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Understanding Comparative Fault, Contributory Negligence and Joint & Several Liability

By [Gary Wickert](#) | September 5, 2013

Effective subrogation requires a thorough understanding of some of the more confusing legal terms we must all work with. Matthiesen, Wickert & Lehrer, S.C. has compiled a list of the various laws in every state dealing with whether the state is a *contributory negligence state* (bars recovery with only 1 percent of fault by the plaintiff) or a *comparative negligence state* (recovery by plaintiff is reduced or prohibited based on the percentage of fault attributed to the plaintiff), and whether the state is a *pure comparative* or *modified comparative state*. It can be viewed by clicking [HERE](#). It is useful in evaluating subrogation potential where there may be [contributory negligence](#) on the insured's part.



Please bear in mind that there are many exceptions within each state with regard to whether the particular fault allocation scheme applied in a state is applicable to a particular cause of action. Some states limit the application of the scheme to negligence claims, and avoid applying it to product liability cases, while other states have effective dates which may come into play and/or have rules which may modify the application of the particular scheme referenced. Understanding the comparative fault laws employed by the state you are subrogating in is essential to making informed decisions regarding the pursuit of subrogation claims.

Comparative fault systems fall into one of three basic types: **pure contributory negligence**, **pure comparative fault**, and **modified comparative fault** (sometimes referred to as “proportionate responsibility”). The comparative fault standards for the 51 jurisdictions break down as follows:

Pure Contributory Negligence

Only four states and the District of Columbia recognize the **Pure Contributory Negligence Rule**, which says that a damaged party cannot recover any damages if it is even 1 percent at fault. The jurisdictions which employ the Pure Contributory Negligence Rule include Alabama, District of Columbia, Maryland, North Carolina, and Virginia. Under this rule, a plaintiff found 10 percent at fault for causing an accident will recover

nothing, even though the defendant is 90 percent at fault. In certain cases, the contributory negligence defense can be overcome. If the plaintiff can prove that the defendant's willful and wanton acts caused the injury, then the defendant cannot claim contributory negligence bars the plaintiff from recovery. Likewise, if the plaintiff can show that the defendant had the last clear chance to avoid an accident and did not do so, then the defendant can still be held accountable even if a plaintiff is found contributorily negligent.

Pure Comparative Fault

Thirteen states recognize the **Pure Comparative Fault Rule**, which allows a damaged party to recover even if it is 99 percent at fault, although the recovery is reduced by the damaged party's degree of fault. These states include Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, South Dakota, and Washington.

Modified Comparative Fault

There are competing schools of thought in the 33 states that recognize the **Modified Comparative Fault Rule**.

Twelve states follow the **50 percent Bar Rule**, meaning a damaged party cannot recover if it is 50 percent or more at fault, but if it is 49 percent or less at fault, it can recover, although its recovery is reduced by its degree of fault. States which adhere to the 50 percent Bar Rule within modified comparative fault include Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, Nebraska, North Dakota, South Carolina, Tennessee, Utah, and West Virginia.

Twenty-one states follow the **51 percent Bar Rule** under which a damaged party cannot recover if it is 51 percent or more at fault. However, the damaged party can recover if it is 50 percent or less at fault, but that recovery would be reduced by its degree of fault. The states which follow the 51 percent Bar Rule include Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Montana, Nevada,

New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Vermont, Wisconsin, and Wyoming.

In a *pure contributory negligence* jurisdiction, if the jury finds the plaintiff was the least bit negligent and contributed to the accident, then the plaintiff will recover nothing. Therefore, even if the plaintiff is only 5 percent at fault and the defendant is 95 percent at fault, the plaintiff recovers nothing.

In a *comparative negligence* jurisdiction, if a jury finds that plaintiff is 5 percent at fault and defendant is 95 percent at fault, plaintiff would still be able to recover, but his \$10,000 in damages would be reduced by his 5 percent at fault, so plaintiff would recover only \$9,500.

Comparative negligence jurisdictions differ among states. For example, if the plaintiff is found to be 50 percent at fault, and the defendant is 50 percent at fault, some comparative negligence states would still allow the plaintiff to recover \$5,000 (50 percent of his damages), while other states would prevent him from recovering anything because he is equally at fault with the other driver. Some argue that comparative negligence jurisdictions are unfair because a difference of just 1 percent of fault is all it takes for a plaintiff to go from recovering half his damages to recovering nothing.

Still other states draw the line at 51 percent, following the principle that a plaintiff who is MORE negligent than a defendant should not be able to recover anything. For example, in Wisconsin, the plaintiff would recover \$5,000 if he is 50 percent negligent, but if he is 51 percent negligent, he would recover nothing.

Let's use Texas as an example to further understand these concepts. Texas, along with 32 other states, uses a *Modified Comparative Fault Rule*. If a person is injured in a car accident in Texas, he cannot recover damages from the other party if he is 51 percent or more at fault for the accident. By definition, comparative fault (which Texas officially calls "proportionate responsibility") is just that: The defendant argues that he was not the only one who was careless and that the plaintiff shares some of the blame for his own injuries. In *pure comparative fault* jurisdictions, the plaintiff can

recover even if he was 80 percent at fault, but would recover only 20 percent of his damages.

In cases involving comparative negligence, the jury determines the percentage of responsibility of each plaintiff, of each defendant, and of other responsible persons (*e.g.*, employers in workers' compensation subrogation third-party cases). After hearing the evidence, the jury will assign a percentage of responsibility to everyone involved. If the plaintiff is found to be less than 51 percent at fault for causing the accident, his recovery will be reduced by whatever percentage of fault he is found responsible for. For example, if plaintiff is awarded \$100,000 in damages and was found to be 20 percent at fault, while two other defendants (Defendant A = 60 percent, Defendant B = 20 percent) are found to be 80 percent at fault in total, the plaintiff would be entitled to recover \$80,000, but this begs the question of from whom plaintiff can collect the \$80,000.

Tied to and somewhat complicating the concept of comparative fault is the notion of joint and several liability. Prior to 1995, Texas followed the traditional "*Joint and Several Liability Rule*". This Rule made each tortfeasor/defendant liable for the entire amount of the plaintiff's damages regardless of their relative degrees of fault or responsibility. The plaintiff could pick from whom he collected his \$80,000. So, in the fact pattern above, the plaintiff would be able to recover his \$80,000 damages from either defendant. This was true even if it was determined that the vehicle that hit them was only 20 percent responsible for the plaintiff's damages; they would still be responsible for 100 percent of the damages.

In 1995, however, Texas made a change and now follows a rule some refer to as "*Modified Joint and Several Liability*". This Rule says that a defendant is only responsible for the full amount of the plaintiff's damages if they are found to be more than 50 percent responsible for the accident. Otherwise, they are only responsible for an amount equal to their percentage of fault. Under modified joint and several liability, a plaintiff is only able to recover his full amount of damages from the tortfeasor/defendant if the jury found him to be more than 50 percent responsible for the accident. So, in the example above, plaintiff could recover up to 20 percent of the \$80,000 in damages from Defendant B, or choose to recover all \$80,000 from

Defendant A. In the case of the latter, Defendant A would look to Defendant B for contribution in the amount of \$20,000 – the amount owed by Defendant B.

Each state has different comparative fault rules and different joint and several liability laws. Understanding each is critical to evaluating and pursuing subrogation cases on a national basis. Matthiesen, Wickert & Lehrer, S.C. has compiled a chart showing the source of these rules for all 51 jurisdictions, and it can be found [HERE](#).