

The Road to Comparative Fault in North Carolina

Burton Craige

North Carolina is one of only five jurisdictions that retain the antiquated doctrine of contributory negligence. Here, as in Alabama, Maryland, Virginia and the District of Columbia, a plaintiff whose negligence makes the slightest contribution to his injury is barred from recovering any damages against the tortfeasor. The other 46 states, either by judicial decision or by statute, have adopted some form of comparative fault, allocating damages based on the degree of fault among the plaintiff and the defendants.

In May 2009, the North Carolina House of Representatives passed a bill that would abolish contributory negligence, adopt a system of modified comparative fault, and modify joint and several liability. Modeled on the Uniform Apportionment of Tort Responsibility Act (UATRA), the bill attracted bipartisan sponsorship and support. After the sponsors agreed to several last-minute amendments that favored defendants, the bill (HB 813) passed by a margin of 67-50, overcoming strong opposition from business and insurance interests.

In the 2010 session, the North Carolina Senate will consider HB 813. If the bill passes the Senate, it will end the long, harsh regime of contributory negligence, and bring North Carolina tort law into the modern era.

This article discusses the provisions of UATRA, the amendments adopted in the House, and the principal objections to the bill.

The Uniform Apportionment of Tort Responsibility Act and HB 813

For many decades, commentators have agreed that the contributory negligence defense should be abolished. By contrast, there has been a lack of consensus about the optimal form of comparative fault. States that have abandoned contributory negligence have devised a wide range of systems of comparative fault and imposed diverse limitations on joint and several liability. Some systems have been viewed as unfairly favoring plaintiffs, and others as unfairly favoring defendants.

In 2002, the National Conference of Commissioners on Uniform State Laws approved a model bill titled the Uniform Apportionment of Tort Responsibility Act (UATRA).¹ A broadly representative 12-member committee, including North Carolina Court of Appeals Judge James A. Wynn, Jr., drafted the model act.

The UATRA drafters surveyed the states and sought to create a bill that incorporated the best features of the comparative fault jurisdictions. They faced five critical questions:

1. What Degree of Fault Will Bar the Plaintiff from Recovering Damages?

Under the traditional rule of contributory negligence, still applicable in North Carolina, even 1 percent fault by the plaintiff is a complete bar to recovery.

In a “pure” system of comparative fault, in effect in 13 states,² the plaintiff is barred from recovering any damages only if she is 100 percent at fault. If her relative fault is less than 100 percent, she is entitled to recover the amount of damages awarded, reduced by her percentage of responsibility. For example, in a pure comparative fault jurisdiction, if the plaintiff is 70 percent at fault and the defendant is 30 percent at fault, and the jury determines that the plaintiff’s damages are \$100,000, judgment will be entered against the defendant for \$30,000.

Thirty-three states have adopted “modified” comparative fault, which bars the plaintiff from recovery if her fault exceeds a certain threshold. Under the most common variant, prevailing in 21 states,³ the plaintiff may not recover any damages if her fault is “greater than” 50 percent. The other common variant, used in 12 states,⁴ bars the plaintiff from recovery if her fault is “equal to or greater than” 50 percent.

The UATRA drafters endorsed modified comparative fault and left to the state legislature the choice between the two common variants. The sponsors of the North Carolina bill chose the version that permits the plaintiff who is 50 percent at fault to recover 50 percent of her damages:

If the claimant’s contributory fault is *greater than* the combined responsibility of all other parties and released persons whose responsibility is determined to have caused personal injury or harm to the property of the claimant, the claimant may not recover any damages.

HB 813, § 1F-10(b) (as filed) (emphasis added).

In a key concession to business and insurance interests, the House sponsors agreed to an amendment adopting the minority position, barring a plaintiff from any recovery if his contributory fault is “*equal to or greater than*” the fault of the other responsible parties. HB 813, §1F-10(b) (as amended). The amendment affects cases in which the jury finds the plaintiff to be equally at fault with the defendant. Without the amendment, a plaintiff who is 50% at fault would recover 50% of his damages. With the amendment, a plaintiff who is 50% at fault would recover nothing.

Under UATRA, where more than one defendant is at fault, a plaintiff may recover part of the damages caused by each culpable defendant, even though the plaintiff’s fault equals or exceeds that of a particular defendant, as long as the claimant’s fault does not exceed the combined fault of the other responsible parties.

2. Is Fault Allocated to Non-Parties?

The second critical question is whether the allocation of fault includes non-parties. The plaintiff may not be able to identify every person at fault, or a culpable person may be immune from liability or outside the court’s jurisdiction. If the jury is instructed to allocate fault among non-parties as well as parties, the party defendant may be able to drastically diminish its responsibility by shifting the blame to alleged tortfeasors who could not have been named as defendants.

If, on the other hand, the allocation of fault is confined to parties, a defendant cannot deflect responsibility to another alleged tortfeasor unless it joins that person as a co-defendant. When fault is allocated only to parties, the defendant has the burden of joining the third party or pursuing the culpable non-party in a subsequent action for contribution.

The comparative fault jurisdictions are split on this issue. In some states, fault is allocated only among the parties that remain in the case at the time the case is submitted to the trier of fact.⁵ In other states, fault is allocated to all tortfeasors, even if they were never parties to the action.⁶ A third group, including Connecticut, Kentucky, Iowa and Oregon, allocate fault to the parties at trial and non-parties who previously settled with the plaintiff.⁷

The drafters of UATRA followed the middle path, limiting the allocation of fault to the current parties and “released persons.” If the plaintiff settles with one defendant and proceeds to trial against the second defendant, the jury is asked to apportion fault between the plaintiff, the current defendant, and the released defendant. The jury, however, is not permitted to consider the fault of an alleged tortfeasor that is not a party or has not entered into a settlement with the plaintiff.

3. Under What Circumstances Are Tortfeasors Jointly Liable?

North Carolina, like the other contributory negligence jurisdictions, retains full joint and several liability. Under joint and several liability, the plaintiff can recover the entire amount of the recovery from any defendant adjudged to have contributed to an indivisible injury, even if that defendant was only partly at fault.

After states adopted comparative fault, judges, legislators, and commentators questioned the fairness of holding one of multiple tortfeasors responsible for more than its proportional share of the damages, especially when the plaintiff was also at fault. In many states, the advent of comparative fault was accompanied by the partial abolition of joint and several liability.

In a system of pure several liability, each tortfeasor is responsible only for its percentage share of fault. While advocates for defendants perceived inequities in the coexistence of comparative fault and joint and several liability, advocates for plaintiffs understood that the complete elimination of joint liability would create other inequities. In almost all comparative fault jurisdictions, courts and legislators have created exceptions to the general rule of several liability.

Incorporating three common exceptions to several liability, UATRA retains joint liability in the following circumstances:

- (a) **Vicarious liability.** Under UATRA, tortfeasors are jointly liable if there is a principal-agent relationship. UATRA provides that “the court shall determine the extent to which the responsibility of one party, which is based on the act or omission of another party, warrants that the parties be treated as a single party for the purpose of submitting interrogatories to the jury . . .” HB 813, § 1F-15(c) (as filed). The most

common reason for unitary treatment is a *respondeat superior* relationship between principal and agent, including employer and employee.

- (b) Parties acting in concert or with an intent to cause harm are subject to joint and several liability. § 1F-25(a)(1) (as filed).
- (c) “If a party is adjudged liable for **failing to prevent another party from intentionally causing personal injury** to, or harm to the property of, the claimant, the court shall enter judgment jointly and severally against the parties for their combined shares of responsibility.” § 1F-25(a)(2) (emphasis added).

The original version of HB 813 included all three exceptions to several liability. On the floor, the House amended the bill to remove the “acting in concert” provision. HB 813, § 1F-25 (as amended).

4. When Multiple Defendants Are Liable, Who Bears the Risk of an Insolvent Defendant?

Under traditional principles of joint and several liability, if one of two defendants is insolvent, the plaintiff has the right to collect all her damages from the solvent co-defendant. The defendant who satisfies the judgment has the burden of initiating a contribution action against the non-paying co-defendant.

The most important consequence of the abolition of joint and several liability is shifting the risk of a co-defendant’s insolvency from the solvent co-defendant to the plaintiff. Under a system of pure several liability, if the insolvent defendant is 80 percent at fault and the solvent defendant is 20 percent at fault, the plaintiff will recover only 20 percent of her damages.

Recognizing the unfairness of saddling the plaintiff with the entire risk of a co-defendant’s insolvency, seven states have adopted a procedure for reallocating the share of the damages attributed to the insolvent tortfeasor. For example, in Minnesota, any damages that cannot be collected from one defendant are reallocated to the plaintiff and the remaining defendants in proportion to their comparative fault. Minn. Stat. § 604.02, subd. 2. In Connecticut, economic damages are reallocated to the remaining solvent defendants, and noneconomic damages are reallocated to the plaintiff and the remaining solvent defendants based on their proportional fault. Conn. Gen. Stat. § 52-572h.

As in the reallocation jurisdictions, UATRA provides a procedure for shifting the risk of a co-defendant’s insolvency from the plaintiff to the solvent co-defendant. After the trier of fact apportions fault among the parties and makes its award of damages, the plaintiff may move the court to determine whether any of the share for which a party is liable “will not be reasonably collectible.” HB 813, § 1F-20(b). Once the court has determined that all or part of a share is not reasonably collectible, it reallocates the uncollectible share to the other parties, including the claimant and any released person, based on each of the remaining parties’ relative proportion of responsibility.

When the plaintiff is partly at fault, she shares the burden of reallocation. Suppose that P is 20 percent at fault, and D1 (insolvent) and D2 (solvent) are each 40 percent at fault. After reallocation, P's comparative share of the fault vis-à-vis D2 is 33.3 percent. She will be entitled to recover only 66.7 percent of the damages awarded – not the 80 percent that she could have recovered in a system of pure joint and several liability.

In another concession to business and insurance interests, the House sponsors of HB 813 accepted an amendment providing that the share for which a defendant is liable “may not be increased by reallocation if the party’s percentage of responsibility is less than the claimant’s percentage of responsibility.” HB 813, § 1F-20(b1) (as amended). As a result, the entire burden of the uncollectible share will fall on the plaintiff when his fault exceeds the fault of the solvent co-defendant.

5. To What Extent Does a Prior Settlement with a Co-Defendant Diminish the Plaintiff’s Recovery from a Defendant Adjudged To Be Liable?

The final critical question in designing a system of comparative fault is the extent to which a prior settlement diminishes the plaintiff’s recovery from a liable defendant.

Under joint and several liability, the amount of the settlement is deducted from the amount awarded at trial on a dollar-for-dollar basis. Consider a case in which the plaintiff settles with one co-defendant (D1) for \$30,000, proceeds to trial against the second co-defendant (D2), and receives an award of damages from the jury of \$300,000. The court will impose a set-off of \$30,000 for the prior settlement and enter judgment against D2 for \$270,000, leaving the plaintiff with a total recovery of \$300,000, the full amount of the jury award.

A system of comparative fault and several liability alters this calculus to the plaintiff’s detriment. As in the previous example, suppose that P settles with D1 for \$30,000, proceeds to trial against D2, and again obtains a verdict of \$300,000. Assume that the jury apportions fault equally between D1 and D2. If liability is several and not joint, P will be able to recover only \$150,000 from D2 ($\$300,000 \times .50$), for a total of \$180,000 (\$30,000 plus \$150,000), or \$120,000 less than she would have recovered in a system of joint and several liability.

Because UATRA includes released parties in the apportionment of fault, it places on the plaintiff the entire risk of obtaining an inadequate settlement from the settling party.

6. What is the Effective Date of the Act?

The North Carolina House of Representatives faced a final question, not addressed in UATRA: when does the Act become effective? The original House bill provided that the new statute would apply to actions “originally filed” on or after the effective date. The amended version provides that the statute would apply to actions “arising from acts or omissions occurring” on or after that date. HB 813, Sec. 8 (as amended). The most important consequence of the amendment is to preserve the contributory negligence defense in product liability actions

arising from latent diseases where the manufacturer's alleged negligence preceded the effective date of the act.

Cumulatively, the effect of the four House amendments is to provide significantly more protection to defendants, and less protection to plaintiffs.

Response to Objections to HB 813

The North Carolina Chamber of Commerce and allied business groups have mobilized to try to block the enactment of HB 813. The opponents have made three principal objections: (1) the bill will sharply raise automobile insurance rates; (2) the reallocation provision is unfair to the solvent joint tortfeasor; (3) the reallocation provision will complicate and prolong litigation. None of the objections has merit.

1. HB 813 Will Not Raise Automobile Insurance Rates.

On the floor of the House, opponents of HB 813 asserted that the adoption of comparative fault would result in a 45 per cent increase in automobile insurance rates for North Carolina drivers. The opponents offered no credible data to support their claim, and the spectre of higher auto insurance premiums failed to derail the bill.

On the Senate side, the business and insurance lobby has again tried to stoke fears that the end of contributory negligence will dramatically raise auto insurance premiums. Thoughtful senators have asked for a reliable analysis that addresses the issue.

In response to the senators' request, the North Carolina Advocates for Justice retained Pinnacle Actuarial Resources, a company that specializes in actuarial analyses for the insurance industry. Pinnacle's report, released in July 2009, demolishes the claim that the adoption of comparative fault will significantly increase insurance premiums in North Carolina. Here is Pinnacle's summary of its findings and conclusion:

Fast-Track data through March 31, 2009 show that ... the mean pure premium in the comparative fault states exceeds the mean pure premium in the contributory negligence states by less than one per cent.

Mean pure premiums in North Carolina are close to those of its comparative fault neighbors South Carolina and Tennessee....

The historical data show that converting to comparative fault did not result in any substantial increase in pure premiums in South Carolina and Tennessee. Indeed, since those states adopted comparative fault in 1991 and 1992, pure premiums in North Carolina and Virginia, the neighboring contributory negligence states, have increased more rapidly than in South Carolina and Tennessee....

Based on a comparison of changes in pure premiums in these four contiguous states since 1991, we conclude that the adoption of UATRA is unlikely to have a material adverse impact on automobile insurance rates in North Carolina.

Since Pinnacle report released its report in July 2009, the opponents of HB 813 have produced nothing to refute its findings or conclusion.

2. Reallocation is the Fairest Method of Apportioning the Uncollectible Share.

HB 813, like UATRA, is a compromise that combines modified comparative fault with modified several liability. The opponents of HB 813 want to combine modified comparative fault with pure several liability. Accordingly, they have lobbied to eliminate HB 813's reallocation provision. When one joint tortfeasor is insolvent, they want the plaintiff to bear the entire burden of the uncollectible share.

In adopting UATRA in 2002, the **National Conference of Commissioners on Uniform State Laws**, after considering all the variants of comparative fault, determined that a reallocation system struck the fairest balance. In doing so, they reached the same conclusion as other neutral groups that have considered the problem of the uncollectible share.

In 1986, North Carolina Bar Association President Robert C. Vaughn appointed the **NCBA Special Committee on the Tort Liability System**, including fifteen leaders of the plaintiffs' and defendants' bar, as well as three law school professors. After ten months of deliberations, the Special Committee recommended a modified comparative fault system, abolition of joint and several liability, and reallocation of a party's uncollectible share:

The share of the claimant's injury attributed to a person shall be reallocated when that person is a party and all or part of his share is uncollectible. The share or uncollectible part of the share shall be reallocated among all other parties, including the claimant, who were at fault on the basis of the percentage of fault attributed to each.

Report of the NCBA Special Committee on the Tort Liability System (January 1987) at 2 ("Joint and Several Liability"). The Committee explained the core principle behind its recommendation: "the reallocation principle recommended by the committee not only is fairer, but also accomplishes the underlying objective of comparative negligence to allocate losses based on fault." *Id.* at 3.

In 2000, the **American Law Institute** published Restatement of Torts: Apportionment of Liability. The Restatement comprehensively surveyed the variants of comparative fault, including the systems used to allocate damages among joint tortfeasors. After reviewing the full range of possibilities, the authors of the Restatement identified reallocation as the "fairest means" of addressing the risk of insolvency because it "imposes the financial risk of insolvency on all legally responsible parties in proportion to their responsibility." Restatement, § C21a.

The American Law Institute, the National Conference of Commissioners on Uniform State Laws and the North Carolina Bar Association's Special Committee on the Tort Liability System have each independently concluded that reallocation is the fairest system. The North Carolina General Assembly should reach the same conclusion.

3. Reallocation Will Not Result in Collateral Litigation.

UATRA critics in North Carolina have claimed that the question of whether a share is "not reasonably collectible" will generate extensive collateral litigation. A review of appellate cases in the seven reallocation states completely refutes that assertion. (Memorandum from Burton Craige to Senate Subcommittee on Comparative Fault, Reallocation and "Collateral Litigation" (November 19, 2009)). After decades of trials in Connecticut, Oregon, Minnesota, New Hampshire, Arkansas, Montana and West Virginia, it appears that no appellate court has ever been asked to resolve a dispute about whether a share is uncollectible. The scant litigation concerning reallocation has instead required appellate courts to resolve issues of statutory construction, most of which were addressed by the drafters of UATRA.

The absence of appellate decisions confirms what we learned from lawyers in the reallocation states: because the statute provides clear guidance, parties rarely if ever disagree about the reallocation of damages, and no judicial intervention is needed.

CONCLUSION

HB 813 is a sensible compromise that fairly balances the interests of plaintiffs and defendants. In 2010, North Carolina has the opportunity to join the 46 states that have adopted comparative fault and end the harsh and inequitable doctrine of contributory negligence.

Burton Craige is a partner at Patterson Harkavy LLP in Raleigh, where his primary areas of practice are civil rights, medical malpractice, and mediation of employment disputes.

¹ National Conference of Commissioners on Uniform State Laws, Uniform Apportionment of Tort Responsibility Act (with prefatory notes and comments) (2003).

² Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, South Dakota, Washington.

³ Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Wisconsin, Wyoming.

⁴ Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, Nebraska, North Dakota, Oklahoma, Tennessee, Utah, West Virginia.

⁵ See, e.g., Nev. Rev. Stat. § 41.141.2 (jury returns a special verdict indicating the percentage of negligence attributable to “each party remaining in the action”).

⁶ See, e.g., Ariz. Rev. Stat. § 12-2506(B) (“In assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been, named as a party to the suit.”) *Allied-Signal, Inc. v. Fox*, 623 So.2d 1180 (Fla. 1993) (interpreting Florida’s tort reform statute as requiring allocation of fault to employer that was immune from suit under workers’ compensation statute); Tex. Civ. Prac. & Rem. Code § 33.004 (allocation of fault includes non-parties designated by defendant).

⁷ See *Viera v. Cohen*, 927 A.2d 843, 851-52, 283 Conn. 412, 423 (2007) (medical malpractice) (interpreting Conn. Gen. Stat. § 52-572h(f)); Ky. Rev. Stat. § 411.182 (allocation limited to claimant, defendants, third-party defendants, and released persons); *Lexington-Fayette Urban County Gov’t v. Smolic*, 142 S.W.3d 128 (Ky. 2004) (immune defendant excluded from allocation); Iowa Code § 668.3.2 (allocation limited to claimant, defendants, third-party defendants, and released persons); Or. Rev. Stat. § 31.600 (“The trier of fact shall compare the fault of the claimant with the fault of any party against whom recovery is sought, the fault of third party defendants who are liable in tort to the claimant, and the fault of any person with whom the claimant has settled.”).