

# PERSPECTIVES ON THE LAW

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## Comparative Fault—It’s There if You “Lookout” for it

— by Jay D. Enloe

Do you ever wonder why it is that you or others you know can go 30 or 40 years without being involved in a serious motor vehicle accident, yet others (usually claimants) cannot seem to go more than a couple of years without being involved in yet another collision? Although it is true that, from time to time, a driver can find him or herself involved in an accident without it being their fault in any way (for example, parked on the side of the road and being run over when a semi leaves the road), usually most drivers in accidents did something to contribute to the cause of the accident, even if the majority of the fault is attributable to someone else.

Drivers who go decades without being involved in accidents are the more defensive drivers among us. Because they do not seem to get into accidents, we do not usually see them in connection with claims or litigation. By definition, drivers who are either claimants or plaintiffs have been in accidents. Therefore, there is usually some factual basis to charge them with fault, even if not the primary fault for the collision’s occurrence. What I am talking about, of course, is comparative fault.

Comparative fault is often overlooked. Too many claimants and their attorneys will suggest to you that “there is no question about liability”, whether or not that is true. You are not bound to agree with such incorrect assertions.

The legal significance of comparative fault is that the percentage of fault attributable to the plaintiff reduces the amount of damages

that an arbitrator or jury awards, economic as well as noneconomic, pursuant to ORS 18.470. A plaintiff’s fault that exceeds 50% will bar a damage recovery all together. Otherwise, 50% fault or less still reduces the recovery. In other words, if the plaintiff has \$10,000 in medical bills and lost wages, and another \$10,000 in noneconomic damages, for a total damages award of \$20,000, a 50% finding of comparative fault will result in a net recovery of only \$10,000. Even 10%, in such a case, will save the defendant, and the defendant’s insurer, \$2,000.

So—where can you find comparative fault? Do you ever notice how drivers insist on camping on each other’s tails on the freeways around here? Or, do you notice how drivers enter uncontrolled intersections (mostly in residential areas) as if they are on a through street, whether or not they are on the “right” of other vehicles about to enter the same intersection? Do you ever notice drivers start up from a stop when their light turns green, without bothering to check to see if other drivers are going to stop when their light turns red? These are all instances in which both drivers usually played a role in causing the resulting accidents, and thus comparative fault would apply.

### Following too Closely

Defensive drivers go out of their way to leave enough room ahead, so as to be able to react safely if something unusual happens ahead. Drivers who are “following too closely” are the ones who tell you in recorded statements, or tell their doctors when showing up for treatment of whiplash,

that the traffic ahead stopped or slowed and they “had to slam on the brakes”. Their sudden slowing contributed to the inability of the drivers to their rear to safely slow without plowing into them. The defensive driver, who brakes gradually when traffic ahead stops or slows, usually does not get rearended. As a result, the driver who “had to slam on the brakes” usually contributed to the cause of the accident and could be assigned some percentage of comparative fault by an arbitrator or jury. The exact percentage assigned is usually more a function of whether such a plaintiff and the plaintiff’s attorney are liked by the arbitrator or jury, and how that impression is compared to that of the defendant and the defendant’s attorney, and whether the damages claim presented is reasonable or overreaching. Claims for excessive damages, or an unreasonable amount of medical care or time loss for insignificant injuries, can make a pretty major difference in the amount of comparative fault assigned.

### **Right of Way**

Remember the old public service commercials on television that talked about drivers who have the right of way sometimes being “dead right”? Right of way is only relative. In other words, statutes give certain drivers a favored position vis-à-vis other drivers in a particular situation. Right of way does not, however, absolve them of fault.

A perfect example of this is the many uncontrolled intersections in the Portland residential neighborhoods. Without regard to excessive speed (which can be the subject of an entirely separate discussion), it is almost always true that no accident occurring at an uncontrolled intersection is 100% the fault of the driver on the left. Although serious injuries and other sympathetic circumstances can cause juries

to treat such accidents as 100% fault situations, as a matter of fact, and as supported by statutory law, almost every uncontrolled intersection accident involves at least 25% comparative fault, on the driver on the right. One of my partners, Tim Heinson, recently tried such a case to a jury in Multnomah County in which the jury assigned 45% comparative fault to the plaintiff, who was the driver on the right. That case involved some serious “lookout” problems for the plaintiff, as well as excessive speed. ORS 811.275 provides that drivers who enter uncontrolled intersections at an “unlawful” speed forfeit the right of way to which they would otherwise be entitled.

### **Traffic Control Devices**

For the most part, I am referring to traffic lights (red, green, yellow), but even stop signs and warning signs are traffic control devices. As with right of way, having the favored position with respect to a traffic control device does not absolve a driver of fault. It is true that a driver running a red light will often find him or herself in a 100% liability situation (for example, when a driver on a green light is just driving down the street, enters the intersection with traffic, and is blasted by a driver who enters the intersection on a red light from behind another, larger, vehicle). Many drivers who enter an intersection when their light turns green, from a stop, do so without first determining whether cross traffic is going to stop. That is extremely dangerous, especially when many drivers these days seem to treat a yellow light as a direction to “go very fast”—and they do so without regard to how far from the intersection they are when their light turns yellow (yellow lights actually require drivers to stop, if they can do so safely, pursuant to ORS 811.260). Entering the intersection from a stop will often give rise to at least the possibility of

an arbitrator or jury deciding that the driver doing so should have first looked, to see if anyone was about to enter the intersection from the side.

### **Other Duties**

Without regard to following too closely, right of way, and traffic control signals, all drivers owe other drivers (and passengers and pedestrians) the duty to drive reasonably. Unless a particular statutory duty like right of way is involved, these duties are usually designated in pleadings as negligence charges of “speed”, “lookout” and “control”. In other words, every driver is required by law to drive at a reasonable

speed, to keep a reasonable lookout for what is going on around them, and to maintain reasonable control of their vehicle at all times.

If you look closely enough, you will usually find that any driver who finds him or herself in an accident that crosses your desk has failed to adhere to at least one of these duties and, as a result, should be looking for less of a recovery than if they had just been parked, properly, on the side of the road and were run over by a semi. ❖

*— If you have any questions about this subject area, please feel free to contact the author by phone at (503) 768-9600 or by email at [jay@lerlaw.com](mailto:jay@lerlaw.com).*