

Cost Effects of Comparative Negligence: Tort Reform in Reverse

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*****Note: Figures may be missing from this format of the document**

Abstract:

This study uses automobile insurance loss costs as a proxy for tort system costs under contributory and comparative negligence standards. The principal finding is that insurance consumers in states that have adopted comparative negligence pay more for automobile liability insurance than do consumers in states that retain traditional contributory negligence. States that have adopted "pure comparative" negligence standards exhibit absolute higher costs than do states that have adopted "modified comparative" negligence standards, and both have higher costs than states that have retained contributory negligence. Moreover, when population density, accident fatalities, and no-fault insurance are allowed for, the average annual dollar loss cost increases are highest with pure comparative and lowest with contributory. To the extent that automobile insurance losses are an accurate proxy for the entire negligence and liability system, states with comparative negligence will have higher liability costs than will those with contributory negligence.

Article:

Change in the civil law in a way generally favorable to defendants has become known as "tort reform." Tort reform enjoys wide support from business as well as insurance company interests. It has attracted considerable attention in Congress, state legislatures, and in the press. Efforts have been underway at the federal level to bring about uniform product liability law, and in the course of so doing, to reform product liability law to make it more difficult for plaintiffs to recover in product actions. Senate bill 1400, introduced by Senator Robert Kasten (Republican, Wisconsin), would have effected numerous such reforms but was not successful in 1990.¹

While federal efforts at tort reform have been restricted to products liability (the rationale being to promote international trade), many states have legislated tort reforms pertinent to general, professional, and automobile liability as well. Examples of tort reforms that various states have adopted include caps on noneconomic awards such as pain and suffering and punitive damages; limitations on attorney contingency fees; limitations on the application of the joint and several liability rule; mandatory use of structured settlements for personal injury awards; banning multiple punitive damage awards or requiring bifurcated trials for the award of punitive damages; and modifications of the collateral source rule. The Defense Research Institute (DRI) keeps track of and reports tort law changes.² They reported that 32 states adopted some "tort reform" during 1986 and that 22 states adopted some tort reform proposals in 1987. Thus, there are numerous examples. According to DRI, Arizona and Oregon abolished joint and several liability in 1987; Texas, Montana, North Dakota, and Idaho limited its application. Iowa and Ohio permitted evidence of collateral sources. California, Georgia, Florida, and Virginia limited punitive damages. The foregoing is merely a scattering of examples and by no means a definitive report. The reader is referred to the DRI report. Virtually all of the reforms strengthen the position of the defendant and thus reduce the cost of liability insurance.

Over the period 1978-1989, many states have replaced contributory negligence with comparative negligence. This pattern of change is of particular interest because the findings presented in this article clearly indicate that the comparative negligence trend, in contrast with the direction of the tort reform agenda, is a "reform" that tends to increase the costs of the liability system, and thus of liability insurance, instead of reducing those costs. It is reasonable to conclude that the comparative negligence trend has contributed to the current high cost of the

liability system. The implication then is that states that have contributory negligence should keep it unless they are willing to accept higher costs. The DRI report indicates that in 1987 Arizona and New Mexico passed legislation that resulted in their moving away from comparative negligence and back toward contributory.³

Contributory Negligence Standards

Civil law in the American legal system, although particular to each of the states, has a foundation in the common law of England, as it was adopted by the colonial governments in the seventeenth century. One of the strongest common law defenses is "contributory negligence." Contributory negligence is the rule that persons seeking damages from others should themselves be free of negligence or fault, however slight, in the causation of those damages. They should "come into court with clean hands."

As recently as 1970, 38 states retained the traditional contributory negligence standard. At the present time, only five states retain a contributory negligence standard. Over the period 1971 to 1985, 33 states changed from the traditional contributory negligence standard to a system of "comparative negligence." Table 1 presents the 50 states by negligence system and the year the most recent change became law. The five states which retain contributory negligence are Alabama, Maryland, North Carolina, South Carolina, and Virginia, along with the District of Columbia.

There are solid equity arguments for replacing the contributory negligence standard with comparative negligence. The contributory rule can be very harsh. It is not difficult to understand why state legislatures have abandoned it. In its extreme application, slightly negligent persons have no recourse against grossly negligent persons. For example, a driver failing to signal a turn or a pedestrian walking on the wrong side of the road could be barred recovery against a grossly negligent driver who causes them injury.

When applicable, the contributory negligence defense may be a complete defense. The defendant need only show that the plaintiff is partially responsible for his or her own losses and then he or she is relieved of liability. One of the few counter-defenses available to the plaintiff is to show "gross negligence" by the defendant. Another counter-defense is to prove the doctrine of "last clear chance." The doctrine of last clear chance states that even though there is contributory negligence by the plaintiff, the defendant had the last clear chance to avoid the accident. The last clear chance doctrine is also known as the "subsequent negligence" doctrine. Before the comparative negligence trend, many states adopted this doctrine as a humanitarian reform to reduce harshness in application of the contributory negligence rule.

Defenders of the traditional contributory negligence rule argue that courts often mitigate its application. It is generally believed and often asserted (with no empirical evidence) that in practice many courts are inclined to ignore slight degrees of contributory negligence. On this basis it is frequently argued that it does not matter for insurance cost purposes whether a state has contributory negligence or comparative negligence.⁴

The problem with the mitigation argument is that it is neither uniformly applied nor even universally the rule. In some instances the bar to recovery is imposed before the case reaches the jury. Equity arguments led the legislatures of many states to abolish the contributory negligence standard and replace it with a comparative negligence standard. Often such changes were adopted on the assumption that the cost implications of the change would not be significant. The continuing trend to comparative negligence suggests that some states might have adopted comparative negligence either without consideration of cost or while accepting the unsubstantiated assertion that insurance costs would be unaffected. The findings of this study indicate that insurance costs are likely to be higher with comparative negligence.

TABLE 1. Summary of Negligence Systems in Effect by State (1985)

Contributory	Modified Comparative	Pure Comparative	Effective
Alabama			—
		Alaska	1975
		Arizona	1984
	Arkansas (49%)		1947
		California	1975
	Colorado (49%)		1975
	Connecticut (50%)		1973
District of Columbia†			—
	Delaware (50%)		1984
		Florida	1973
	Georgia (50%)		1950
	Hawaii (50%)		1969
	Idaho (49%)		1971
		Illinois	1981
	Indiana (50%)		1985
	Iowa (50%)		1982
	Kansas (49%)		1974
		Kentucky	1984
		Louisiana	1980
	Maine (49%)		1965
Maryland			—
	Massachusetts* (50%)		1974
		Michigan	1979
	Minnesota (50%)		1969
		Mississippi	1910
		Missouri	1983

* Not included in analysis; does not report to ISO. † Not included in analysis; not enough data.

Source: General statutes of the various states

Table 1 shows that some states adopted comparative negligence considerably before the now recurrent, volatile, and extreme hard market/soft market cycles of recent years. However, other states have adopted comparative negligence more recently, indeed as they were simultaneously adopting tort reforms designed to reduce the cost of the liability system and alleviate the insurance availability problems of hard markets.

Contributory	Modified Comparative	Pure Comparative	Effective
	Montana (50%)		1975
	Nebraska (S/G)		1943
	Nevada (50%)		1973
	New Hampshire (50%)		1969
	New Jersey (50%)		1973
		New Mexico	1980
		New York	1975
North Carolina			—
	North Dakota (49%)		1973
	Ohio (50%)		1980
	Oklahoma (50%)		1973
	Oregon (50%)		1971
	Pennsylvania (50%)		1977
		Rhode Island	1971
South Carolina*			—
	South Dakota (S/G)		1964
	Tennessee (Remote)		—
	Texas* (50%)		1973
	Utah (49%)		1973
	Vermont (50%)		1970
Virginia			—
		Washington	1974
	West Virginia (49%)		1979
	Wisconsin (50%)		1971
	Wyoming (49%)		1972

Comparative Negligence Standards

Comparative negligence is a system in which a plaintiff's fault is compared with that of the defendant(s) and an allocation is then made as a basis for the awarding of damages.⁵ A range of "comparative" fault standards has been adopted in 45 of the 50 states either through judicial decision or legislative action. The polar extreme from a contributory negligence standard is a "pure" comparative negligence standard under which a contributorily negligent plaintiff may recover even though his or her negligence is greater than the negligence of the defendant. The plaintiff's damages will be reduced in proportion to the degree of negligence that is attributed to the plaintiff by the jury. With pure comparative negligence, a plaintiff can be primarily responsible for his or her own damages and still seek recovery from another who was responsible to a *lesser* degree. Such a rule coupled with the rule of joint and several liability opens "deep pocket" defendants to paying no matter how limited their contribution to accident causation.

Pure comparative negligence is viewed by many as too radical a departure from the common law standard. The idea of "modified" comparative negligence has evolved as a compromise between pure comparative and contributory. Modified comparative negligence has more than one meaning. Some states, notably Nebraska and South Dakota, have a rule under which a contributorily negligent plaintiff whose negligence is "slight" in comparison to the defendant's "gross" negligence may recover, with damages reduced by the percentage of his or her fault. This is known as the "slight/gross rule." Many more states have adopted a standard known as the "49% rule," under which a plaintiff's contributory negligence will not bar recovery if his or her negligence is less than that of the defendant(s), with the plaintiff's damages reduced pro rata to the extent that his or her

negligence contributes to the accident. When the plaintiff's negligence is equal to or greater than that of the defendant(s), the common-law contributory negligence rule is applied and recovery is barred. Some states have gone somewhat further in allowing a plaintiff to recover damages when his or her negligence is equal to that of a defendant. This is known as the "50% rule."

These three formulations generally describe the concept of modified comparative negligence. The several states have significant differences among them. For purposes of this research and this article, the authors have adopted a trichotomous classification system: (1) contributory; (2) modified comparative, including slight/gross, 49% and 50%; and (3) pure comparative negligence.

Research Purpose

The purpose of this article is to identify and measure liability system cost differentials among states by negligence standard. Total liability system cost is not directly observable because uninsured and self-insured loss payments must be included. Still, automobile liability insurance costs serve as a good proxy. Statistical data on automobile insurance losses is available for a long period of time (1971-85) for almost all states. This data permits the comparison of automobile insurance loss costs among states. When classified by negligence standard, the state costs are a reliable proxy to compare cost differentials among negligence standards.

Loss Costs. Two series of loss costs are used, one including only bodily injury loss costs and the other including property damage. Data for 47 states were obtained from the Insurance Services Office (ISO). Loss costs for each of the 47 states for which data were available (the other three states did not report to ISO over the period) for the period of 1971 through 1985 were calculated for each year. Bodily injury loss costs are the sum of the following losses divided by the number of earned car years:

1. Bodily injury basic limits losses
2. Plus bodily injury excess limits losses
3. Plus medical payments losses
4. Plus personal injury protection losses
5. Plus uninsured and under-insured motorists losses For bodily injury plus property damage loss costs, the following are added on:
6. Plus property damage basic limits losses 7. Plus property damage excess limits losses

Both dependent variables were calculated on a state-by-state, year-by-year basis. Thus, there are data points representing 47 states for 15 years.

Negligence Systems. Table 1 classifies the states into contributory negligence, modified comparative negligence, and pure comparative negligence standards. The year that legislation became effective for modified and pure comparative negligence states is also listed. The dates on this list have been used to sort the cost observations among the negligence standards. Although there are only five states that retain contributory negligence today, it is important to note that many states have changed from contributory to comparative negligence during the period of time under consideration. Approximately 38 percent of the total state-year observations are classified as contributory, 44 percent as modified, and 18 percent as pure comparative negligence. All states in the analysis were classified as belonging to one of three standards identified below. Those states that changed from contributory negligence to a comparative negligence were classified first as contributory and later as the appropriate system to which they changed. The standards are as follows:

1. *Traditional contributory negligence*, wherein recovery is barred to those plaintiffs whose negligence contributes to their own losses.
2. *"Pure" comparative negligence* (adopted by 14 states by 1985), in which recovery is permitted even for those plaintiffs whose negligence is greater than that of another but with damages reduced pro rata to the degree of attributable negligence.
3. *"Modified" comparative negligence*, which includes slight/gross, the 49% rule, and the 50% rule.

Negligence System Cost Findings From 1971 to 1985

The research explores whether comparative negligence (whether pure or modified) has an effect on the cost of automobile insurance. The null hypothesis is that

TABLE 2. Automobile Bodily Injury Loss Costs by Year and Reparations System

Year	Contributory	Modified Comparative	Pure Comparative
1971	\$ 42.66	\$ 41.70	\$ 44.45
1972	43.03	40.52	45.05
1973	40.33	56.20	53.73
1974	46.19	53.85	63.83
1975	47.14	62.53	83.17
1976	52.15	62.23	85.06
1977	53.82	67.03	84.84
1978	55.36	74.19	83.45
1979	57.76	81.67	89.97
1980	58.22	104.90	99.37
1981	58.29	120.03	18.38
1982	61.50	123.40	114.05
1983	83.67	124.54	134.71
1984	92.11	137.03	143.09
1985	98.01	138.87	149.38
Compound Growth Rate	6.1%	9.0%	9.0%

Source: Insurance Services Office

states with comparative negligence will not have higher automobile (and other types of liability insurance by inference) insurance costs than states with contributory negligence. The argument runs as follows. Comparative negligence permits partially negligent plaintiffs to recover, but plaintiff recoveries are offset to the extent that they contribute to their own losses. Thus, although more plaintiffs recover, they recover less. These offsets should reduce liability costs and counter the effects of more plaintiffs recovering.

Table 2 presents the bodily injury loss costs by negligence system from 1971 to 1985. The table shows that in 1971 the bodily injury loss cost in states with modified comparative negligence was \$41.70 as compared to \$42.66 for contributory negligence states, and \$44.45 for states with pure comparative negligence. By 1985, a significant divergence had developed. The states with pure comparative negligence standards had the highest bodily injury loss costs of \$149.38. The second highest was modified comparative negligence systems at \$138.87. The states that continued to have the contributory negligence standard had a bodily injury loss cost of only \$98.01.

It must be emphasized that these three series do not represent a static series of data. During the period defined by the data, 1971 to 1985 inclusive, 33 states changed from contributory negligence to comparative negligence. The data in Table 2 represent insurance loss costs for these changing groups of states. In 1971, the states with modified comparative had slightly lower loss costs than did the states with contributory. Loss costs in the states with modified comparative negligence increased so much that by 1985 they were 41.7 percent greater than the loss costs for states with contributory. States with pure comparative negligence had total system pure premiums that were 52.4 percent higher than contributory states by 1985. Table 3 presents loss costs for bodily injury and property damage combined and reveals a similar pattern.

Figure 1 is a least squares trend line of bodily injury loss costs from 1971 to 1985. The data show that comparative negligence states had higher absolute costs than contributory negligence states. The data also suggest that the costs are higher in states with pure comparative negligence than in those with modified comparative negligence.

System Costs Controlling for State Characteristics from 1971 to 1985

The foregoing analysis makes no allowance for characteristics of the individual states which could affect the overestimate or underestimate of liability insurance costs. A multiple regression analysis was conducted to hold constant the effects of other state characteristics. Specifically, allowance was made for the population density, fatalities per registered vehicle, and whether the state had a no-fault auto insurance system.⁶

When the influence of these factors is considered, we continue to find that cost increases were greater in states adopting comparative standards than in those

TABLE 3. Automobile Bodily Injury Plus Property Damage Loss Costs by Year and Reparations System

Year	Contributory	Modified Comparative	Pure Comparative
1971	\$ 63.52	\$ 63.22	\$ 67.69
1972	63.98	62.10	70.59
1973	63.31	82.10	72.01
1974	69.35	78.95	89.34
1975	73.52	91.73	115.11
1976	80.02	92.67	116.81
1977	83.40	98.98	117.03
1978	87.97	108.45	117.47
1979	93.98	117.98	123.28
1980	90.93	144.53	134.96
1981	92.63	163.59	146.32
1982	98.37	169.17	155.57
1983	122.94	165.79	177.87
1984	137.14	183.93	189.13
1985	146.52	190.07	199.12
Compound Growth Rate	6.2%	8.2%	8.0%

Source: Insurance Services Office

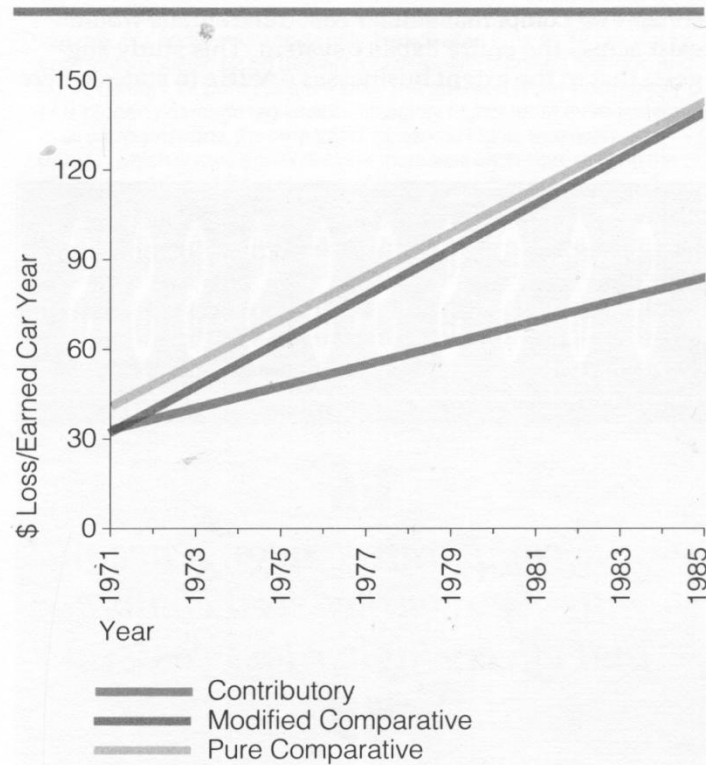


FIGURE 1. Bodily Injury System Losses, by Negligence System

states retaining the contributory standard. Table 4 presents the dollar denominated average annual cost coefficients for each of the three negligence systems. For bodily injury, the increase in the average dollar loss cost per year is much higher for modified comparative system states than for contributory system states (\$5.90 to \$3.99). Pure comparative system states have an even higher average cost increase (\$7.53 to \$3.99). Assuming a common base year cost of \$50 and applying the average dollar change for twenty years would result in modified comparative premiums more than 29 percent higher than those for comparative system states (\$168 to \$130). Pure system loss costs would be almost 55 percent greater than under contributory (\$201 to \$130). The second part of the table presents the differences as a percentage of base year system premiums. As with the dollar change, the longterm effects of such percentage differences are dramatic.

When property damage loss costs are added to the analysis, cost differences continue in the same manner. However, the differences among the systems are not so great as for bodily injury alone. Comparative negligence seems to have its greatest upward cost pressure for bodily injury.

Summary and Conclusions

The data and findings reported in this study indicate quite clearly that states with comparative negligence standards have substantially higher automobile insurance loss costs. One can infer from that finding that it is rea-

TABLE 4. Automobile Bodily Injury Loss Costs Per Year and Reparations System Controlling for State Characteristics

	Contributory	Modified Comparative	Pure Comparative
Average Dollar Cost Per Year:			
Bodily Injury	\$3.99	\$5.90	\$7.53
Bodily Injury and Property	\$5.94	\$7.82	\$9.52
Percentage of Base Year System Premium (1971):			
Bodily Injury	9.35%	14.15%	16.94%
Bodily Injury and Property	9.35%	12.37%	14.06%

sonable to expect that similar cost differentials would exist across the entire liability system. This study suggests that to the extent businesses operate in states where comparative negligence is the rule, they should expect higher costs for general liability, product liability, and professional liability insurance. Consumers in those states should expect higher costs for homeowners insurance, as well as for automobile insurance.

There is likewise a relationship between modified and pure comparative negligence. One would expect pure comparative, which allows recovery even for plaintiffs primarily responsible for their own losses, to be more expensive than modified comparative. The findings suggest that loss costs are much higher in pure comparative states than in modified, and that these costs are higher in comparative states than in contributory states. Moreover, when one controls for population density, fatalities, and no-fault, one discovers that the average cost increase per year for bodily injury liability is 48 percent higher for modified over contributory negligence, 28 percent higher in pure than in modified, and 89 percent higher for pure over contributory.

These findings clearly indicate that the legislatures of those five states that retain contributory negligence should adopt comparative negligence only with caution and with the expectation of higher insurance costs. If simultaneously considering other tort reforms, those legislatures should anticipate loss costs reductions being offset by loss cost increases from comparative negligence. States that already have comparative negligence should consider adopting a less costly alternative.

It must be repeated that this study examines only the cost implications of comparative negligence standards. The qualitative arguments in favor of comparative negligence standards are compelling. But comparative negligence must be regarded as a change that effects higher loss costs. The items on the tort reform agenda seek to effect lower loss costs.

Endnotes

1. Business Insurance, March 5, 1989, p. 2, includes a complete analysis of the law that was under consideration during the last session of Congress. It will doubtless return in the next Congress.
2. The most recent report is "State Tort Reform in 1987," which appeared in For the Defense, February 1988, by Cinda L. Berry. Ms. Berry indicates by telephone that DRI prepares reports as activity warrants.
3. Arizona changed from pure comparative negligence to modified. New Mexico adopted the rule that defendants will be only severally liable instead of jointly and severally in comparative fault actions (although excluding product liability and intentional conduct actions). The DRI report, referred to in note 2 above, indicated that Nevada replaced contributory negligence with comparative negligence. The writers think that to classify such a change as a "reform" is not appropriate in light of the findings presented in this paper.

4. See Emmett Vaughan, *Fundamentals of Risk and Insurance*, John Wiley, 1989, p. 488. This was also found in a survey reported in J. E. Johnson and G. B. Flanigan, *Update of an Investigation of the Relative Costs of Comparative Negligence Standards* (1985), submitted by Joseph E. Johnson to the Judiciary Committees of the General Assembly of the State of North Carolina.
5. There are numerous sources. For example, see W. Prosser, "Comparative Negligence," *Michigan Law Review* 51, 1953, p. 465 and V E. Schwartz, *Comparative Negligence*, 2nd Edition, Allen Smith Company, Indianapolis, 1986. Also see Emmett Vaughan, *Fundamentals of Risk and Insurance*, John Wiley, 1989, p. 486, and V. E. Schwartz, *Comparative Negligence*, 2nd Edition, Allen Smith Company, Indianapolis, 1986.
6. The density of the population controls for differences in vehicular and pedestrian congestion. The fatality rate per registered vehicle proxies the effects of road condition, driver education programs, drunk driver enforcement, and other safety-related aspects. A dummy variable for states with no-fault recognizes potential differences in costs between tort and no-fault systems. The average dollar cost per year is captured by a trend variable. For bodily injury costs only, the adjusted R2 is 46.78 percent for contributory states, 62.66 percent for states with modified systems, and 50.96 percent for pure system states. The adjusted R2 for bodily injury plus property damage regressions is slightly higher for all three systems. In all six regressions, the time trend variable is highly significant at 0.0001, which shows significant cost increases each year, holding the other variable constant. It is these cost increases that are shown in Table 4. No problems of excessive multicollinearity or autocorrelation appeared in the regressions.