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by Myles L. Lichtenberg

The time is more than ripe for Maryland to abolish the outdated tenets of contributory negligence and join with her forty-five sister states in adopting the modern doctrine of comparative negligence. Currently, Maryland law embodies the doctrine of contributory negligence, the "all or nothing rule," that bars recovery to an injured plaintiff who is found to be even a scintilla at fault. The Maryland Court of Appeals has again left it up to the legislature to initiate a change in the law by refusing to adopt comparative negligence in *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 456 A.2d 894 (1983) (quadriplegic student denied recovery after failing to properly execute a front flip in his school gymnasium). The 1986 Maryland Legislature must adopt the modified form of comparative negligence proposed in Senate Bill 589 (SB 589, 1986 Sess.) ("SB 589") in order to remedy the inequities evidenced by *Harrison* and abolish a law that is patently unfair.

Senate Bill 589 plans to adopt the modified form of comparative negligence that would not permit a person's contributory negligence to be a complete bar to recovery if the contributory negligence was *less than* the negligence of the person against whom recovery is sought. One's damage award would be diminished in the proportion of the percentage of contributory negligence attributable to that person. Senate Bill 589 remains unchanged from similar bills that have failed in the past two legislative sessions. However, significant progress has been made by our legislature in these last two sessions since the introduction of such a bill nearly twenty years ago. Two years ago marked the first time that the bill moved out of the Senate and the first time since 1968 that a comparative negligence bill moved from one house to the other (dying in the House Judiciary Committee by a vote of 12 to 9). Last year's bill passed on the Senate floor (41-3) then passed in the House Judiciary Committee (12-9) before being defeated on the House floor by a narrow margin (66-53). The 1986 legislature must complete the trend toward adopting comparative negligence.

Why would forty-five states convert to comparative negligence except for the basic premise that the law of contributory negligence is outdated and its "all or nothing" approach is patently unfair? These strong policy reasons must be kept in the forefront of each legislator's decision-making process. The major threats to SB 589 are the skepticism over jury verdicts, the threat of increased litigation, the powerful insurance lobby, and the effects on other areas of tort law.

Generally, the skepticism over jury verdicts is unfounded. There has been no dependable evidence from any state that has adopted a comparative negligence standard that juries have had any difficulty apportioning harm by percentages to the respective parties. In fact, SB 589 provides for an explanatory jury instruction. Juries have the knowledge to understand the ramifications of their decisions before apportioning fault. Opponents to SB 589 have argued that, under our present system, juries apply a rough comparative negligence standard and compromise their verdicts. Opponents say, "Why fix a machine that is not broken?" This goes against the fundamental policies of our judicial system. Judges give instructions to be adhered to, not compromised. Even if this rough comparative negligence standard is true, many actionable claims that would go to the jury under a comparative negligence standard are not given the chance under the contributory negligence standard due to summary judgments and directed verdicts. Furthermore, many claims are never filed because the injured person is slightly at fault. Injured plaintiffs maintaining meritorious claims must be given access to the courts instead of being thwarted by the law of contributory negligence.

The second apparent concern is the threat of increased litigation. Because the adoption of a comparative negligence standard is a recent phenomenon, there has not been sufficient research on its effects. It is important to note that SB 589 only provides recovery to one whose negligence is *less than* the negligence of the person against whom recovery is sought. Therefore, the "less than" standard may inhibit fraudulent claims for fear that the person bringing suit may be found to be more at fault and subject to a counterclaim by the opposing party. Hence, there is an inherent mechanism to insure that only valid claims may increase. Justice requires and encourages the maintenance of valid claims. Furthermore, no significant increase in litigation has been noted by any comparative negligence state.

A third concern comes from the powerful insurance lobby. These opponents to the comparative negligence standard argue that the number of claims and the number of successful claims will increase, thereby causing an increase in rates. It must be emphasized that there is no dependable data to support the insurance lobbyists' contentions. Our Maryland Legislature must shy away from the unsubstantiated fears of the strong insurance lobby and lean toward a statute that benefits the well-being of the citizens of our State. If insurance companies will be affected by comparative negligence at all, it is by set-offs; that is, set-offs will play an important role in the ultimate division of damages.

Finally, there are concerns that other areas of tort law such as strict liability in tort, assumption of risk, last clear chance and settlements by joint tortfeasors will be affected if comparative negligence legislation is adopted. However, as Judge Rita Davidson stated in her dissent in *Harrison*, any discrepancies with any other areas of tort law can be adequately resolved by our judicial system if not legislatively corrected. Just as was done in every other comparative negligence state, Maryland can effect a needed tort reform by a smooth legislative and judicial transition.

The time for change is now. Legislative action must be taken in this 1986 session in order to remedy the obvious inequities inherent in the doctrine of contributory negligence. Opponents of SB 21 have not adequately substantiated their reasons against acceptance of a comparative negligence standard so as to outweigh the reasons for its adoption. Juries will be able to apportion fault, only meritorious claims will increase, no attributable rise in insurance rates has been noted by any other comparative negligence state, and a smooth tort reform can be accomplished. Let us join our 45 sister states in adopting the doctrine of comparative negligence and abolish a rule that is patently unfair.

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