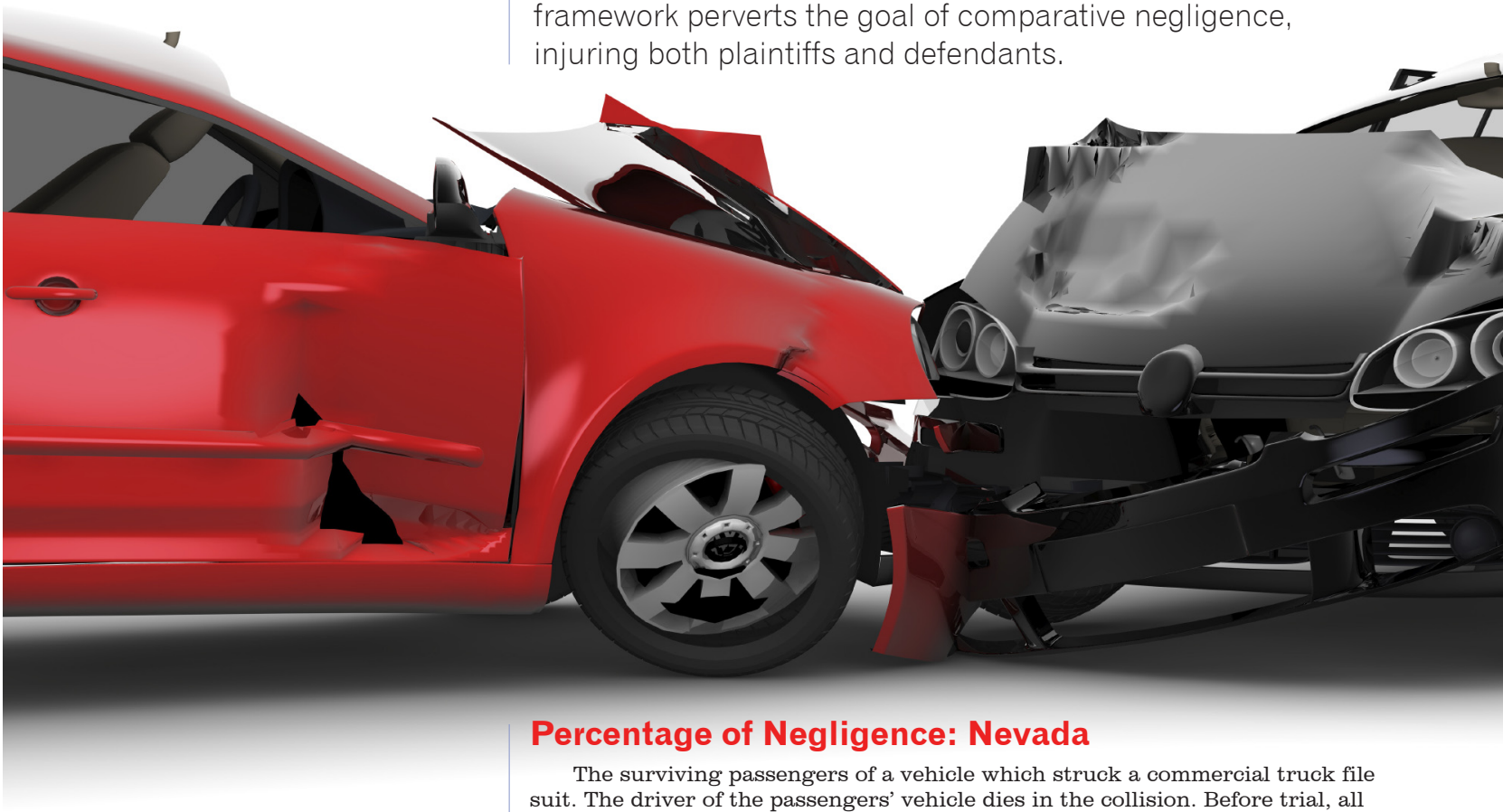
COMPARATIVE NEGLIGENCE UNDER NRS 41.141: FALLING SHORT OF EXPECTATIONS

BY MICHAEL P. LOWRY, ESQ.

NRS 41.141 was first enacted in 1973 with the goal of abolishing the harsh doctrines of contributory negligence and joint and several liability.[1] Its very text, however, creates a very real and regular exception through which these doctrines survive. The following examples highlight how this statutory framework perverts the goal of comparative negligence, injuring both plaintiffs and defendants.



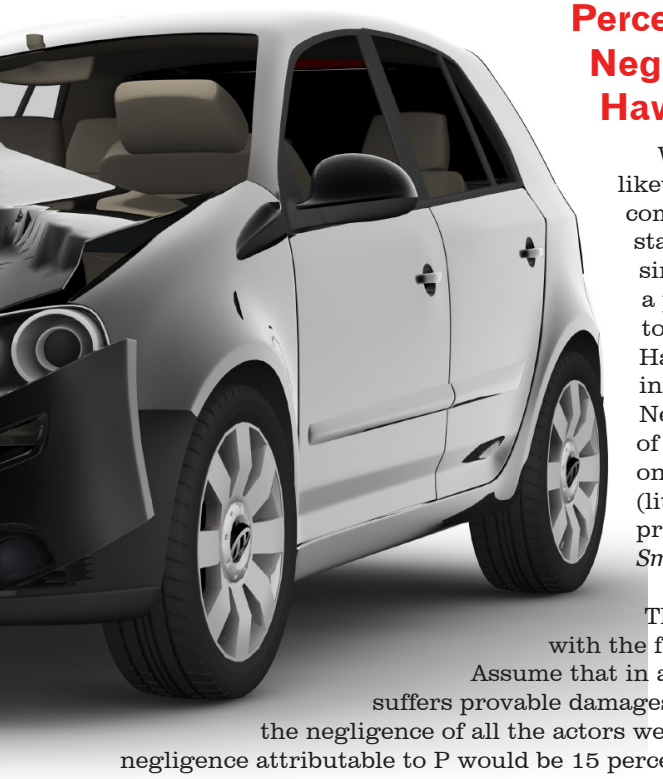
Percentage of Negligence: Nevada

The surviving passengers of a vehicle which struck a commercial truck file suit. The driver of the passengers' vehicle dies in the collision. Before trial, all defendants save the commercial truck are dismissed or settle. Although bitterly disputed, the available evidence indicates the plaintiffs' driver was traveling 30-35 miles per hour above the posted speed limit, ignored a stop sign, and thus caused the collision. Conversely, the commercial truck appeared to have satisfied all applicable regulations, laws and standards of care. Clearly the commercial truck has every interest in assigning fault to the deceased driver.

NRS 41.141(2)(b)(2), however, decrees the fact finder may only decide "the percentage of negligence attributable to each *party* remaining in the action." Thus if a potential tortfeasor is not named in or is dismissed from the action prior to trial, fault may not be assigned to that tortfeasor. NRS 41.141(3) goes one step further and explicitly bans the fact finder from considering the

negligence of a settled defendant. Fault may not be assigned to a non-party and no evidence may be introduced pertaining to a settled defendant's comparative negligence.

Applying these statutes to this scenario, although the commercial truck could argue an empty-chair defense,[2] NRS 41.141(2)(b)(2) allowed the jury to only assign fault to the remaining parties to the suit: the commercial truck or the passengers. This creates an all-or-nothing choice in which the commercial truck ran "the risk of bearing the entire financial burden of plaintiff's misfortune when he may only be slightly negligent for causing injury when his negligence is compared to the total negligence of all [participants to the injury]. This may defeat the purpose of several liability [by] requiring the slightly negligent party to pay for a disproportionate part of the others not party to the suit."[3]



Percentage of Negligence: Hawaii

Worthy plaintiffs may likewise suffer. Hawaii's comparative negligence statute is ambiguous and simply refers to assigning a percentage of negligence to each "party," which the Hawaii Supreme Court interpreted to permit, like Nevada, a "determination of comparative negligence only among the parties (litigants) to the proceeding." *Sugue v. F.L. Smithe Mach Co.*[4]

This decision was criticized with the following example:

Assume that in an accident plaintiff (P) suffers provable damages of $1 million and that if the negligence of all the actors were considered, the causal negligence attributable to P would be 15 percent; to [defendant] D, 10 percent; and to [the third party] X, 75 percent.

Here, the negligence attributable to P is greater than the negligence attributable to D. If P joined D and X in his action, P's recovery would be reduced by 15 percent and D and X would be held jointly and severally liable to P in the amount of $850,000. If, however, X were immune from suit, as in Sugue, or were a released tortfeasor who was not a party to P's action against D, and if the causal fault of non-parties cannot be considered in P's action against D, as Sugue suggests, then P will be barred from recovery against D because the negligence attributable to P is "greater than" the negligence of the other party, D, "against whom recovery is sought."[5]

Thus, although the plaintiff had compensable damages, he was denied a new source for recovery because the distorted jury verdict form restricted the assignment of fault to the plaintiff and a slightly negligent defendant. Whether for plaintiffs or defendants NRS 41.141 presently fails its stated goal of achieving comparative negligence.

The Solution in Other Jurisdictions

Nevada was not alone in its restraining comparative negligence in this manner; however, it is now in a minority of jurisdictions adhering to this system. Oregon once employed the Nevada system. However, its statute was ambiguous in that it failed to define the term "party." The term was defined in a case involving a three-car collision in which the plaintiff had settled with one defendant and the trial court refused to allow the jury to assign fault to the settled defendant.[6]

Initially, the Oregon Court of Appeals reversed this ruling. Forbidding the jury to consider the fault of the settled defendant…

> …caused the jury to decide a case that was quite different than the one presented by the facts. Whatever his degree of fault, plaintiff did not simply have an encounter with defendants that produced his injury. He encountered defendants' vehicle, he reacted in some fashion and he was hit from behind by Humphreys. The causation issues that ought to have been decided by the jury are who did what to whom, who was to blame and how is any joint blame to be allocated. Once the jury had answered those questions, the court should have done any arithmetic the verdict might require.[7]

The Oregon Supreme Court later reversed and upheld the trial court's instruction. "The statutory scheme of comparative fault restricts the jury or judge, as the fact-finder,

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to consideration only of the fault of the parties before the court at the time the case is submitted to the fact-finder for a verdict or decision."[8] It concluded "a once-named party who settles a case prior to or during a trial is no longer a party in the action," and therefore may not be assigned fault by the fact finder.

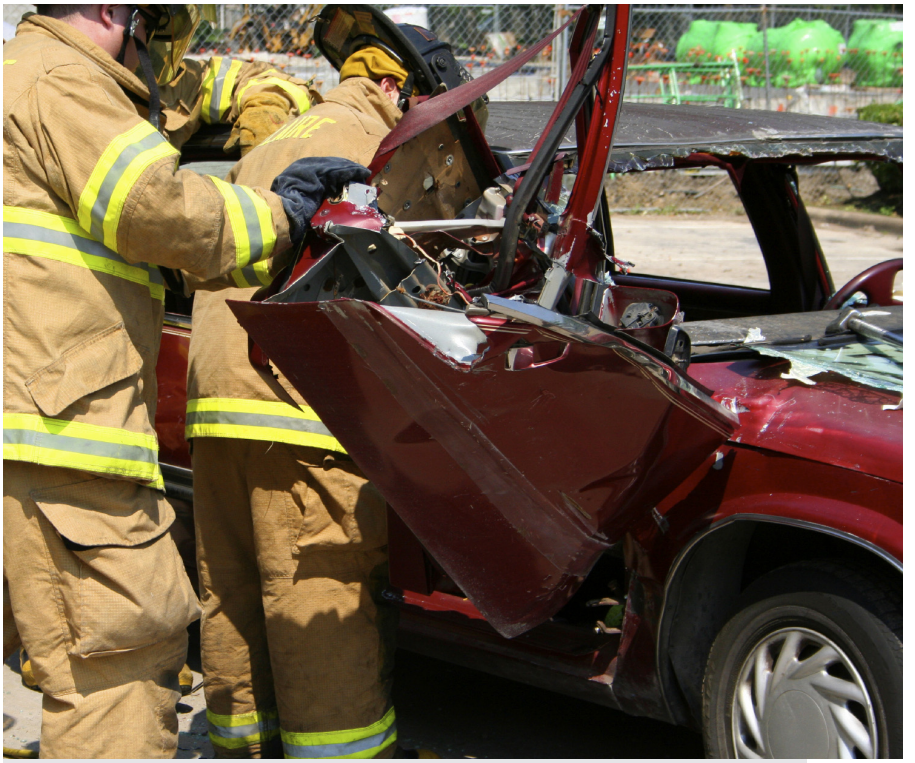
The Oregon Legislature abrogated this rule in 1995. Oregon's comparative negligence statute now reads, in relevant part:

> (2) The trier of fact shall compare the fault of the claimant with the fault of any party against whom recovery is sought, the fault of third party defendants who are liable in tort to the claimant, and the fault of any person with whom the claimant has settled. The failure of a claimant to make a direct claim against a third party defendant does not affect the requirement that the fault of the third party defendant be considered by the trier of fact under this subsection. Except for persons who have settled with the claimant, there shall be no comparison of fault with any person:
>
> > (a) Who is immune from liability to the claimant;(b) Who is not subject to the jurisdiction of the court; or (c) Who is not subject to action because the claim is barred by a statute of limitation or statute of ultimate repose.
>
> (3) A defendant who files a third party complaint against a person alleged to be at fault in the matter, or who alleges that a person who has settled with the claimant is at fault in the matter, has the burden of proof in establishing:
>
> > (a) The fault of the third party defendant or the fault of the person who settled with the claimant; and (b) That the fault of the third party defendant or the person who settled with the claimant was a contributing cause to the injury or death under the law applicable in the matter.
>
> (5) This section does not prevent a party from alleging that the party was not at fault in the matter because the injury or death was the sole and exclusive fault of a person who is not a party in the matter.[9]

These changes eliminated the all-or-nothing choice described in the commercial truck example, as the Oregon fact finder is now explicitly permitted to compare "the fault of any person with whom the claimant has settled." Importantly, the statute also contains several procedural barriers which limit the ability to blame non-parties.

Oregon is not alone in abandoning Nevada's comparative negligence system. New Hampshire's comparative negligence statute also referred simply to "parties." Like in Oregon, the phrase was interpreted to apply to only those parties who were present before the court.[10] New Hampshire has since, however, adopted the modern system, noting "[m]any jurisdictions permit a jury to consider 'nonparties' such as unknown or immune tortfeasors when apportioning fault."[11] In reversing its prior decisions, the court discussed its reasoning.

The underlying rationale for such a rule is that true apportionment cannot be achieved unless that apportionment includes all tortfeasors who are causally negligent by either causing or contributing to the occurrence in question, whether or not they are named parties to the case. It would be patently unfair in many cases to require a defendant to be "dragged into court" for the malfeasance of another and to thereupon forbid the defendant from establishing that fault should properly lie elsewhere. There is nothing inherently fair about a defendant who is 10 percent at fault paying 100 percent of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss.



> Apportionment of fault to non-parties is, moreover, recognized in many jurisdictions as being compatible with the doctrine of comparative fault. [T]he policy considerations underlying the comparative fault doctrine would best be served by the jury's consideration of the negligence of all participants to a particular incident which gives rise to a lawsuit.[12]

In reaching this conclusion, New Hampshire extensively discussed the comparative negligence systems of other jurisdictions and the decision to assign fault to those not before the court. For example, in Idaho, "when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction...whether or not they can be liable to the plaintiff or to the other tortfeasors either by operation of law or because of a prior release."[13]

The Mississippi Supreme Court echoed this decision, but highlighted an important analytical distinction: a tortfeasor may be at fault but be liable for damages. A "party" refers to any participant to an occurrence which gives rise to a lawsuit, and not merely the parties to a particular lawsuit or trial.... Fault and liability are not synonyms. "Fault" is "an act or omission." Immunity from liability does not prevent an immune party from acting or omitting to act. Rather, immunity shields that party from any liability stemming from that act or omission. There is nothing logically or legally inconsistent about allocating fault but shielding immune parties from liability for that fault. And there is no reason to imagine that the Legislature did not intend fault to be allocated

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against immune parties, insofar as that allocation can be of no detriment to those parties.[14]

Thus "party" in Mississippi means "any participant to an occurrence which gives rise to a lawsuit, and not merely the parties to a particular lawsuit or trial"[15] and sweeps "broadly enough to bring in entities which would not or could not have been 'parties to a lawsuit,' thus including immune parties."[16]

The Solution for Nevada

As noted in New Hampshire, "limiting a jury to a consideration of the fault of the parties at trial would infringe upon a defendant's right to present his or her version of a case to a jury...."[17] Likewise, as noted in Hawaii, it can block a plaintiff from a full recovery. Unlike the states discussed, the term "party" as used in NRS 41.141 is not ambiguous. Thus, legislative action is required to remedy this problem. Many states have adopted comparative negligence statutes upon which Nevada could base its revisions to NRS 41.141.[18] Each of these states, like Oregon, have "gatekeeper" procedural safeguards in place to protect the integrity of the system.

A revised NRS 41.141 should establish a fact finder's ability to allocate fault to anyone, including immune or nonparties, provided procedural and evidentiary burdens are satisfied. This approach results in a true comparison of negligence which cannot occur if immune parties may not be assessed fault such as in Oregon. As the Mississippi Supreme Court noted, "[t]here is nothing logically or legally inconsistent about allocating fault but shielding immune parties from liability for that fault."[19] More importantly, the facts presented to the jury for decision are distorted by precluding the allocation of fault to an immune party. Immunity saves the tortfeasor from liability for any judgment, but does not render them faultless.

This approach understandably would raise concern among employers who possess immunity under workers' compensation. To allay these concerns, other jurisdictions have specifically used statutory language which states that assessments of percentages of fault for nonparties or immune persons are used only to accurately determine the fault of the named parties. An assessment of fault against nonparties or immune persons does not subject them to liability in any action and it may not be introduced as evidence of liability in any action.

Shifting fault to a nonparty should not be an easy escape for a litigant; thus, certain procedural safeguards should be enacted. Along these lines, some states adopted language permitting the fact finder to allocate fault "to those for whom there is a factual and legal basis to allocate fault." Like in Oregon, this establishes an evidentiary threshold which must be satisfied.

Procedurally, litigants should know if other litigants to the suit intend to argue the liability of a nonparty or immune person. Thus it may be advisable to require the litigant seeking to argue liability in this manner to plead it as an affirmative defense. Along this line, other jurisdictions require the litigant seeking to argue nonparty liability to serve notice of the identity and last known contact information of the nonparty. If a nonparty is accessible and jurisdiction can be obtained, they should be added to the suit.

Conclusion

"[W]e believe that fairness precludes a defendant from bearing the entire weight of a damages verdict where, for example, that defendant is ten percent at fault and another party possessing absolute immunity from liability is ninety percent at fault."[20] NRS 41.141 in its present form, however, actually serves to encourage this precise scenario. It is time for Nevada to reform NRS 41.141 and join the growing trend of states moving away from its restrictive interpretation of comparative negligence. ■

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1 *Warmbrodt v. Blanchard*, 100 Nev. 703, 692 P.2d 1282 (1984).
2 *Banks v. Sunrise Hosp.*, 120 Nev. 822, 845, 102 P.3d 52, 67 (2004).
3 *Paul v. N.L. Indus.*, 624 P.2d 68, 70 (Okla. 1980).
4 *Sugue v. F. L. Smithe Mach. Co.*, 546 P.2d 527 (Haw. 1976).
5 Richard S. Miller, *Filling the "Empty Chair": Some Thoughts About* Sugue, 15 Haw. B.J. 69, 70 (1980).
6 *Mills v. Brown*, 735 P.2d 603 (Or. 1987).
7 *Mills v. Brown*, 726 P.2d 384 (Or. App. 1986), *rev'd* 735 P.2d 603 (Ore. 1987).
8 *Mills*, 735 P.2d at 605.
9 Or. Rev. Stat. § 31.600 (2008).
10 *Mihoy v. Proulx*, 313 A.2d 723 (N.H. 1973).
11 *DeBenedetto v. CLD Consulting Eng'rs, Inc.*, 903 A.2d 969, 978 (N.H. 2006) (*citing* 1 Comparative Negligence Manual § 14.9, at 14-12 (3d ed., Clark Boardman Callaghan 1995)).
12 *Id.* (internal citations and quotations omitted).
11 *Van Brunt v. Stoddard*, 39 P.3d 621, 627 (Idaho 2001) (internal citations omitted).
14 *Mack Trucks, Inc. v. Tackett*, 841 So. 2d 1107, 1113 (Miss. 2003).
15 *Estate of Hunter v. General Motors Corp.*, 729 So. 2d 1264, 1276 (Miss. 1999).
16 *Tackett*, 841 So. 2d at 1113.
17 *DeBenedetto*, 903 A.2d at 979.
18 Ariz. Rev..Stat. § 12-2506(A) (2008); Colo. Rev. Stat. § 13-21-111.5(2)-(3)(b) (2008); Fla. Stat. § 768.81(3)(a), (b) (2008); Ohio. Rev. Code § 2307.23 (2008); Okla. Stat. tit. 23 § 13 (2008); Wash. Rev. Code § 4.22.070(1) (2008); Wyo. Stat. Ann. § 1-1-109(c)(d) (2008).
19 *Tackett*, 841 So. 2d at 1113.
20 *DeBenedetto*, 903 A.2d at 979.