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# The Spread of the Comparative Negligence Rule in the United States

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## I. Introduction

In the sixteen years following 1968, thirty-seven states joined seven other states and most of the common law and statute law world in replacing the tort law principle of contributory negligence with comparative negligence. Contributory negligence absolves a negligent defendant of any financial responsibility for injuries occurring to a plaintiff if the plaintiff contributed in any manner to causing the accident. While there are exceptions to the rule, in general, under comparative negligence the courts use the degree of negligence of the parties to an accident to determine the percentage of the costs of the accidents each party will pay. Thus, a plaintiff whose actions are found to have contributed 25 percent of the cause of an accident will have his award reduced by 25 percent. Under the contributory negligence rule, he would receive nothing from the defendant.

This rapid change in the kind of rule applied in tort law has not attracted much attention from researchers in law and economics. A majority of the literature has analyzed the relative efficiency of the various forms of tort law.<sup>1</sup> Alternative questions

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I presented an earlier version of this paper at the European Law and Economics Association Meetings in Vienna in September 1989; I wish to acknowledge helpful comments from the audience, particularly Hugh Gravelle, Anthony Ogus, Roger Van den Bergh, and Michael Faure. I also have benefited from helpful comments from David Haddock, Peter Aranson, Mary Beth Walker, Matt Cushing, George Benston, Fred McChesney, Frank Vandall, Jennifer Arlen, Daniel Rubinfeld, Bengt-Arne Wickstrom, Jeffery O'Connell, and two anonymous referees. John F. Curran provided research help. Any remaining errors are the responsibility of the author.

<sup>1</sup>Examples from this rich literature include Ronald H. Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3 (1960): 1; Harold Demsetz, "When Does the Rule of Liability Matter?" *Journal of Legal Studies* 1 (1972): 13–28; Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," *Harvard Law Review* 85 (1972): 1089; John P. Brown, "Toward an Economic Theory of Liability," *Journal of Legal Studies* 2 (1973): 323–350; Jerry Green, "On the Optimal Structure of Liability Laws," *Bell Journal of Economics* 7 (1976): 553–574; George L. Priest, "The Common Law Process and the Selection of Efficient Rules," *Journal of Legal Studies* 6 (1977): 65; Mario J. Rizzo, "Law amid Flux: The Economics of Negligence and Strict Liability in Tort," *Journal of Legal Studies* 9 (1980): 291–318; A. Mitchell Polinski, "Strict Liability vs. Negligence in a Market Setting," *American Economic Review* 70 (1980): 363; Gordon Tullock, "Negligence Again," *International Review of Law and Economics* 1 (1981): 51–62; Paul H. Rubin, "Common Law and Statute Law," *Journal of Legal Studies* 11 (1982): 205–224; Richard A. Epstein, "The Social Consequences of Common Law Rules," *Harvard Law Review* 95 (1982): 1717–1754; Mark F. Grady, "A New Positive Economic Theory of Negligence," *Yale Law Review* 92 (1983): 799; Steven Shavell, *Economic Analysis of Accident*

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