

Should North Carolina Enact the Uniform Apportionment of Tort Responsibility Act?

by **Burton Craige**

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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.

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 sought to incorporate features that have worked well in comparative fault jurisdictions, and to ameliorate perceived inequities. Notably, the model bill includes a procedure for reallocating responsibility among solvent defendants if the judgment against a culpable co-defendant is uncollectible.

In 2007, four Republican state legislators (Reps. Blust, Hilton, Holloway, and McGee) introduced a bill to adopt UATRA in North Carolina.² The proposed legislation would revolutionize North Carolina tort law by ending contributory negligence, adopting a system of comparative fault, and modifying joint and several liability. Legislators are likely to reintroduce the bill in 2009. If North Carolina adopts UATRA, it will be the first state to do so.

Comparing UATRA with the current law in North Carolina, and with other states' versions of comparative fault, this article focuses on five critical questions that confronted the drafters of the model act.

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 thirteen states,³ 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,⁴ the plaintiff may not recover any damages if her fault is “greater than” 50 percent. The other common variant, used in 12 states,⁵ bars the plaintiff from recovery if her fault is “equal to or greater than” 50 percent. The distinction is important because juries often find a plaintiff to be 50 percent at fault.

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.⁶

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, not the plaintiff, 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.⁷ In other states, fault is allocated to all tortfeasors, even if they were never parties to the action.⁸ Several states, including Connecticut, Kentucky and Oregon, take a middle course, limiting the allocation of fault to the parties at trial and non-parties who previously settled with the plaintiff.⁹

The drafters of UATRA followed the middle path. They rejected the pro-defendant position of allocating fault to non-parties, as well as the pro-plaintiff position of allocating fault only among the parties present when the case is submitted to the jury. Instead, the allocation of

fault under UATRA is limited to the current parties and “released persons.”¹⁰ 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 and 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, it became difficult to justify the continuation of pure joint and several liability. 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 also was at fault. In many states, the advent of comparative fault was accompanied by the abolition of joint and several liability. For example, in 1992, when the Tennessee Supreme Court renounced contributory negligence, it declared joint and several liability to be “obsolete.” The court reasoned:

Having thus adopted a rule more closely linking liability and fault, it would be inconsistent to simultaneously retain a rule, joint and several liability, which may fortuitously impose a degree of liability that is out of all proportion to fault.¹¹

Only four comparative fault states – Delaware, Maine, Massachusetts and Rhode Island – retain pure 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 important 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 . . .”¹² 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.¹³

- (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.”¹⁴

A few states have carved out an exception to their general rule of liability for medical malpractice cases. West Virginia retains joint and several liability except in medical negligence cases.¹⁵ Michigan, by contrast, has a general rule of several liability and imposes joint liability only in medical malpractice cases in which the plaintiff is not at fault.¹⁶

Some states retain joint and several liability when the tortfeasor’s fault exceeds a certain threshold. For example, in South Carolina and New Hampshire, a defendant whose fault is less than 50 percent is severally liable, but a defendant whose share of the total fault is 50 percent or greater is jointly and severally liable.¹⁷

Striking another balance between the two systems of liability, the Washington statute provides that defendants are severally liable if the plaintiff is partly at fault, but jointly and severally liable when the plaintiff is not at fault.¹⁸

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, several 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.¹⁹ 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.²⁰

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.”²¹ 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 not at fault, reallocation leaves her in exactly the same position as under a system of joint and several liability. For example, if the plaintiff (P) is not at fault, an insolvent defendant (D1) is 60 percent at fault, and a solvent defendant (D2) is 40 percent at fault, the entire share of damages attributed to D1 is reallocated to D2.

When, however, the plaintiff is partly at fault, she shares some of 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.

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. This feature of the model act may have the unintended consequence of discouraging settlements and forcing parties to trial, even if they are willing to settle for their insurance limits and have no collectible assets beyond those limits.

The drafters of the North Carolina statute should amend UATRA to encourage settlement with a party when nothing more could be recovered from that party by forcing it to trial. Following the guidance of the American Law Institute's Restatement on Apportionment of Liability,²² the statute should provide a procedure for judicial review of the proposed settlement to determine whether the amount of the settlement is all that could reasonably be collected from the settling party (D1). Once the plaintiff obtains a judicial declaration to that effect, she could settle with D1 and proceed to trial against the non-settling party (D2). If the verdict against D2 exceeds the amount of the settlement with D1, the plaintiff would recover the amount of the verdict from D2, less the amount of the settlement with D1. If, on the other hand, the verdict against D2 is less than the settlement with D1, the plaintiff would recover nothing from the non-settling defendant.

The Uniform Apportionment of Tort Responsibility Act is a useful but imperfect model. Drafters of the North Carolina statute should consider two amendments that would more equitably apportion fault among the parties:

1. As in South Carolina and New Hampshire, a joint tortfeasor responsible for 50 percent or more of the total fault should be subject to joint and several liability. Alternatively, as in Washington, when the plaintiff is not at fault, joint tortfeasors should be jointly and severally liable.

2. The statute should provide a procedure to encourage early settlement with defendants who voluntarily offer to pay the maximum amount they could be required to pay at trial.

If adopted, UATRA will dramatically alter tort litigation in North Carolina. With the amendments suggested above, the model act offers an excellent opportunity to end the harsh and inequitable doctrine of contributory negligence. ■

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

² HB 1571.

³ Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, South Dakota, Washington.

⁴ Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Wisconsin, Wyoming.

⁵ Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, Nebraska, North Dakota, Oklahoma, Tennessee, Utah, West Virginia.

⁶ HB 1571, § 1F-10(b) (emphasis added).

⁷ *See, e.g.*, Nationsbank, N.A. v. Murray Guard, Inc., 343 Ark. 437, 443, 36 S.W.3d 291, 295 (2001) (interpreting Ark. Code Ann. § 16-64-122); Maxwell v. Montey, 262 Neb. 160, 168-69, 631 N.W.2d 455, 462 (2001) (interpreting Neb. Rev. Stat. § 25-21,185.10) (“Because the statute’s effect is on only the apportionment of damages between multiple defendants after liability has been established, the proper timeframe to consider in determining whether there are, in fact, multiple defendants in a case is when the case is submitted to the finder of fact.”).

⁸ *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); Carroll v. Whitney, 29 S.W.3d 14, 18 (Tenn. 2000) (medical malpractice) (fault allocated to immune non-parties).

⁹ *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); 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.”).

¹⁰ HB 1571, § 1F-15(a)(2).

¹¹ McIntyre v. Balentine, 833 S.W.2d 52, 58 (1992).

¹² HB 1571, § 1F-15(c).

¹³ § 1F-25(a)(1).

¹⁴ § 1F-25(a)(2).

¹⁵ W. Va. Code § 55-7B-9(c).

¹⁶ Mich. Comp. Laws § 600.6304(6).

¹⁷ S.C. Code Ann. § 15-38-15; N.H. Rev. Stat. Ann. § 507:7-e.

¹⁸ Wash. Rev. Code § 4.22.070.

¹⁹ Minn. Stat. § 604.02, subd. 2.

²⁰ Conn. Gen. Stat. § 52-572h.

²¹ HB 1571, § 1F-20(b).

²² American Law Institute, RESTATEMENT OF TORTS: APPORTIONMENT OF LIABILITY, at § 16, Comment g (2000).