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# Appellate caseload and the switch to comparative negligence

Jef De Mot[a], Michael Faure[b], Jonathan Klick[c,*]

[a] FWO, University of Ghent, Centre for Advanced Studies in Law and Economics, Belgium
[b] Comparative private law and economics Erasmus University Rotterdam, Comparative and international environmental law Maastricht University, Netherlands
[c] University of Pennsylvania and Erasmus Chair of Empirical Legal Studies, Erasmus School of Law, Rotterdam, Netherlands

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ABSTRACT

The switch from contributory to comparative negligence is thought to have been motivated primarily out of a concern for justice. We offer a different perspective. Language in state supreme court decisions suggests that some judges thought the switch would reduce appeal rates. We hypothesize that courts were more likely to make the switch when their appellate caseloads are relatively high. To examine this, we estimate hazard models, showing that states with appellate courts where caseloads grew relatively faster made the switch more quickly, and the effect was more pronounced for the switch to the pure, as opposed to the modified, form of comparative negligence.



## 1. Introduction

The economic analysis of law struggles with finding a convincing economic rationale for the widespread adoption of comparative negligence in the United States in the period 1969–1985.[1] First, it is still unclear whether comparative negligence creates better incentives for parties to adopt efficient care than contributory negligence.[2] Also, the alleged risk-spreading virtue of comparative negligence is questionable. Given the availability of third-party insurance, there are better alternatives available to spread the risk of accidental harm.[3] Finally, comparative negligence is generally considered to generate higher costs per case. For example, White (1989) argues that comparative negligence seems to generate higher litigation and administrative costs than the traditional negligence rules because courts must decide on the degree of negligence by both parties and not just whether each party was negligent.[4] Recently however, using a rent seeking model, De Mot (2013) has shown that litigation expenditures can be either larger or smaller under comparative negligence than under contributory negligence (depending on the quality of the case).

Curran (1992) provides an interest group model to explain the timing of the switch from contributory to comparative negligence in the United States.[5] He argues that of all the potential interest groups, only manufacturers and lawyers had a sustained interest in comparative negligence. For most of the twentieth century, manufacturers stood to lose from the adoption of comparative negligence, while the legal profession stood to gain. However, the adoption of strict product liability in many states from the mid-1960s onwards eliminated the resistance of manufacturers, which enabled lawyers to push successfully for the adoption of comparative negligence. Curran provides some empirical support for this argument. It is a puzzle, however, why these interests were important in determining the switch to comparative negligence, but were unable to stave off the movement toward strict product liability, which would be seemingly unattractive to manufacturers by Curran's rationale.

In this article, we provide a different, though not necessarily mutually exclusive, perspective. We argue that comparative negligence, especially in its pure form, was used to mitigate appellate caseloads. Our hypothesis is that states with larger supreme court caseloads had a stronger incentive to switch to comparative negligence. This hypothesis is based on the following insights. First,

* Correspondence to: University of Pennsylvania, Law, 3501 Sansom Street, Philadelphia, PA 19104, United States.
*E-mail addresses:* Jef.DeMot@UGent.be (J. De Mot), Michael.Faure@maastrichtuniversity.nl (M. Faure), Jklick@law.upenn.edu (J. Klick).

[1] See Artigot i Golobardes and Gómez Pomar (2009); Ben-Shahar and Bar-Gill (2003).
[2] See e.g. Shavell (1987).
[3] See e.g. White (1989).
[4] See also Landes and Posner (1981); Shavell (1987); Bar-Gill and Ben-Shahar (2001).
[5] See also Rubin et al. (2001); Zywicki (2000).

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appellate caseloads started to rise dramatically in the 1960s.[6,7] This increase was much larger and started earlier in some states than in others. Second, supreme courts with large increases in caseloads looked for ways to decrease their caseloads. Third, a switch from contributory negligence to comparative negligence was expected to reduce the numbers of appeals since the harshness of contributory negligence led many courts to create a complex patchwork of exceptions which often gave rise to an appeal.[8]

The next section provides some further background on contributory and comparative negligence and on the incentives of the judiciary necessary to motivate our empirical investigation. Section 3 offers some background on the data. Section 4 contains the empirics. Section 5 concludes.

## 2. Negligence rules, appeal rates and the judiciary

As mentioned in the introduction, our hypothesis is based on three elements. We provide more details on caseloads in later sections. In this section, we focus on the judiciary's incentive to reduce caseloads and on the difference in appeal rates under contributory and comparative negligence.

### 2.1. The incentives of the judiciary

Some studies have concluded that state appellate courts managed to keep abreast of the caseload explosion of the 1960s and 1970s by making numerous and varied changes to their personnel, structure and procedure.[9] We argue that supreme courts have also made changes in substantive law to keep caseloads under control. This fits into a line of research that argues that judges are rational utility maximizers with relatively weak performance incentives and constraints on their decision-making, at least at the highest levels. This issue has been stressed by Cooter (1983) and Posner (1993). Both authors assume that judges seek to minimize effort subject to various institutional constraints. Cooter assumes that judges providing private services have a financial incentive to increase their caseload to the extent it increases their income. In Posner's approach, focusing on federal judges, income is fixed and can hence not be increased by more effort. For Posner judicial utility is a function of income, status and leisure. Since the income of judges is largely fixed, maximizing leisure becomes especially important, conditional on maintaining status levels (Posner, 1993; Stras, 2006).[10] Posner further predicts that judges who have reached a high income level (e.g. Supreme Court justices) will prefer to maximize leisure.[11] Furthermore, "the opportunities for a leisured judicial life, especially at the appellate level, are abundant" (Posner, 2008, p. 61). Hence one can expect judges to try to reduce their workload.

In theory, judges confronted with an increased workload could maximize leisure by simply deciding fewer cases. This would unavoidably lead to increased court congestion and a backlog of cases. This could harm the reputation of judges and will likely be avoided (Helland and Klick, 2007; Beenstock and Haitovsky, 2004). Judges could also lobby the legislator for more judges to deal with increasing workloads. However, this could reduce the prestige of the judges as more people attain the position. The judiciary will then look for alternative ways to reduce its workload according to Posner's model of judicial behavior.

There is some empirical evidence supporting this. For example, Helland and Klick (2007) show that judges in class action cases have an incentive to easily grant the attorney's fee request in order to terminate cases rapidly, thus avoiding court congestion. Research from Israel also shows that judges, for reputational reasons, will avoid a large case backlog and hence will dispose of more cases when the caseload increases (Beenstock and Haitovsky, 2004). Other research shows that a higher workload increases the probability of retirement of judges (see e.g. Nixon and Haskin, 2000; Spriggs and Wahlbeck, 1995).[12]

### 2.2. Appeal rates under contributory and comparative negligence

Turning to the third element of our hypothesis, a switch to comparative negligence, especially the pure form, was regarded by commentators and judges as being capable of reducing appellate caseloads. Before the widespread adoption of comparative negligence, many state courts had tried to reduce the harshness of contributory negligence by creating a patchwork of exceptions to avoid its application.[13] Already in 1858, the Supreme Court of Illinois decided that "wherever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action".[14] Under this particular version of the slight-gross rule, a plaintiff could recover the full amount of the damage as long as the plaintiff's negligence was slight or less than slight. This rule however soon proved to be unworkable, leading to definitional problems of the terms "slight" and "gross", which resulted in numeral appeals.[15] The Supreme Court of Illinois repudiated the doctrine in 1894.[16] Other states also experimented with the slight-gross rule through judicial adoption (Kansas, Oregon, Wisconsin and Tennessee), but none of these states held on to the rule for very long.[17] In the first half of the twentieth century, some state legislatures enacted slight-gross statutes (Ohio, Alaska, California, District of Columbia, Wisconsin, Nebraska and South Dakota).[18] Nebraska was the last state to repudiate this rule in 1992. South Dakota is now the only remaining state to employ a slight-gross rule. The "last clear chance" doctrine provides another example. This doctrine makes the last person who could have reasonably avoided an accident liable.[19] Thus a plaintiff may recover his full damage, in spite of his own contributory fault, if it can be shown that the defendant had the last clear chance to avoid the accident. The doctrine originated in the English case of Davies v. Mann.[20] Prosser noted the great difficulties this doctrine has caused

[6] Note that appellate judgeships have more than doubled in the period 1965–1980, but they have grown much more slowly than the volume of appeals. See Marvell and Kuykendall (1980).

[7] This was not only the case in state Supreme Courts, but also in the US Supreme Court. In 1951, there were 1200 new cases in the US Supreme Court. In 1971, the number had reached 3600. See Federal Judicial Center (1972).

[8] Note that tort claims make up a substantial part of all appellate court filings.

[9] See e.g. Marvell (1989).

[10] The importance of maximizing leisure for judges was recently repeated by Posner (see Posner, 2008).

[11] In Posner's words: "I therefore predict that a higher judicial salary is likely to reduce the amount of work done by existing judges" (Posner, 1993).

[12] For a summary of this literature see Stras, 2006.

[13] See Mills (2002).

[14] Galena & Chi. Union R.R. Co. v. Jacobs, 20 Ill., at 497 (Ill. 1858).

[15] Prosser (1953a,b, p. 485) (citing St. Louis A. & T.H. R. Co. v. Todd, 36 Ill. 409 (1865); Chicago, B. & Q. R. Co. v. Payne, 59 Ill. 534 (1871); Illinois Cent. R. Co. v. Cragin, 71 111. 177 (1873); Illinois v. Hall, 72 Ill. 222 (1874); Chicago & A. R. Co. v. Hammer, 72 Ill. 347 (1874); Illinois Cent. R. Co. v. Goddard, 72 Ill. 567 (1874); Schmidt v. Chicago & N.W. R. Co., 83 Ill. 405 (1876); Illinois Cent. R. Co. v. Hammer, 85 Ill. 526 (1877); Wabash R. Co. v. Henks, 91111. 406 (1879)). See also Green (1944), at 50–53.).

[16] Lake Shore & M.S.R. Co. v. Hession, 150 Ill. 546, 556 (Ill. 1894).

[17] Prosser (1953a,b, p. 485).

[18] Prosser (1953a,b, p.486). In some states the rule was only applied to railroad or labor liability suits.

[19] See Wittman (1998).

[20] 10 M. & W. 546, 152 Eng. Rep. 588 (1842). The plaintiff, having fettered the forefeet of his ass, left it to graze on the off-side of the road. The defendant's servant, at a smartish pace, drove his wagon into the animal. Although the ass might have been unlawfully on the highway, it was held that the defendant, by proper care, might have avoided the accident and was therefore liable.