

## Surprising New Data on Modified Comparative Negligence: *A Boon for Plaintiffs?*

Recently published analyses of more than 800 trials in which juries allocated fault suggest that juries in modified comparative negligence states, as compared to pure comparative negligence states, are more likely to find plaintiffs less than 50% at fault.

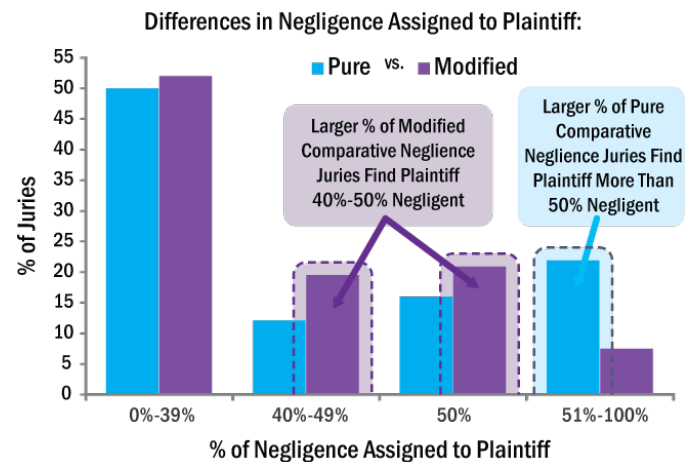
California and eleven other states use pure comparative negligence rules, where plaintiffs can recover a proportional amount of damages unless their share of the negligence is 100%. Illinois, Indiana, and nineteen other states use modified comparative negligence rules, where plaintiffs recover a proportional amount of damages unless their share of the negligence is greater than 50%. Many trial lawyers believe defendants are better off in modified states, where counsel just has to convince a jury that the plaintiff was at least 51% at fault to achieve a defense verdict. But, juries in modified states are usually informed of the consequence of finding a plaintiff more than 50% at fault. With that knowledge, might juries in modified states actively work to avoid finding a plaintiff just over 50% at fault, even when the evidence warrants such a finding?

Stanford Law School Professor John J. Donohue and a colleague set out to explore that question with empirical data from the Bureau of Justice Statistics and the National Center for State Courts. They analyzed a sample of 823 state court negligence trials in which the jury recorded "the percentage of negligence assigned to the plaintiff." (Pg. 957.) The data they analyzed presumably excluded defense verdicts in which there was no allocation of fault or the allocation was not reported in the dataset. Of the 823 cases, 388 were from "pure" states and 435 were from "modified" states.

In pure states, about 22% of the trials resulted in a finding that the plaintiff was more than 51% at fault. In contrast, that result was seen in only about 8% of the trials in modified states.

Percentage of Juries That Found the Plaintiff 51% or More at Fault	
"Pure" States	"Modified" States
21.9%	7.6%

The researchers also conducted a regression analysis. This allowed them to control for other variables that could be systematically impacting the results, such as litigant characteristics, state demographics, and case type (motor vehicle, premises liability, etc.). The results revealed that, all else being equal, being in a pure versus a modified jurisdiction had no meaningful relationship with the percentage of juries who find plaintiffs less than 40% at fault. However, statistically significant differences between pure and modified states emerged when the plaintiffs were found 40% or more at fault. According to the researchers, a plaintiff in a modified state is "more likely to be found to be between 40 and 49 percent negligent . . . , more likely to be found to be exactly 50 percent negligent, and . . . less likely to be found to be between 51 and 100 percent negligent." (Pg. 965.)



Because the results are statistically significant, it is highly unlikely the findings are due to chance. Instead, something is causing this pattern. What that "something" is, the researchers could not definitively answer. But a reasonable theory is that, when faced with a sympathetic plaintiff, juries "manipulate the percentage of negligence to avoid the harsh result of a plaintiff arbitrarily going home empty-handed." (Pg. 975-976.)

Eli K. Best & John J. Donohue III, *Jury Nullification in Modified Comparative Negligence Regimes*, 79 U. Chi. L. Rev. 945 (2012).