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Comparative versus contributory negligence: A comparison of the litigation expenditures

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ABSTRACT

The previous literature on comparative and contributory negligence points out that administrative costs are higher under comparative negligence because the courts must decide on the degree of negligence by both parties and not just whether the parties were negligent. In this article, I show that this finding is not necessarily correct. I use a rent seeking model to show that the litigation expenditures may be smaller under comparative negligence. The previous literature has focused on only one effect, while there may be three effects at play.

1. Introduction

In the United States as well as in Europe, comparative negligence rather than contributory negligence is the general rule in tort law (see Artigot i Golobardes & Gómez Pomar, 2009).[1] Comparative negligence divides the cost of harm between the parties in proportion to the contribution of their negligence to the accident. Under a rule of (negligence with a defense of) contributory negligence, the negligent injurer can escape liability by proving that the victim's precaution fell short of the legal standard of care (see Cooter & Ulen, 2003). Although these negligence rules have been examined quite extensively in the law and economics literature, it is still debated whether comparative negligence creates better incentives for parties to adopt efficient care than contributory negligence (see e.g. Artigot i Golobardes & Gómez Pomar, 2009; Bar-Gill & Ben-Shahar, 2003). The early literature concluded that contributory negligence is more efficient (e.g. Brown, 1973; Diamond, 1974; Posner, 1977).[2] Later it was shown that both rules are equivalent from an efficiency perspective when information is perfect and decision-makers are error-free (e.g. Haddock & Curran, 1985; Shavell, 1987)[3], but that the equivalence does not hold when these assumptions are relaxed (e.g. Cooter & Ulen, 1986; Haddock & Curran, 1985).[4] At first, relaxing the assumptions seemed to favor comparative negligence, but more recent literature is rather sceptical concerning any general superiority

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[1] In the US, negligence with contributory negligence was the dominant tort-liability rule in common law countries for most of the last 200 years. This changed however within the last 40 years. The prevailing liability standard in all but a few of US states is one of comparative negligence. Most civil law jurisdictions in Europe adopted the principle of comparative negligence long before the US made this change.

[2] For example, Brown (1973) states that with comparative negligence, the costs of accidents are shared between injurer and victim, so neither of them bears the full costs of failing to take optimal care. Consequently, both parties may be induced to take less care than is optimal.

[3] The reason is that under both rules, if parties of one type take due care, then parties of the other type will reason that they alone will be found negligent if they do not take due care (see Shavell, 2004). Note that it is assumed that due care is set at the optimal level.

[4] Cooter and Ulen (1986) show that under conditions of evidentiary uncertainty, comparative negligence gives moderate incentives to deviate from the standard of care to both parties. Contributory negligence gives the strongest incentives to one party and the weakest incentives to the other. Comparative negligence is then the most efficient rule because it minimizes the total amount of deviation from due care when parties are symmetrically situated.

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of one of these liability regimes (e.g. Bar-Gill & Ben-Shahar, 2003).[5,6]

This ongoing debate stands in contrast to the lack of conflicting opinions with respect to the relative size of the administrative costs under both negligence rules. Comparative negligence is generally considered to generate higher costs per case. Landes and Posner (1987) observe that comparative negligence costs more to administer than contributory negligence. Shavell (1987) states that the defense of contributory negligence may lead to less complicated proceedings compared to comparative negligence. White (1989) argues that comparative negligence seems to generate higher litigation and administrative costs than the traditional negligence rules because the courts must decide on the degree of negligence by both parties and not just whether the parties were negligent. Bar-Gill and Ben-Shahar (2001) state that contributory negligence might be cheaper to administer than comparative negligence.[7]

The point of view that comparative negligence entails higher costs per case is obviously true in a setting with exogenous litigation costs. The additional element of weighing the parties' degree of negligence indeed generates extra costs. However, the previous literature has overlooked the fact that different effects (more precisely, three) are at play in a more realistic setting in which litigation costs are endogenous.[8] We show that in such a setting, comparative negligence can be less costly than contributory negligence. The kernel of the argument can be explained with a simple numerical example. Suppose (for simplicity) that the defendant's negligence is certain and that the parties share the loss (J) equally when also the plaintiff is held liable. The plaintiff can make an additional investment[9] to increase his chances of not being held liable from 20% to 50%.[10] Under a rule of contributory negligence, the marginal benefit from this extra investment equals $0.5J - 0.2J = 0.3J$. Under a rule of comparative negligence, the marginal benefit of the extra investment is smaller: $(0.5J + 0.5J/2) - (0.2J + 0.8J/2) = 0.15J$. Clearly, the benefit is smaller under a rule of comparative negligence. Intuitively, the stakes are higher under contributory negligence: if the plaintiff is held liable, he pays everything. Under comparative negligence, he only bears half of the harm. While the expenditures of the parties concerning the *liability of the plaintiff* are larger under contributory negligence, we can easily show that the expenditures concerning the *liability of the defendant* are larger under comparative negligence. Another numerical example can easily demonstrate this. Suppose that this time the plaintiff's negligence is certain and that once again the parties share the loss equally when also the defendant is held liable. The plaintiff can make an extra investment to increase the probability that the defendant will be held liable from 20% to 50%. Under a rule of contributory negligence, the marginal benefit from this extra investment equals 0 (since the plaintiff will bear the full loss, no matter whether the defendant is found negligent or not). Under a rule of comparative negligence, the marginal benefit of the extra investment is larger: $0.3J/2$. Intuitively, when it comes to the negligence of the defendant, the stakes are higher under comparative negligence. Note that things are more complex than this. Under comparative negligence the expenditures may also influence the court's perception of the degree of negligence and this may determine the division of the loss under this negligence rule. We incorporate this in the general model. We find a relatively simple condition for the case in which the total expenditures are smaller under comparative negligence than under contributory negligence. We will see that especially for high-quality claims, comparative negligence may lead to lower litigation costs than contributory negligence.[11] I stress that this article deals with one particular aspect of the relative efficiency of contributory and comparative negligence, namely their relative costs at trial. It does not address the overall efficiency of the two negligence standards.[12]

We will proceed as follows. The following section provides a general model which incorporates contributory negligence and comparative negligence.[13] Section 3 compares the litigation expenditures for contributory and comparative negligence. Section 4 concludes.

2. Model

As mentioned in the introduction, comparative negligence divides the cost of harm between the parties in proportion to the contribution of their negligence to the accident. Under a rule of contributory negligence, the negligent injurer can escape liability by proving that the victim's precaution fell short of the legal standard of care. More formally, we can describe the judgment under comparative negligence as follows:

$$L(x,y) = \begin{cases} 0 \text{ if } x \geq x^* \\ 1 \text{ if } x < x^* \text{ and } y \geq y^* \\ \sigma \text{ if } x < x^* \text{ and } y < y^* (\text{with } 0 < \sigma < 1) \end{cases}$$

with x the level of care of the defendant, x^* the optimal level of care of the defendant, y the level of care of the plaintiff, y^* the optimal level of care of the plaintiff and σ the plaintiff's share if both parties are considered liable. By assumption, the plaintiff has suffered harm of 1.[14]

[5] Note that some articles show that comparative negligence provides better incentives to take efficient care levels than negligence or contributory negligence when injurers as well as victims are heterogeneous (see Emons & Sobel, 1991; Feess & Hege, 1998).

[6] Bar-Gill and Ben-Shahar (2003) challenge the assumption that parties are symmetrically situated: one party could be better situated to take care. Also, they show that small intermediate deviations are not necessarily preferred to large deviations which may result from other liability rules (they use computer simulations to show this). Note that some empirical studies point out that comparative negligence weaken incentives to take precaution (see White, 1989), is associated with higher automobile liability insurance premiums (see Flanigan, Johnson, Winkler & Ferguson 1989), and increases binge drinking (see Sloan, Reilly, & Schenzler, 1995). According to Dari-Mattiacci and De Geest (2005), the current empirical literature does not allow us to make any statements on whether comparative negligence worsens the parties' incentives. Although there can be more accidents under comparative negligence, injurers who exercise care have, on average, lower care costs. In other words, under comparative negligence, there are more accidents, and less is spent on precaution, but what is spent on precaution is relatively well spent. Some of the empirical studies need to be interpreted with care for other reasons as well. For example, Flanigan et al. (1989) find that comparative negligence is associated with higher automobile liability insurance premiums, but they did not investigate whether this increase was due to more accidents or to more claims toward injurers.

[7] Note further that 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 (see White, 1989).

[8] Many relatively recent accounts of litigation stress the importance of treating litigation expenditures as endogenously determined.

[9] This is an investment in more or better lawyering services once a trial is imminent or has begun.

[10] These numbers are merely illustrative.

[11] By this we mean that the inherent degree of fault of the defendant is large and the inherent degree of fault of the plaintiff is low.

[12] The model does not directly suggest how potential injurers and victims might react in their precautionary decisions.

[13] Note that we will focus on the pure comparative negligence rule, and not on modified forms (e.g. the '50 percent rule'). A modified rule bars a negligent plaintiff's recovery when the plaintiff's fault exceeds a certain level in comparison to the defendant's fault. Otherwise the rule allocates damages based on the relative negligence exhibited by each (like pure comparative negligence).

[14] Note that (for example) $x < x^*$ needs to be read as: *the court considers* the defendant's amount of care to be lower than the optimal amount of care. In the model of this paper, the expected award does not only depend on the levels of care of the parties (which play their role in the model through F, the inherent merit of the case, see further), but also on the expenditures of the parties.