent to do harm to others.

State	Negligence System	Multiple Defendant Liability					Authority for Liability of Multiple Defendants
		Joint & Several Liability		Several Liability		Hybrid	
		Pure	Where Plaintiff Has No Comparative Responsibility	Pure	Under Specified Circumstances	(For details see Appendix 3)	
Washington	Comparative – Pure		X		X[32]		Wash. Rev. Code Ann. § 4.22.030 and .070; *Edgar v. City of Tacoma*, 919 P.2d 1236 (1996)
West Virginia	Comparative – Modified/less than 50%				X[33]	X[34]	W. Va. Code §§ 55-7-24 and 55-7B-9
Wisconsin	Comparative – Modified/ equal to or less than 50%				X[35]	X	Wis. Stat. Ann. § 895.045
Wyoming	Comparative – Modified/ equal to or less than 50%			X			Wy. Stat. Ann. §§ 1-1-109(e)

Source: Department of Legislative Services

[32] In Washington, several liability applies unless (1) the plaintiff was not negligent; (2) the defendant acted in concert or as an agent; or (3) the case involves hazardous waste actions, tortious interference with contracts/business relations, or the manufacture or marketing of a fungible product in generic form.

[33] In West Virginia, several liability applies to responsible defendants in medical malpractice cases. W. Va. Code § 55-7B-9.

[34] West Virginia uses a hybrid liability system for civil tort cases that do not involve medical malpractice.

[35] In Wisconsin, a defendant found to be 51% or more causally negligent is jointly and severally liable. A defendant who is less than 51% causally negligent is severally liable unless the defendant acted as part of a common scheme or plan. In that case, the defendant is jointly and severably liable.

Appendix 3. Hybrid Systems

Hybrid Systems

State	Comparative Fault Status	Reallocation Jurisdictions	Threshold Jurisdictions	Authority for Liability of Multiple Defendants
Connecticut	Comparative – Modified/equal to or less than 50%	X		Conn. Gen. Stat. Ann. § 52-572h(b)
Hawaii	Comparative – Modified/equal to or less than 50%		X[1]	Haw. Rev. Stat. § 663-10.9
Illinois	Comparative – Modified/less than 50%		X[2]	735 ILCS 5/2-117 (from Ch.110)
Iowa	Comparative – Modified/equal to or less than 50%		X[3]	Iowa Code Ann. § 668.4
Michigan	Comparative – Modified/equal to or less than 50%[4]	X[5]		Mich. Comp. Laws Serv. §§ 600.6304 and 600.2956

[1] Hawaii has joint and several liability for economic loss involving injury or death to persons. Joint and several liability also applies to economic and non-economic damages in cases involving intentional torts, environmental pollution torts, toxic and asbestos-related torts, aircraft accident torts, strict and product liability torts, and torts relating to most motor vehicle accidents. A defendant in a cause of action other than the ones previously mentioned is jointly and severally liable for non-economic damages if he/she is 25% or more at fault; otherwise, several liability applies.

[2] In Illinois, joint and several liability applies to medical damages. If a defendant is less than 25% at fault, the defendant is severally liable for non-medical damages. Otherwise, joint and several liability applies to non-medical damages.

[3] In Iowa, only those tortfeasors whose fault accounts for 50% or more of the total fault assigned to all persons may be held jointly and severally liable for economic damages. Defendants who acted in concert are subject to joint and several liability for economic and non-economic damages regardless of their percentages of fault. *Reilly v. Anderson*, 727 N.W. 2d 102 (Iowa 2006).

[4] Michigan has a modified/equal to or less than 50% comparative negligence system for noneconomic damages and a pure comparative negligence system for economic damages.

[5] In Michigan, reallocation applies in medical malpractice cases if the plaintiff is determined to have fault.

State	Comparative Fault Status	Reallocation Jurisdictions	Threshold Jurisdictions	Authority for Liability of Multiple Defendants
Minnesota	Comparative – Modified/equal to or less than 50%	X[6]	X[7]	Minn. Stat. Ann. § 604.02
Missouri	Comparative – Pure		X[8]	Mo. Ann. Stat. § 537.067
Montana	Comparative – Modified/equal to or less than 50%	X[9]	X[10]	Mont. Code Ann. § 21-1-703
New Hampshire	Comparative – Modified/equal to or less than 50%	X[11]	X[12]	NH Rev. Stat. Ann. §§ 507:7-e and 507.7-f
New Jersey	Comparative – Modified/equal to or less than 50%		X[13]	NJ Stat. Ann. § 2A:15-5.3

[6] In Minnesota, a court may reallocate uncollectible damages after the making of a timely motion. With respect to product liability claims, a court must reallocate any amount uncollectible from a person in the chain of manufacture and distribution among all other persons in the chain, other than the claimant or others at fault who are not in the chain of manufacture and distribution. However, a person whose fault it is less than the claimant's fault is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to the person whose fault is less.

[7] In Minnesota, joint and several liability applies if (1) the defendant is more than 50% at fault; (2) two or more persons acted in a common scheme or plan that results in injury; (3) the defendants committed an intentional tort; or (4) a defendant's liability arises out of specified environmental/public health torts.

[8] In Missouri, a defendant who is 51% or more at fault is subject to joint and several liability (does not apply to punitive damages). In general, a defendant who is less than 51% at fault is severally liable, unless (1) the other defendant was the defendant's employee; or (2) the case falls under the federal Employers' Liability Act.

[9] In Montana, reallocation by a defendant 50% or less responsible is limited to that defendant's comparative share of responsibility.

[10] In Montana, a defendant who is 50% or less at fault is severally liable unless he/she acted in concert with or as an agent of another defendant.

[11] In New Hampshire, reallocation is applied to other defendants according to their percentage of fault.

[12] In New Hampshire, several liability applies unless the defendant is 50% or more at fault or acted in concert to cause harm to the plaintiff (regardless of the percentage of fault).

[13] In New Jersey, joint and several liability applies if a defendant is 60% or more at fault. Environmental claims subject defendants to joint and several liability unless a defendant's fault is determined to be less than 5%.

State	Comparative Fault Status	Reallocation Jurisdictions	Threshold Jurisdictions	Authority for Liability of Multiple Defendants
New York	Comparative – Pure		X[14]	NY Civ. Prac. L&R § 1601
Ohio	Comparative – Modified/equal to or less than 50%		X[15]	Ohio Rev. Code Ann. § 2307.22
Oregon	Comparative – Modified/equal to or less than 50%	X[16]		Or. Rev. Stat § 31.610
Pennsylvania	Comparative – Modified/equal to or less than 50%		X[17]	42 Penn. Con. Stat. Ann. § 7102
South Carolina	Comparative – Modified/equal to or less than 50%		X[18]	S.C. Code Ann. § 15-38-15
South Dakota	Comparative – Modified/slight/gross		X[19]	S.D. Cod. Laws Ann. §§ 15-8-15.1 and 15.2

[14] New York generally authorizes joint and several liability. However, in a personal injury claim, a defendant who is 50% or less at fault is severally liable for the plaintiff's non-economic damages. However, defendants are subject to joint and several liability (no threshold) in several specified causes of action, such as environmental claims, motor vehicle cases, gross negligence claims, workers' compensation cases, intentional torts, concerted acts, and product liability cases where the manufacturer could not be joined.

[15] In Ohio, when two or more defendants cause injury, a defendant who is more than 50% liable is joint and severally liable for economic loss of plaintiff. If defendant is 50% or less at fault, defendant is severally liable for economic loss. Defendant is jointly and severally liable for intentional tortious conduct. Defendants are severally liable for noneconomic damages.

[16] In Oregon, there is no reallocation if the defendant's liability is 25% or less or if the defendant's fault is less than the plaintiff's liability. Or. Rev. Stat. §31.610(4).

[17] In Pennsylvania, a defendant found responsible for at least 60% of the total fault is jointly liable and a defendant found responsible for less than 60% is severally liable. See Appendix 2 for other exceptions to several liability in Pennsylvania.

[18] In South Carolina, in an action to recover damages from personal injury, wrongful death, damage to property, or to recover damages for economic loss or non-economic loss, joint and several liability does not apply to a defendant who is less than 50% at fault. Exceptions to this standard include defendants who acted in concert or when a defendant is vicariously liable for the conduct of another defendant. A court may also determine that two or more persons are to be treated as a single party. Traditional joint and several liability applies to a defendant whose conduct (1) is willful, wanton, reckless, grossly negligent, or intentional; or (2) involves the use, sale, or possession of alcohol or drugs.

[19] In South Dakota, a defendant less than 50% at fault is not jointly liable for more than twice the percentage of fault.

State	Comparative Fault Status	Reallocation Jurisdictions	Threshold Jurisdictions	Authority for Liability of Multiple Defendants
Texas	Comparative – Modified/equal to or less than 50%		X[20]	Tex. Civ. Prac. & Rem. Code Ann. § 33.013
Utah	Comparative – Modified/less than 50%	X[21]		Utah Code Ann. §§ 78B-5-819 and 820
West Virginia	Comparative – Modified/less than 50%	X[22]	X[23]	W. Va. Code § 55-7-24
Wisconsin	Comparative – Modified/equal to or less than 50%		X[24]	Wis. Stat. Ann. § 895.045

Source: Department of Legislative Services

[20] In Texas, a defendant is jointly and severally liable if he/she is more than 50% at fault or acted in concert with another defendant to commit specified crimes with the specific intent to do harm to others.

[21] In Utah, if the total percentage of comparative responsibility assigned to all immune persons is less than 40%, the court shall reallocate that percentage to zero and reallocate that percentage to the other parties proportionately to their comparative share.

[22] In West Virginia, a plaintiff in a non-medical malpractice case who is unable to collect a judgment from a liable defendant may move for reallocation within six months after final judgment. The amount reallocated to a defendant may not exceed the defendant's percentage of fault multiplied by the uncollectible amount. A defendant is exempt from reallocation if the defendant's percentage of fault is equal to or less than the claimant's percentage of fault.

[23] In West Virginia, medical malpractice defendants are severally liable. However, in a non-medical malpractice case, a defendant who is more than 30% at fault is jointly and severally liable. A defendant who is 30% or less at fault is severally liable. Joint and several liability also applies to defendants who acted in concert, intentional torts, toxic torts, and strict product liability cases involving defective products.

[24] In Wisconsin, a defendant found to be 51% or more causally negligent is jointly and severally liable. A defendant who is less that 51% causally negligent is severally liable unless the defendant acted as part of a common scheme or plan. In that case, the defendant is jointly and severally liable.