

## ARTICLES

### IMPEDIMENTS TO REASONABLE TORT REFORM: LESSONS FROM THE ADOPTION OF COMPARATIVE NEGLIGENCE

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#### INTRODUCTION

In an “avalanche”<sup>1</sup> of tort reform a generation ago, the number of states applying the contributory negligence doctrine<sup>2</sup> fell from forty-four to seven. States replaced that doctrine with either the “pure” or “modified” form of comparative negligence. While almost all scholars favored the pure form that treats negligent plaintiffs and negligent defendants the same way, the majority of jurisdictions chose the modified form that varies the effect of a share of responsibility depending on whether it is assigned to a plaintiff or to a defendant.<sup>3</sup>

The pure form of comparative negligence makes any party’s financial consequence from involvement in a negligently-caused injury directly proportional to that party’s share of responsibility, whether that consequence is the amount of damages a defendant must pay or the amount of loss a plaintiff must bear without compensation.<sup>4</sup> In the modified system, plaintiffs and

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1. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7, reporters’ notes, cmt. a (2000) (“The modern American adoption of comparative responsibility began in Arkansas in 1955. Arkansas first adopted a pure comparative-negligence statute and then amended it to embody modified comparative negligence. Maine followed suit with a modified-comparative-negligence statute in 1965. In the 1970s, the avalanche began, leading to the nearly uniform adoption of comparative principles that exists today.” (citations omitted)). This Article studies the period of 1969 through 1984. See Appendix for references for each state.

2. The contributory negligence doctrine bars recovery when a plaintiff is negligent in any way that contributes to the plaintiff’s harm. See BLACK’S LAW DICTIONARY 353 (8th ed. 2004).

3. See text accompanying *infra* notes 22-29.

4. In the “pure form” of comparative negligence, a plaintiff is entitled to recovery unless the plaintiff’s share of responsibility for his or her injuries is 100%. If the plaintiff’s share is 99% or less, the plaintiff is entitled to recovery that is reduced to reflect the plaintiff’s percentage of

defendants receive different treatment.<sup>5</sup> A plaintiff who is more than half at fault in causing his or her injury bears *all* of the cost, but a defendant who is more than half at fault in causing an injury bears only *some* of the cost of that injury.<sup>6</sup> From the defendant's point of view, this is a beneficial "heads I win, tails you lose" discrepancy. If a jury concludes that the plaintiff was more than half to blame, the *defendant wins* and pays nothing. However, if a jury concludes that the plaintiff was less than half to blame, the defendant pays only part of the cost of the injury and the *plaintiff loses* (partially) by bearing some of the cost of the injury.

This Article examines the ascendancy of the modified form of comparative negligence in an effort to understand factors that can influence how we define, debate, and adopt tort reform measures. Traditional framing choices, reformers' rhetorical framing choices, habituation to injustice, and institutional differences between courts and legislatures all may have influenced the pattern of change. Identifying these factors may offer lessons for advocacy or analysis of current tort reform proposals.

## I. TRADITIONAL TREATMENT OF CASES INVOLVING A PLAINTIFF'S NEGLIGENCE

Influenced by the 1809 English case, *Butterfield v. Forrester*,<sup>7</sup> the contributory negligence doctrine became the dominant American treatment of cases in which a plaintiff's injuries were caused by negligence of both a plaintiff and a defendant. For those cases, the plaintiff was not entitled to recover any damages.<sup>8</sup> This doctrine completely precluded a plaintiff's recovery in any case where the plaintiff and defendant were both negligent.

*De jure* and *de facto* responses to the "all or nothing" aspect of the doctrine were plentiful. Courts developed pro-plaintiff standards of care for particularly appealing plaintiffs whose conduct was likely to fall below the degree of care

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responsibility. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7 cmt. a (2000).

5. There are two forms of "modified" comparative negligence, the "49% form" and the "50% form." They vary only in treatment of a plaintiff whose share of responsibility is exactly 50%. In the 49% form, a plaintiff whose share of responsibility is 49% or less recovers damages reduced proportionally to reflect that share, but a plaintiff whose share of responsibility is 50% or more recovers nothing. In the 50% form, a plaintiff whose share of responsibility is 50% or less recovers damages reduced proportionally to reflect that share, but a plaintiff whose share of responsibility is 51% or more recovers nothing. See *id.*

6. The examples in this Article assume a hypothetical two-party case in which one actor suffers an injury and a jury finds that each actor had some share of responsibility for the injury. The differences between the 49% and 50% forms of modified comparative negligence do not affect the analysis in this Article; for that reason, its examples use percentages of responsibility that are treated the same way in both forms of modified comparative negligence.

7. (1809) 103 Eng. Rep. 926 (K.B.).

8. See generally Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946).

required by the reasonable person standard. In particular, the child's standard of care exemplifies this response.<sup>9</sup> The "last clear chance doctrine" was another device that facilitated recovery by plaintiffs whose conduct was unreasonable.<sup>10</sup> The "rescue doctrine"<sup>11</sup> and various "sudden emergency doctrines"<sup>12</sup> also offered jurors the opportunity to treat conduct by plaintiffs as reasonable that they might have characterized as contributorily negligent in the absence of those elaborations on the standard of reasonable care. In addition to these doctrines that sometimes limited the impact of the contributory negligence doctrine, the legal community widely believed that some juries ignored their instructions and rendered verdicts for plaintiffs even though there was substantial support for a finding of contributory negligence.<sup>13</sup>

While the contributory negligence doctrine continued to be the predominant approach to cases with negligent plaintiffs until the end of the twentieth century, several statutory developments limited its scope and a small number of states pioneered the shift from contributory to comparative negligence. The Federal Employers Liability Act of 1908 applied pure comparative principles in actions by employees against railroads or other common carriers.<sup>14</sup> The Jones Act of 1970 applied pure comparative negligence in suits involving maritime workers and their employers.<sup>15</sup> Workers' Compensation statutes allowed administrative redress for injured workers regardless of their possible negligence. Mississippi adopted pure comparative negligence by statute in 1910.<sup>16</sup> In a combination of legislative and judicial actions, Georgia employed modified comparative negligence at about the same time.<sup>17</sup> The Wisconsin legislature adopted the modified form of comparative negligence in 1931.<sup>18</sup>

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9. See, e.g., *Roth v. Union Depot Co.*, 43 P. 641, 647 (Wash. 1896).

10. See, e.g., *Davies v. Mann*, 152 Eng. Rep. 588, 589 (Exch. of Pleas 1842).

11. See, e.g., *Wagner v. Int'l Ry. Co.*, 133 N.E. 437, 438 (N.Y. 1921).

12. See, e.g., *Lyons v. Midnight Sun Transp. Servs., Inc.*, 928 P.2d 1202, 1205 (Alaska 1996).

13. Fleming James, Jr., *Contributory Negligence*, 62 YALE L.J. 691, 705 n.78 ("[T]his tall timber in the legal jungle has been whittled down to toothpick size by the sympathetic sabotage of juries . . ." (quoting Charles L.B. Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 674 (1934))).

14. 45 U.S.C. §§ 51-53 (2000).

15. 46 U.S.C. § 688 (2000); see also *Death on the High Seas Act of 1920*, 46 U.S.C. §§ 761-768 (2000).

16. MISS. CODE ANN. § 11-7-15 (2006).

17. The Georgia legislature first abandoned contributory negligence in an 1863 statute that stated, "the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained." GA. CODE ANN. § 51-11-7 (2006). The same year, the Georgia legislature specifically adopted comparative negligence for railroad cases. *Id.* § 46-8-291. The Georgia judiciary gradually combined these statutes and developed a general system of modified comparative negligence. See, e.g., *Elk Cotton Mills v. Grant*, 79 S.E. 836, 838 (Ga. 1913).

18. WIS. STAT. § 895.045 (2005).

## II. CRITICISMS OF CONTRIBUTORY NEGLIGENCE

Courts and scholars criticized the doctrine of contributory negligence on a number of grounds. The ameliorative doctrines were considered too difficult to predict and too difficult to justify.<sup>19</sup> Commentators noted that strongly deterring plaintiffs who might act unreasonably while eliminating any deterrence of negligent defendants was extremely difficult to justify.<sup>20</sup>

The contributory negligence system required jurors to describe the conduct of any party involved in an injury as either negligent or not negligent. Some suggested that these two categories failed to capture a more realistic description of the causes of accidental injuries because it is often true that more than one party is partly to blame for an injury.<sup>21</sup>

The belief that jurors intentionally reached the conclusion that a plaintiff was free from contributory negligence even when they believed that the plaintiff had been negligent was treated as a fault of the contributory negligence system. That system could be criticized as forcing citizens into unethical conduct as jurors. Also, if jurors misstated their conclusions about plaintiffs' fault but then adjusted amounts of damages to reflect fault, that state of affairs would be contrary to the general rule of law that requires the legal system, not individual juries, to develop and state the governing principles for treating various types of cases.

## III. SCHOLARLY EVALUATIONS OF COMPARATIVE NEGLIGENCE

In scholarly writings that illuminated the shortcomings of the contributory negligence doctrine and recommended adoption or expansion of comparative negligence principles, leading figures in tort law either advocated the pure system or took it for granted that comparative negligence was equivalent to what became known as the pure system. In 1953, William L. Prosser published "Comparative Negligence."<sup>22</sup> In that same year, Fleming James, Jr. published "Contributory Negligence."<sup>23</sup> Each of these articles surveyed the injustices inherent in the contributory negligence system and evaluated instances in which comparative negligence was used. Prosser criticized the modified form used in Wisconsin, stating: "It appears impossible to justify the rule on any basis except one of pure political compromise. It is difficult . . . to escape the conclusion that at the cost

19. See, e.g., Laurence W. DeMuth, *Derogation of the Common Law Rule of Contributory Negligence*, 7 ROCKY MTN. L. REV. 161, 186-87 (1935); William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 471-74 (1953) (demonstrating the complex and sometimes unpredictable operation of the last clear chance doctrine).

20. See Guido Calabresi, *Optimal Deterrence and Accidents: To Fleming James, Jr.*, 84 YALE L.J. 656, 662-63 (1975); William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 885-92 (1981).

21. See Charles O. Gregory, *Loss Distribution by Comparative Negligence*, 21 MINN. L. REV. 1, 1-2 (1936) (discussing "the inevitability of accidents involving several parties, all or more than one of whom are equally 'at fault'").

22. Prosser, *supra* note 19, at 465.

23. James, *supra* note 13, at 691.

of many appeals they have succeeded merely in denying apportionment in many cases where it should have been made.”<sup>24</sup> Explicitly communicating his preference for the pure form, Prosser included a draft statute in his article adopting the pure form of comparative negligence.<sup>25</sup> James concluded “both modern policy and the logic of the fault principle point to a rule that plaintiff’s fault—if it is to be counted at all—will diminish rather than defeat his recovery.”<sup>26</sup> Other studies reached the same conclusion.<sup>27</sup>

When the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Comparative Fault Act, it chose the pure form of comparative negligence.<sup>28</sup> The Act’s Prefatory Note offered a summary of the on-going movement for change:

The harsh all-or-nothing rule of contributory negligence at common law has not been properly ameliorated by the several exceptions also developed at common law. Whether the general rule or an exception applies, one party or the other is always treated unfairly. . . . This Uniform Act . . . addresses the problems and provides what are regarded as the best solutions for them.<sup>29</sup>

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24. Prosser, *supra* note 19, at 494.

25. *Id.* at 508.

26. James, *supra* note 13, at 731.

27. See Gregory, *supra* note 21, at 6 (stating that the pure system of comparative negligence as applied in Mississippi “saved its courts an immense amount of cumbersome administrative and legalistic detail and at the same time penalized the too negligent plaintiff by providing for a substantial decrease in his recoverable damages”); A. Chalmers Mole & Lyman P. Wilson, *A Study of Comparative Negligence* 17 CORNELL L.Q. 333, 341 (1932) (describing the “equal division principle” in admiralty law as a “stepping-stone” to comparative negligence which would avoid the equal division principle’s risk of imposing “more harm to one of the wrong-doers than he deserves”); A. Chalmers Mole & Lyman P. Wilson, *A Study of Comparative Negligence, Part II*, 17 CORNELL L.Q. 604, 642 (1932) (describing Mississippi’s pure form of comparative negligence as approaching “more closely the ideals of theoretical and practical justice than the harsh and inflexible rule of contributory negligence”); see also Ernest A. Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 304 (1950) (comparing the pure system of comparative negligence with the modified approaches in other states and endorsing the pure form); see generally Francis S. Philbrick, *Loss Apportionment in Negligence Cases Part II: Some Proposals for Reform in Pennsylvania*, 99 U. PA. L. REV. 766 (1951) (endorsing the pure form of comparative negligence).

28. UNIF. COMPARATIVE FAULT ACT § 1(a), 12 U.L.A. 127 (1996). The Uniform Act was adopted in 1977, near the mid-point of the period of reform studied in this Article. As its Preface states, the Act reflected long years of work. It therefore may reflect the consensus of scholarly opinion that could have influenced the judicial and legislative actions that occurred during the years of study that produced the Act.

29. *Id.* at 123-24.

#### IV. DETAILS OF THE COMPARATIVE NEGLIGENCE REVOLUTION

In the period of this study, the majority rule in the United States changed from treating a plaintiff's negligence as a complete bar to recovery to treating a plaintiff's negligence as a factor that either reduced or barred recovery.<sup>30</sup> From 1969 through 1984, thirty-seven states abolished their contributory negligence doctrines and adopted comparative negligence.<sup>31</sup> Table I depicts this revolution, showing which states adopted each form of comparative negligence and whether the legislature or judiciary adopted the change. The modified form was adopted in twenty-three of the thirty-seven states that acted during the period studied.<sup>32</sup> In states where legislatures replaced the contributory negligence system with a comparative system, twenty-two out of twenty-six chose the modified form.<sup>33</sup> In states where courts made the switch, one out of eleven chose that form.<sup>34</sup>

**Table I**

**STATE ADOPTIONS OF COMPARATIVE NEGLIGENCE: 1969-1984**  
(showing choice of form by court or legislature)

	COURT	LEGISLATURE
PURE	AR CA FL IA IL KY MI MO NM RI	AZ LA NY WA
MODIFIED	WV	CO CT DE HI ID IN KS MA MN MT NH NJ NV ND OH OK OR PA TX UT VT WY

#### V. MODIFIED COMPARATIVE NEGLIGENCE AND THE "FAIRNESS" CRITERION

Courts and legislatures both referred to concepts such as fairness and justice in their adoptions of comparative negligence. For example, the Alaska Supreme Court stated: "We are persuaded that the contributory negligence rule yields

30. See Appendix *infra* pp. 17-22.

31. See Appendix *infra* pp. 17-22.

32. See Table I.

33. See Table I.

34. See Table I. The fact that legislatures were more likely than courts to adopt the modified form is statistically significant. A student's two-tailed t-test yielded a p-factor of less than 0.001.

*unfair* results which can no longer be justified.”<sup>35</sup> Legislators also frequently supported their choices with references to fairness. Illustratively, a description of the legislative process in Ohio referred to “the principal argument espoused in favor of the modified form, *fairness* and equity.”<sup>36</sup> The central defect of the contributory negligence system is its unequal treatment of plaintiffs and defendants. That is, a negligent plaintiff is always required to bear the full cost of an injury partly caused by the plaintiff, although a negligent defendant is never required to bear any of the cost of an injury partly caused by the defendant. The pure system of comparative negligence addresses that flaw. The modified form does not, yet it was the overwhelming choice of legislatures that were concerned with “fairness.” This section demonstrates that adopting the modified form does not further the fairness objective and thus suggests that it would be worthwhile to attempt to identify other explanations for the typical legislative preference for the modified form.

Ordinarily our legal system gives identical treatment to identical actors. The pure system of comparative negligence does just that. Table II shows shares of responsibility that a jury might assign to a plaintiff or a defendant, and it also shows for each share the portion of the costs of the injury that the doctrine will require the party to bear. The Table shows that pure comparative negligence treats a plaintiff who is more than 50% responsible for an injury exactly the same

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35. Kaatz v. State, 540 P.2d 1037, 1049 (Alaska 1975) (emphasis added); see also Li v. Yellow Cab Co., 532 P.2d 1226, 1232 (Cal. 1975) (“[L]ogic, practical experience, and fundamental justice counsel against the retention of the doctrine rendering contributory negligence a complete bar to recovery . . .”); Hoffman v. Jones, 280 So. 2d 431, 436 (Fla. 1973) (“Whatever may have been the historical justification for [the contributory negligence doctrine], today it is almost universally regarded as unjust and inequitable. . .”).

36. Jeffrey A. Hennemuth, *Ohio's Last Word on Comparative Negligence?—Revised Code Section 2315.19*, 9 OHIO N.U. L. REV. 31, 48 (1982) (emphasis added). The experience in other states may be similar. For example, the legislative process in Arkansas is the subject of a number of articles, probably because it was one of the first states to reject contributory negligence. See Maurice Rosenberg, *Comparative Negligence in Arkansas: A “Before and After” Survey*, 13 ARK. L. REV. 89, 90 (1959); Billy J. Thomson, Note, *Comparative Negligence—A Survey of the Arkansas Experience*, 22 ARK. L. REV. 692, 692 (1969). The state adopted a pure comparative negligence regime in 1955, but replaced it with the modified form two years later. A writer at the time explained, “The primary purpose of the new act seems to be to eliminate [a] situation, felt by many attorneys to be *unfair*.” Dan B. Dobbs, *Legislative Notes*, 11 ARK. L. REV. 375, 392 (1957) (emphasis added). A New Hampshire legislator described the “fundamental” legislative motivation as “a deep conviction that the contributory negligence rule was *so basically unfair* and illogical that it should have no further place in our law.” David L. Nixon, *The Actual “Legislative Intent” Behind New Hampshire's Comparative Negligence Statute*, 12 N.H.B.J. 17, 18 (1969) (emphasis added). The sponsor of a modified comparative negligence statute adopted in Indiana wrote: “It is highly unlikely that a pure form of comparative fault, which allows recovery for a ninety-nine percent-fault plaintiff, would have been regarded as fair by the members of the Indiana General Assembly.” Nelson J. Becker, *Indiana's Comparative Fault Law: A Legislator's View*, 17 IND. L. REV. 881, 881 (1984).

way it treats a defendant who is more than 50% responsible for an injury. Also, the pure system treats a plaintiff who is less than 50% responsible for an injury exactly the same way it treats a defendant who is less than 50% responsible for an injury.

**Table II**

**Pure Comparative Negligence  
(examples for plaintiffs and defendants in separate cases)**

Share of Responsibility Assigned to the Party by the Jury	Plaintiff less than 50%	Defendant less than 50%	Plaintiff more than 50%	Defendant more than 50%
Share of Injury Cost Borne by the Party	Some	Some	Some	Some

In contrast to the pure comparative negligence treatment shown in Table II, modified comparative negligence treats a plaintiff's negligence as a complete bar to recovery in any case where the plaintiff's negligence exceeds 50%.<sup>37</sup> This leaves the plaintiff bearing all of the cost of the injury. However, the modified system applies a different consequence to a defendant in a case where a defendant's negligence exceeds 50%. That defendant will bear only a portion of the cost of the injury. Table III illustrates how modified comparative negligence applies different treatment to parties whose shares of negligence are the same based on the party's status as a plaintiff or a defendant.

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37. Both forms of modified comparative negligence produce this result (the "49% form" also provides this result in any case where the plaintiff's negligence is equal to 50%).

Table III

**Modified Comparative Negligence**  
(examples for plaintiffs and defendants in separate cases)

Share of Responsibility Assigned to the Party by the Jury	Plaintiff less than 50%	Defendant less than 50%	Plaintiff more than 50%	Defendant more than 50%
Share of Injury Cost Borne by the Party	Some	None	All	Some

Table III shows the serious logical flaw of modified comparative negligence. The system applies the concept of fault in different ways to plaintiffs and defendants so that the same amount of fault has a graver consequence for a plaintiff than for a defendant.<sup>38</sup> For example, assume an accident in which an inattentive cyclist suffers \$10,000 in damages because of a collision with a car driven by an inattentive driver. If the cyclist sues the driver and the jury finds the cyclist more than 50% negligent, the cyclist will bear the full cost of the \$10,000 injury. In contrast, if the jury finds the driver more than 50% negligent, the driver will bear only a *fraction* of the \$10,000 because the modified system will reduce the cyclist's recovery to reflect the cyclist's share of responsibility. Thus, if the jury assigned 20% of responsibility to the cyclist, the cyclist would recover 80% of the total damages and the driver would bear \$8,000 of the cost of the injury.

Based on the theory that plaintiffs should be deterred from harming themselves, it might be argued that generally a plaintiff's conduct that causes the plaintiff harm is worse than conduct by a defendant that causes a plaintiff harm. There are two objections to this suggestion. First, all negligent conduct ought to be deterred by tort principles. Second, if it were fruitful to characterize differences between conduct by a plaintiff that imperils a plaintiff personally and conduct by a defendant that imperils a stranger, a strong argument might be made that it is worse to endanger others than it is to endanger oneself.<sup>39</sup>

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38. It might be helpful to recall here that tort law can never undo an injury. Tort law can only shift the economic consequences of an injury and thus determines what portion of the cost of an injury will be borne by each actor who participated in causing it.

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[I]n cases where a plaintiff is partially at fault, his culpability is not equivalent to that of a defendant. The plaintiff's negligence relates only to a lack of due care for his own safety while the defendant's negligence relates to a lack of due care for the safety of others; the latter is tortious, but the former is not.

Implicit in the description provided in Table III is another controversial aspect of modified comparative negligence. Besides failing to treat plaintiffs and defendants who have identical shares of responsibility (in separate cases) the same way, the system applies drastically different treatment to some plaintiffs whose shares of responsibility are almost identical. For example, a plaintiff who is 49% to blame is entitled to receive damages but a plaintiff who is 51% to blame recovers nothing. Rationalizing this result as a matter of causation makes little sense, since each of these plaintiffs has causal responsibility for his or her harm and each of them has also been a victim of negligent conduct caused by a defendant.

Could a modified comparative negligence system give identical treatment to identical actors as the pure system does? That result is possible, although no current modified system achieves it. Table IV illustrates a proposed system that no state currently uses. It might be called "symmetrical" or "balanced" modified comparative negligence. Its crucial aspect is the equal treatment of parties who are more than 50% or who are less than 50% responsible for any injury, regardless of whether they are plaintiffs or defendants. A plaintiff who is less than 50% responsible bears none of the cost of injury, and a defendant who is less than 50% responsible bears none of the cost of injury. Similarly, a plaintiff who is more than 50% responsible bears all of the cost of injury, and a defendant who is more than 50% responsible bears all of the cost of injury.

**Table IV**

**"Symmetrical" or "Balanced" Modified Comparative Negligence  
(examples for plaintiffs and defendants in separate cases)**

Share of Responsibility Assigned to the Party by the Jury	Plaintiff less than 50%	Defendant less than 50%	Plaintiff more than 50%	Defendant more than 50%
Share of Injury Cost Borne by the Party	None	None	All	All

If "fairness" in the minds of legislators really required making an actor whose share of responsibility is greater than 50% bear the entire cost of an injury, the symmetrical system shown in Table IV is the system they should have adopted. It links any party who was more than 50% responsible for an injury to full financial responsibility for that injury. In contrast, the widely-adopted modified comparative negligence systems ignore this possibility and impose that

link only on plaintiffs. The legislatures' stated rationale for adopting the modified form is not consistent with the version of comparative negligence that they typically widely adopted. Replacing the contributory negligence regime with modified comparative negligence must have satisfied some concerns other than fairness, assuming fairness can be defined as equal treatment for identical actors. The following sections of this Article seek to understand the factors that might have influenced jurisdictions to choose a system that seems to incorporate severe flaws of logic and therefore leading to injustice.

## VI. THE PATH FROM FAIRNESS TO COMPROMISE

Modified comparative negligence fails tests of fairness and logic. Yet it was the clear preference of legislatures that sought to eliminate the strongly pro-defendant doctrine of contributory negligence. Lobbying by insurance interests apparently played a significant role in the legislative process,<sup>40</sup> with the slim historical record suggesting that legislatures were pulled strongly towards what could be characterized as a compromise position.<sup>41</sup>

Available descriptions of the legislative history of comparative negligence in Ohio show the influence of the insurance industry.<sup>42</sup> One account described the law as "the culmination of long and arduous efforts at compromise in the legislature . . . follow[ing] more than seven years of fierce opposition by insurance companies and the insurance lobby."<sup>43</sup> The state bar, a trial lawyers group, and some members of the judiciary supported the pure form while opposition to all comparative negligence came from "the insurance industry, defense lawyers, and others (railroads, for example) who were satisfied to maintain the *status quo*."<sup>44</sup> By 1980, comparative negligence had become a majority position in the country, but Ohio still applied contributory negligence.<sup>45</sup> "[I]n order to get some form of comparative negligence on the statute book" proponents of comparative fault agreed to support a proposal for the modified

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40. John G. Fleming, *Foreword: Comparative Negligence at Last—By Judicial Choice*, 64 CAL. L. REV. 239, 239 (1976); see also VICTOR E. SCHWARTZ & EVELYN F. ROWE, *COMPARATIVE NEGLIGENCE* 14 (4th ed. 2002); Hennemuth, *supra* note 36, at 45-46; Carol Isackson, *Pure Comparative Negligence in Illinois*, 58 CHI.-KENT L. REV. 599, 605-06 (1981).

41. Legislatures considering reforms of the contributory negligence system naturally considered the problem in the context of experience under that system. That is, they may have seen their task as developing improvements in a system that was routinely unfair to large numbers of plaintiffs. Against that background, a system that might be unfair only to small numbers of plaintiffs might have seemed to be sufficient reform. The plaintiffs who were left behind by the partial reform could have no complaint that they were disadvantaged, since their position remained exactly the same as it had been prior to the reform.

42. Hennemuth, *supra* note 36, at 45-46; see Paul Courtney & Brian Dovi, Note, *S.B. 165: Comparative Negligence in Ohio*, 7 U. DAYTON L. REV. 257 (1981); see also Charles E. Brant, *A Practitioner's Guide to Comparative Negligence in Ohio*, 41 OHIO ST. L.J. 585 (1980).

43. Courtney & Dovi, *supra* note 42, at 257.

44. Hennemuth, *supra* note 36, at 46; Courtney & Dovi, *supra* note 42, at 263.

45. Courtney & Dovi, *supra* note 42, at 264.

form.<sup>46</sup>

Information is also available for Indiana's process of adopting comparative negligence. There, adoption of modified comparative negligence was the result of compromise between those who supported the pure form and advocates for insurance interests who opposed it.<sup>47</sup> One commentator explained: "Although statutory adoption of apportionment of liability may have been inevitable, the precise system accepted by the General Assembly was not. . . . [P]olitical compromises necessary to enact some form . . . militated against whatever theoretical chances a pure system may have had."<sup>48</sup>

Adopting the modified form may have seemed like a sensible compromise to legislatures because of traditional framing of tort issues in general and certain specific framing choices by scholarly advocates of the pure form. The analysis of most tort problems asks whether plaintiffs may recover rather than asking what share of the cost of injury anyone should bear, regardless of whether that person is identified as a plaintiff or defendant. Also, scholarly proponents of comparative negligence supported their arguments with extreme examples. Framing the issue in these ways may have made acceptance of partial solutions seem attractive. For the question "Can a plaintiff recover?" the above-proposed modified form supplies a "yes" answer in many of the cases where the traditional contributory negligence system says "no." Furthermore, the above-proposed modified form resolves the injustices illustrated by the extreme examples given above.

When legislators rejected the pure form in favor of the modified form, they failed to see this compromise as a rejection of logic. The perceived legitimacy of modified comparative negligence as a compromise position may have been strengthened by the tradition in tort law of discussing most issues (including treatment of a plaintiff's negligence) in terms of a plaintiff's eligibility to recover damages. This pattern inevitably invites a logical error. Only a plaintiff can recover damages. Therefore, any rule expressed in terms of recovery of damages will be insulated from the question of how it would apply to defendants because defendants never recover damages.

The error in analysis becomes obvious by restating a central precept of modified comparative negligence in neutral terminology. A conventional statement of the modified form's main theme is that a plaintiff who is more 50% at fault for an injury should recover no damages. This position reflects the belief that an actor whose conduct is "bad" to that degree ought not to be assisted by the legal system. Characterized more generally, the idea that one whose conduct caused more than half of an injury *should recover no damages* is equivalent to

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46. Hennemuth, *supra* note 36, at 47.

47. Edgar W. Bayliff, *Drafting and Legislative History of the Comparative Fault Act*, 17 IND. L. REV. 863 (1984); *see also* Becker, *supra* note 36, at 881-82. *See generally* Symposium, *Indiana's Comparative Fault Act*, 17 IND. L. REV. 687 (1984) (containing the cited articles and additional articles).

48. Lawrence P. Wilkins, *The Indiana Comparative Fault Act at First (Lingering) Glance*, 17 IND. L. REV. 687, 688 (1984).

the idea that a party who is more than half at fault for an injury *should bear all the cost* of that injury. The difference in these two statements is the switch from the terminology of recovering damages to the terminology of bearing costs. One formulation refers to “recover no damages” and the other refers to “bear all the cost.” The language choice is crucial because it exposes the imbalance in the modified comparative negligence approach to the question of what loss should be shifted when a party is more than 50% negligent.

If legislators who were attracted to the idea that “bad” plaintiffs (those whose responsibility is greater than 50%) should recover nothing had understood that this is equivalent to making those plaintiffs bear all of the cost of their injuries, perhaps the legislators would have realized that “bad” defendants also could be made to bear all of the costs of the injuries caused by their “bad” conduct. This might have led legislators to adopt the kind of balanced or symmetrical modified comparative negligence described above or to choose the pure form. It certainly could have made it more difficult for legislators to embrace the typical modified system as almost all of them did.

Another framing process used by legislators involved the selection of hypothetical examples for highlighting the flaws of the contributory negligence system. When scholars described the consequences of the contributory negligence system, they almost always used the illustration of a slightly-to-blame plaintiff who the doctrine completely barred from recovery.<sup>49</sup> References to that specific category of cases appear even where the author’s argument supported reform of the contributory negligence system that would have benefited all plaintiffs, not just “good” plaintiffs whose share of responsibility was small.<sup>50</sup> These rhetorical choices could lead to an over-estimation of the power of modified comparative negligence to remedy the shortcomings of contributory negligence. The extreme cases are all situations in which the modified form will provide a solution, even though the modified form fails to solve the problems of the entire class of negligent plaintiffs—the class for which the scholars intended to advocate redress.<sup>51</sup>

An early and frequently cited article on comparative negligence put it this way: “The plaintiff who has thus contributed, no matter how *slightly*, to his own injury may not recover for such injury, regardless how negligent the other party may have been.”<sup>52</sup> In his article “Contributory Negligence,” William Prosser described contributory negligence as “a rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and *quite possibly much less at fault* than the defendant who goes scot free.”<sup>53</sup>

The Prosser treatise also provided a similar description of contributory

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49. See WILLIAM PROSSER, LAW OF TORTS 433 (4th ed. 1971); Turk, *supra* note 27, at 199.

50. See Prosser, *supra* note 19, at 469; Turk, *supra* note 27, at 199.

51. See FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 22.3, at 1207 (1956).

52. Turk, *supra* note 27, at 199 (footnote omitted) (emphasis added).

53. Prosser, *supra* note 19, at 469 (emphasis added).

negligence:

The hardship of the doctrine of contributory negligence upon the plaintiff is readily apparent. It places upon one party the entire burden of a loss for which two are, by hypothesis, responsible. The negligence of the defendant has played no less a part in causing the damage; the plaintiff's deviation from the community standard of conduct may even be relatively *slight*, and the defendant's more extreme . . . .<sup>54</sup>

Further, the Harper and James treatise states:

[T]here is no justification—in either policy or doctrine—for the rule of contributory negligence, except for the feeling that if one man is to be held liable because of his fault, then the fault of him 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.<sup>55</sup>

Judicial opinions in the period of this study also illustrate a preoccupation with the special case of the nearly-perfect plaintiff. The Florida Supreme Court wrote: “The injustice which occurs when a plaintiff suffers severe injuries as the result of an accident for which he is only *slightly* responsible, and is thereby denied any damages, is readily apparent.”<sup>56</sup> The New Mexico Supreme Court wrote: “The predominant argument for its abandonment rests, of course, upon the undeniable inequity and injustice in casting an entire accidental loss upon a plaintiff whose negligence combined with another's negligence in causing the loss suffered, no matter how *trifling* plaintiff's negligence might be.”<sup>57</sup> The West Virginia Supreme Court explained: “[O]ur system of jurisprudence, while based on concepts of justice and fair play, contains an anomaly in which the *slightest* negligence of a plaintiff precludes any recovery and thereby excuses the defendant from the consequences of all of his negligence, however great it may be.”<sup>58</sup>

The California Supreme Court characterized the doctrine of contributory negligence as a system that “bars all recovery when the plaintiff's negligent conduct has contributed as a legal cause *in any degree* to the harm suffered by him.”<sup>59</sup> Related to the conventional use of extreme examples was the almost universal use of one particular word to describe contributory negligence—“harsh.”<sup>60</sup> However, it wasn't specified whether the system was

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54. PROSSER, *supra* note 49, at 433 (emphasis added).

55. HARPER & JAMES, *supra* note 51, at 1207 (emphasis added).

56. *Hoffman v. Jones*, 280 So. 2d 431, 437 (Fla. 1973) (emphasis added).

57. *Scott v. Rizzo*, 634 P.2d 1234, 1241 (N.M. 1981) (emphasis added).

58. *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 882 (W. Va. 1979) (emphasis added).

59. *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1229 (Cal. 1975) (emphasis added).

60. Hundreds of judicial opinions use that word to describe the doctrine or its consequences. *See, e.g., Lyons v. Midnight Sun Transp. Servs.*, 928 P.2d 1202, 1205 (Alaska 1996) (“The sudden

harsh towards *all* plaintiffs or harsh only to plaintiffs whose conduct was nearly blameless.<sup>61</sup>

There is evidence that state legislatures were influenced by the power of these extreme examples. When the Arkansas legislature adopted modified comparative negligence, a contemporary account stated: "Under the 1955 Act, the plaintiff might be 90% negligent and still recover a net judgment against a defendant. . . . The primary purpose of the new act seems to be to eliminate this situation, felt by many attorneys to be unfair."<sup>62</sup> Similarly, the sponsor of modified comparative fault legislation in Indiana wrote: "It is highly unlikely that a pure form of comparative fault, which allows recovery for a ninety-nine percent-fault plaintiff, would have been regarded as fair by the members of the Indiana General Assembly."<sup>63</sup>

However, these legislative framings alone did not cause adoption of the modified form. Courts also typically adopted the pure system even though judges were exposed to the same traditional style of describing torts cases and the same extreme examples in the scholarly literature. It is likely, however, that the framings decreased the political cost of preferring the modified form. Legislators could accede to the insurance industry position without obviously contradicting the predominant scholarly position. The extreme examples frame could lead legislators to believe that adopting modified comparative negligence was a comprehensive response to the deficiencies of the contributory negligence doctrine.

### CONCLUSION

This Article suggests that legislatures typically rejected the form of comparative negligence that was favored by scholars and adopted almost uniformly by courts for two reasons. First, the legislative process favors compromise approaches to complex issues. Second, framing choices inherent in tort law and chosen by reform advocates may have facilitated selection of the modified form because they highlighted extreme examples of harm caused by the contributory negligence system and thus exaggerated the extent to which the modified form of comparative fault would remedy the range of problems inherent

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emergency doctrine arose as a method of ameliorating the, sometimes *harsh*, 'all or nothing' rule in contributory negligence systems." (emphasis added)); *Wallis v. Mrs. Smith's Pie Co.*, 550 S.W.2d 453, 458 (Ark. 1977) ("The decided trend is away from the *harsh* results which occur in the application of the contributory negligence rule of law." (emphasis added)); *Haysville U.S.D. No. 261 v. GAF Corp.*, 666 P.2d 192, 199 (Kan. 1983) ("The comparative negligence concept comes as a result of a desire to soften the *harsh* 'all or nothing' rule of common law contributory negligence." (emphasis added)); *Austin v. Raybestos-Manhattan, Inc.*, 471 A.2d 280, 286 (Me. 1984) ("Thus, the comparative negligence statute does not create any new defenses. Its sole purpose is to eliminate the *harsh*, all-or-nothing consequence of the contributory negligence defense." (citation omitted) (emphasis added)).

61. See *supra* note 60.

62. Dobbs, *supra* note 36, at 392.

63. Becker, *supra* note 36, at 881.

in that system.

For contemporary tort reform proposals, the lessons of this Article are both clear and gloomy. Compromises may be inimical to reasonable tort reform. For that reason it may be desirable—although difficult—to avoid them. Where extreme examples cloud debate, advocates should be aware of that process and have the creativity to develop rival extreme examples as a way to increase the chance that the moderate instances that may represent the majority of real cases will not be overlooked. Fighting misleading examples with alternative misleading examples cannot be heartening, but it may improve legislative results.

## Appendix

**STATE ADOPTIONS OF COMPARATIVE NEGLIGENCE: 1969-1984<sup>64</sup>**  
**(showing system adopted and mode of adoption)**

Legislative adoption shown in light type (example: Hawaii)  
 Judicial adoption shown in bold italicized type (example: *Rhode Island*)

YEAR	MODIFIED FORM	PURE FORM
1969	Hawaii Massachusetts Minnesota New Hampshire	
1970	Vermont	
1971	Colorado Idaho Oregon	<i>Rhode Island</i>
1972		
1973	Connecticut Nevada New Jersey North Dakota Oklahoma Texas Utah Wyoming	<i>Florida</i> Washington
1974	Kansas	
1975	Montana	<i>Arkansas</i> <i>California</i> New York
1976	Pennsylvania	
1977		
1978		
1979	<i>West Virginia</i>	Louisiana <i>Michigan</i>
1980	Ohio	
1981		<i>Illinois</i> <i>New Mexico</i>
1982		<i>Iowa</i>
1983	Indiana	<i>Missouri</i>
1984	Delaware	Arizona <i>Kentucky</i>

64. This Appendix reports initial adoptions. Judicial or legislative changes after a state's initial adoption of comparative negligence are not reported.

### Alabama

Alabama has not adopted comparative negligence and continues to utilize contributory negligence. *Williams v. Delta Int'l Mach. Corp.*, 619 So. 2d 1330 (Ala. 1993).

### Alaska

The Alaska judiciary adopted the pure form of comparative negligence in 1975. *Kaatz v. State*, 540 P.2d 1037, 1049 (Alaska 1975).

### Arizona

The Arizona legislature adopted the pure form of comparative negligence in 1984. ARIZ. REV. STAT. ANN. § 12-2505 (1984).

### Arkansas

The Arkansas legislature originally adopted the pure form of comparative negligence in 1955. 1955 Ark. Acts 443.

### California

The California judiciary adopted the pure form of comparative negligence in 1975. *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1243 (Cal. 1975).

### Colorado

The Colorado legislature adopted the modified form of comparative negligence in 1971. COLO. REV. STAT. ANN. § 13-21-111 (West 1971).

### Connecticut

The Connecticut legislature adopted the modified form of comparative negligence in 1973. CONN. GEN. STAT. § 52-572h (1973).

### Delaware

The Delaware legislature adopted the modified form of comparative negligence in 1984. DEL. CODE ANN. tit. 10, § 8132 (1984).

### District of Columbia

The District of Columbia has not adopted comparative negligence and continues to utilize contributory negligence. *R. & G. Orthopedic Appliances and Prosthetics, Inc. v. Curtin*, 596 A.2d 530, 544 (D.C. 1991).

### Florida

The Florida judiciary adopted the pure form of comparative negligence in 1973. *Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1973).

### Georgia

The Georgia legislature first abandoned contributory negligence in an 1863 statute that stated, "the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained." GA. CODE ANN. § 51-11-7

(1863). The same year, the Georgia legislature specifically adopted comparative negligence for railroad cases. *Id.* § 46-8-291. The Georgia judiciary gradually combined these statutes and developed a general system of modified comparative negligence. *See, e.g., Elk Cotton Mills v. Grant*, 79 S.E. 836, 838 (Ga. 1913).

#### Hawaii

The Hawaii legislature adopted the modified form of comparative negligence in 1969. HAW. REV. STAT. § 663-31 (1969).

#### Idaho

The Idaho legislature adopted the modified form of comparative negligence in 1971. IDAHO CODE ANN. § 6-801 (1971).

#### Illinois

The Illinois judiciary adopted the pure form of comparative negligence in 1981. *Alvis v. Ribar*, 421 N.E.2d 886, 898 (Ill. 1981).

#### Indiana

The Indiana legislature adopted the modified form of comparative negligence in 1983. IND. CODE ANN. § 34-51-2-6 (1983).

#### Iowa

The Iowa judiciary adopted the pure form of comparative negligence in 1982. *Goetzman v. Wichern*, 327 N.W.2d 742, 754 (Iowa 1982). The Iowa legislature later adopted the modified form. IOWA CODE § 668.3 (1984).

#### Kansas

The Kansas legislature adopted the modified form of comparative negligence in 1974. KAN. STAT. ANN. § 60-238a (1974).

#### Kentucky

The Kentucky judiciary adopted the pure form of comparative negligence in 1984. *Hilen v. Hays*, 673 S.W.2d 713, 720 (Ky. 1984).

#### Louisiana

The Louisiana legislature adopted the pure form of comparative negligence in 1979. LA. CIV. CODE ANN. art. 2323 (1979).

#### Maine

The Maine legislature adopted the modified form of comparative negligence in 1965. ME. REV. STAT. ANN. tit. 14, § 156 (1965).

#### Maryland

Maryland has not adopted comparative negligence and continues to utilize contributory negligence. *Harrison v. Montgomery County Bd. of Educ.*, 456 A.2d 894, 903 (Md. 1983).

Massachusetts

The Massachusetts legislature adopted the modified form of comparative negligence in 1969. MASS. GEN. LAWS ANN. ch. 231, § 85 (West 2000).

Michigan

The Michigan judiciary adopted the pure form of comparative negligence in 1979. *Placek v. Sterling Heights*, 275 N.W.2d 511, 520 (Mich. 1979).

Minnesota

The Minnesota legislature adopted the modified form of comparative negligence in 1969. MINN. STAT. ANN. § 604.01 (West 2000).

Mississippi

The Mississippi legislature adopted the pure form of comparative negligence in 1910. MISS. CODE ANN. § 11-7-15 (West 1999).

Missouri

The Missouri judiciary adopted the pure form of comparative negligence in 1983. *Gustafson v. Benda*, 661 S.W.2d 11, 15 (Mo. 1983).

Montana

The Montana legislature adopted the modified form of comparative negligence in 1975. MONT. CODE ANN. § 27-1-702 (2005).

Nebraska

The Nebraska legislature enacted the “slight gross” system of comparative negligence in 1913. NEB. REV. STAT. § 25-21,185 (1995).

Nevada

The Nevada legislature adopted the modified form of comparative negligence in 1973. NEV. REV. STAT. ANN. § 41.141 (2002).

New Hampshire

The New Hampshire legislature adopted the modified form of comparative negligence in 1969. N.H. REV. STAT. ANN. § 507:7-d (1997).

New Jersey

The New Jersey legislature adopted the modified form of comparative negligence in 1973. N.J. STAT. ANN. § 2A:15-5.1 (West 2000).

New Mexico

The New Mexico judiciary adopted the pure form of comparative negligence in 1981. *Scott v. Rizzo*, 634 P.2d 1234, 1242 (N.M. 1981).

New York

The New York legislature adopted the pure form of comparative negligence in 1975. N.Y. C.P.L.R. § 1411 (McKinney 1997).

North Carolina

North Carolina has not adopted comparative negligence and continues to utilize contributory negligence. *Miller v. Miller*, 160 S.E.2d 65, 73-74 (N.C. 1968).

North Dakota

The North Dakota legislature adopted the modified form of comparative negligence in 1973. N.D. CENT. CODE § 9-10-07 (repealed 1987).

Ohio

The Ohio legislature adopted the modified form of comparative negligence in 1980. OHIO REV. CODE ANN. § 2315.33 (LexisNexis 2005).

Oklahoma

The Oklahoma legislature adopted the modified form of comparative negligence in 1973. OKLA. STAT. tit. 23, § 13 (2005).

Oregon

The Oregon legislature adopted the modified form of comparative negligence in 1971. OR. REV. STAT. § 31.600 (2004) (formerly § 18.470).

Pennsylvania

The Pennsylvania legislature adopted the modified form of comparative negligence in 1976. PA. CONS. STAT. § 7102 (2006).

Rhode Island

The Rhode Island legislature adopted the pure form of comparative negligence in 1971. R.I. GEN. LAWS § 9-20-4 (2005).

South Carolina

The South Carolina judiciary adopted the modified form of comparative negligence in 1991. *Nelson v. Concrete Supply Co.*, 399 S.E.2d 783, 784 (S.C. 1991).

South Dakota

The South Dakota legislature enacted the “slight gross” system of comparative negligence in 1941. S.D. CODIFIED LAWS § 20-9-2 (2006).

Tennessee

The Tennessee judiciary adopted the modified form of comparative negligence in 1992. *McIntyre v. Balentine*, 833 S.W.2d 52, 53 (Tenn. 1992).

Texas

The Texas legislature adopted the modified form of comparative negligence in 1973. TEX. CIV. PRAC. & REM. CODE ANN. § 33.011 (Vernon 2006).

Utah

The Utah legislature adopted the modified form of comparative negligence in 1973. UTAH CODE ANN. § 78-27-38 (2005).

Vermont

The Vermont legislature adopted the modified form of comparative negligence in 1970. VT. STAT. ANN. tit. 12, § 1036 (2005).

Virginia

Virginia has not adopted comparative negligence and continues to utilize contributory negligence. *Litchford v. Hancock*, 352 S.E.2d 335, 337 (Va. 1987).

Washington

The Washington legislature adopted the pure form of comparative negligence in 1973. WASH. REV. CODE § 4.22.005 (2006).

West Virginia

The West Virginia judiciary adopted the modified form of comparative negligence in 1979. *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 885 (W. Va. 1979).

Wisconsin

The Wisconsin legislature adopted the modified form of comparative negligence in 1931. WIS. STAT. § 895.045 (2005).

Wyoming

The Wyoming legislature adopted the modified form of comparative negligence in 1973. WYO. STAT. ANN. § 1-1-109 (2006).