Interest Groups and the Switch from Contributory to Comparative Negligence

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Austrian Student Scholars Conference 2024

February 17, 2024

Abstract

Beginning in the 1960s, most U.S. states switched from a contributory negligence standard for torts to a comparative negligence standard. Only four states – Alabama, Maryland, North Carolina, and Virginia – still use a contributory negligence standard. Several law and economics scholars have explained the switch to comparative negligence, but it remains unexplained why four states still use contributory negligence. We use an interest group analysis framework to explain why these four states have not adopted comparative negligence. We argue that states switch to comparative negligence when the interest groups in favor of comparative negligence have a stronger incentive and ability to lobby for rule change relative to interest groups in opposition. After identifying which interest groups support and oppose comparative negligence, we theoretically and empirically analyze some factors that may contribute to the persistence of contributory negligence, including appellate caseloads, strict product liability, and business lobbying.

JEL classification: D20, K13, K41, N42
Keywords: contributory negligence, comparative negligence, tort law, interest groups

1. Filing Suit – Introduction

In 1809, the case *Butterfield v. Forrester* was settled in English courts. Legal scholars generally agree that the doctrine of contributory negligence was first established with this case (Wade 1980, 299). By 1824 contributory negligence had entered American courts through the case *Smith v. Smith* (Shrager and Shepherd 1979, 423). Over the next few decades contributory negligence would be adopted across the United States to become the dominant legal doctrine for most of the 19th century and the first half of the 20th century.

In 1910 the state of Mississippi became the first state to move away from contributory negligence and adopted a "pure" form of comparative negligence. By 1969 the dominance of contributory negligence in the American judicial system began to change with more and more states passing "pure" or "modified" forms of comparative negligence (De Mot, Faure, and Klick 2015, 152). By 1976, thirty-six states had moved from contributory negligence to comparative negligence, and by 1985 all but six states had moved to a comparative negligence system. Today, Alabama, the District of Columbia, Maryland, North Carolina, and Virginia still retain the contributory negligence doctrine. This leads to a puzzle: why have four states not switched from contributory negligence to comparative negligence?

While economists and legal scholars have written much on the switch from contributory to comparative negligence, the persistence of contributory negligence in certain states has not been fully explained. We argue that states switch to comparative negligence when the interest groups in favor of comparative negligence have a stronger incentive and ability than competing interest groups to lobby for comparative negligence.

First, we review the law and economics literature on the switch to comparative negligence. Next, we explain our theoretical framework. Then we conduct an empirical analysis to explain the variation in negligence rules. In the final section, we summarize and conclude.

2. Summons – Literature Review

Our analysis builds on existing literature explaining the switch from contributory to comparative negligence. Curran (1992) uses an interest group analysis to argue that the timing of the switch to comparative negligence was related to the adoption of strict product liability. Lawyers and manufacturers were the two groups that had an interest in the switch to comparative negligence. While lawyers favored the switch, manufacturers opposed comparative negligence because they expected the doctrine would increase litigation costs. From the mid-1960s, states began to adopt strict product liability. Strict liability standards removed liability protection for manufacturers that the contributory negligence standard provided, so the adoption of comparative negligence would have little additional effect on manufacturers. Once the resistance of manufacturers was eliminated, lawyers were enabled to push for the adoption of comparative negligence. While Curran provides empirical evidence for this explanation, De Mot, Faure, and Klick (2015, 147) question why manufacturers were able to hold off the adoption of comparative negligence but were unable to resist the adoption of strict liability.

De Mot, Faure, and Klick (2015) offer their own complementary explanation of the switch. They argue that comparative negligence was adopted in order to reduce appellate court caseloads. Prior to the adoption of comparative negligence, most states had implemented numerous exceptions to the contributory negligence rule, resulting in high appeal rates. Additionally, defendants have a stronger incentive to appeal cases under contributory negligence than they do under comparative negligence. If a defendant loses a case under contributory

negligence, all the defendant must do to avoid bearing the entire loss is to show the appellate court that the plaintiff acted negligently as well. To avoid bearing the loss under comparative negligence, however, the defendant must show that he did not act negligently at all and that the plaintiff bears the entire fault. Hence, judges predicted that a switch from contributory to comparative negligence would reduce appellate caseloads. Appellate judges would benefit from the switch because they would gain leisure time from a lower workload, so in various states they either adopted the comparative negligence rule judicially or lobbied state legislatures to implement the rule through statute. De Mot, Faure, and Klick show empirically that states with higher appellate caseloads were more likely to adopt comparative negligence. Additionally, states with the highest caseloads were more likely to switch to a pure form of comparative negligence which reduced appellate caseloads the most, instead of modified comparative negligence which reduced caseloads less.

Forty-six states have switched from a contributory negligence standard to a comparative negligence standard. The only remaining states using contributory negligence are Alabama, Maryland, North Carolina, and Virginia (De Mot, Faure, and Klick 2015, 152-153). We aim to explain why the contributory negligence rule persists in these states.

4. Discovery – Theory

We view individuals as rational and self-interested acting through interest groups to confer benefits on their group (Olson 1965). To explain the variation in adoption of comparative negligence, we build on and expand the interest group analysis framework of Curran (1992) and De Mot, Faure, and Klick (2015). These writers show how the interaction of certain interest groups is a strong factor in determining whether a state switches to comparative negligence. Curran attributes the cause of the switch to the decline of manufacturing lobbying relative to

lobbying from the legal profession, while De Mot, Faure, and Klick argue that appellate court judges have the primary influence. De Mot, Faure, and Klick (2015) also identify insurance companies and business as groups opposed to comparative negligence (152, 155). Insurance companies expect comparative negligence to result in more litigation and higher costs, while businesses worry about higher insurance rates and litigation costs.

The interest groups in favor of comparative negligence include lawyers and appellate judges, while the interest groups opposed include manufacturers, insurance companies, and corporate business. We explain the remaining variation in negligence rules through the incentives and influence of these interest groups. In a state, when groups in favor of comparative negligence have sufficient influence over rule changes and are sufficiently incented to lobby for rule change relative to opposed groups, we expect that the state will switch to comparative negligence. On the other hand, as long as groups opposed to comparative negligence have greater influence and have a greater incentive to seek rule change than groups in favor, we expect that contributory negligence will persist in the state. In other words, the relative costs and benefits of seeking rule change for each interest group significantly influence whether a state will switch to comparative negligence. In the next section, we examine these costs and benefits in the states with contributory negligence to explain its persistence.

5. Testimony – Empirical Analysis

Many different factors affect the costs and benefits of the groups with an interest in the adoption of comparative negligence, but we focus on just a few significant factors. These factors include appellate caseloads, strict product liability, and lobbying from manufacturers and businesses.

As aforementioned, De Mot, Faure, and Klick (2015) explain the switch to comparative negligence using appellate caseloads. They find that higher caseloads increase the likelihood that

a state switched to comparative negligence (151-152). All states but Alabama, Maryland, North Carolina, and Virginia have switched to comparative negligence. They note that around the period when many states switched, appellate caseloads were relatively low in Alabama, Maryland, and North Carolina (152-153). On the other hand, Virginia's caseload was slightly higher than the average (153). The low caseloads in Alabama, Maryland, and North Carolina help explain why they did not switch to comparative negligence, but the reason for the lack of a switch in Virginia remains unclear. We examined more recent caseload data in these states to explain why contributory negligence has continued to persist after several decades. We found the average number of appeals cases per appellate judge in the jurisdictions with contributory negligence and compared them to the national average for states with comparative negligence for which data was available. Because California has significantly higher caseloads than other contributory negligence states, we excluded it from the national average.

Number of Appellate Cases per Appellate Judge											
	2022	2021	2020	2019	2018	2017	2016	2015	2014	2013	2012
National Average for States with Comparative Negligence, sans CA	104	109	99	129	135	147	147	147	174	163	156
Alabama	189	190	197	214	234	244	241	255	265	266	294
Maryland	119	107	107	151	153	143	154	129	130	127	129
North Carolina	102	93	90	109	112	116	115	120	127	149	141
Virginia	-	153	87	126	123	217	219	227	237	244	254

Table 1: Appeals Cases per Appellate Judge (Court Statistics Project; National Center for State Courts)

For most of these states, appellate caseloads are similar to the national average, with two exceptions. Virginia's appellate caseloads were substantially higher until 2018. Since then, Virginia's caseloads have been comparable to the national average. Since at least 2012, Alabama's caseloads have been significantly higher than the national average. Aside from

Virginia before 2018 and Alabama, since 2012 the level of appellate caseloads in states with contributory negligence has been similar to the national average of those with comparative negligence. Appellate court judges in Maryland, North Carolina, and recently Virginia have caseloads comparable to those of the rest of the nation, reducing their incentive to judicially adopt or lobby legislatures for comparative negligence. This helps to explain the continued persistence of contributory negligence in these states, although variation in Alabama and Virginia remains partially unexplained.

The status of strict product liability could also factor into the persistence of contributory negligence in some of the four states. As Curran (1992) argues, the adoption of strict product liability reduces the incentive for manufacturers to lobby against comparative negligence (De Mot, Faure, and Klick 2015, 148). North Carolina and Virginia are two of the few states yet to adopt strict product liability (Graham 2014, 21). The absence of strict product liability may contribute to explaining why these two states didn't switch to comparative negligence when many other states did. However, Virginia has over time broadened its warranty law to strengthen consumer protection. While Virginia lacks strict product liability in statute or in common law, its warranty law approximates strict liability (Graham 2014, 51). The impact of the lack of strict product liability on the persistence of comparative negligence in Virginia is probably only marginal. North Carolina, on the other hand, lacks strict product liability and has no similar law (56). In North Carolina, manufacturers have more to lose if comparative negligence is adopted, so manufacturers have a stronger incentive to lobby against it. In addition to lower caseloads, strict product liability likely contributes to the persistence of contributory negligence in North Carolina.

Finally, lobbying by businesses and manufacturers contributes to the persistence of contributory negligence. The impact of business lobbying on the persistence of contributory negligence is clear. In recent years, efforts to implement comparative negligence both judicially and through legislation in Maryland, North Carolina, and Virginia have been resisted by those states' respective chambers of commerce (Chertock 2013; Lash 2019; NC Chamber 2021; Virginia Chamber 2023). Gardner (1996) documents how businesses vigorously and successfully lobbied against comparative negligence legislation in North Carolina in the 1980s and 1990s (39-47). Legislators who opposed the bills argued that comparative negligence would raise insurance rates and hurt businesses (42). Additionally, judges in North Carolina and Alabama are elected rather than being chosen by legislatures, leaving judicial elections open to influence by campaign donors such as business lobbyists. According to campaign finance data from followthemoney.org (OpenSecrets 2023), General Business contributions to candidates for the Alabama Supreme Court in election years 2021-2022 totaled $1.01 million. General Business contributions to supreme court and appellate court candidates in North Carolina during the same years totaled $395,000. Furthermore, the manufacturing industry has a particularly large presence in Alabama and North Carolina. Both Alabama and North Carolina are among the top ten U.S. states in percentage of gross state output from manufacturing and in percentage of employees in manufacturing (National Association of Manufacturers 2023). Due to the large manufacturing presence in these two states, lobbying by manufacturers against comparative negligence likely contributes to the persistence of contributory negligence. Lobbying by businesses in general appears to be a significant factor preventing the switch to comparative negligence in Alabama, Maryland, North Carolina, and Virginia.

While strict product liability appears to be a marginal factor contributing to the persistence of contributory negligence, appellate caseloads and lobbying by businesses and manufacturers appear to be the most influential of these three factors. As a result of these factors, the interest groups in opposition to comparative negligence have stronger incentives and influence on rule changes than the groups in favor of comparative negligence. The relative strength of anti-comparative negligence interest groups explains why contributory negligence continues to persist in Alabama, Maryland, North Carolina, and Virginia.

6. Judgment – Conclusion

The switch from contributory to comparative negligence has been well documented by law and economics scholars, but why some states never switched remained unclear. We argue that self-interested individuals acted collectively through interest groups to implement policies that concentrate benefits in their favor. Because of the relatively low caseloads per appellate judge (depending on the time period) in Alabama, Maryland, Virginia, and North Carolina, there was less judicial pressure to change the negligence rules of each state. The presence of strict product liability in North Carolina helps explain the persistence of contributory negligence in that state. Lobbying by businesses and manufacturers also contributes to the maintenance of contributory negligence. In the four contributory negligence states, these influences shape interest groups' costs and benefits of influencing rule change in favor of the groups opposed to contributory negligence, explaining the doctrine's persistence.

This paper analyzed only a few causes of the persistence of contributory negligence in the remaining contributory negligence states. More work remains to be done regarding which factors prevent these states from switching to a comparative negligence standard. Due to their particularly large variations in appellate caseloads over time, Alabama and Virginia pose a

particularly hard-to-answer puzzle as to why they have not switched to comparative negligence. While our analysis may explain some of the variation, there are likely more factors contributing to this variation which deserve more research.

Our paper contributes to the public choice literature by further demonstrating that the "politics as exchange" model of rulemaking holds even in the case of tort law. Furthermore, our paper makes progress in solving the puzzle as to why some states have not yet switched from contributory to comparative negligence.

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