

**Representative John E. Swallow** proposes to substitute the following bill:

**COMPARATIVE NEGLIGENCE ALLOCATION**

1999 GENERAL SESSION

STATE OF UTAH

**Sponsor: John E. Swallow**

AN ACT RELATING TO THE JUDICIAL CODE; ALLOWING THE ALLOCATION OF FAULT IN A NEGLIGENCE ACTION TO BE ATTRIBUTED TO ALL PERSONS WHO CONTRIBUTED TO THE INJURY, EVEN THOSE IMMUNE FROM SUIT; AND PROVIDING FOR RETROSPECTIVE OPERATION.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

**78-27-37**, as last amended by Chapter 240, Laws of Utah 1996

**78-27-38**, as last amended by Chapter 221, Laws of Utah 1994

**78-27-39**, as last amended by Chapter 221, Laws of Utah 1994

**78-27-41**, as last amended by Chapter 221, Laws of Utah 1994

**78-27-43**, as last amended by Chapter 240, Laws of Utah 1996

*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section **78-27-37** is amended to read:

**78-27-37. Definitions.**

As used in Sections 78-27-37 through 78-27-43:

(1) "Defendant" means a person, other than a person immune from suit as defined in Subsection (3), who is claimed to be liable because of fault to any person seeking recovery.

(2) "Fault" means any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all its degrees, [contributory] comparative negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification, or abuse

26 of a product.

27 (3) "Person immune from suit" means:

28 (a) an employer immune from suit under Title [35A] 34A, Chapter 3, Workers'  
29 Compensation Act, or Chapter 3a, Utah Occupational Disease Act; and

30 (b) a governmental entity or governmental employee immune from suit pursuant to Title  
31 63, Chapter 30, Governmental Immunity Act.

32 (4) "Person seeking recovery" means any person seeking damages or reimbursement on  
33 its own behalf, or on behalf of another for whom it is authorized to act as legal representative.

34 Section 2. Section **78-27-38** is amended to read:

35 **78-27-38. Comparative negligence.**

36 (1) The fault of a person seeking recovery shall not alone bar recovery by that person.

37 (2) A person seeking recovery may recover from any defendant or group of defendants  
38 whose fault, combined with the fault of persons immune from suit, exceeds the fault of the person  
39 seeking recovery prior to any reallocation of fault made under Subsection 78-27-39(2).

40 (3) No defendant is liable to any person seeking recovery for any amount in excess of the  
41 proportion of fault attributed to that defendant under Section 78-27-39.

42 (4) (a) In determining the proportionate fault attributable to each defendant, the fact finder  
43 may, and when requested by a party shall, consider the conduct of any person who contributed to  
44 the alleged injury regardless of whether the person is a person immune from suit or a defendant  
45 in the action and may allocate fault to each person seeking recovery, to each defendant, and to any  
46 other person whether joined as a party to the action or not and whose identity is known or  
47 unknown to the parties to the action, including a person immune from suit who contributed to the  
48 alleged injury. In the case of a motor vehicle accident involving an unidentified motor vehicle, the  
49 existence of the vehicle shall be proven by clear and convincing evidence which may consist solely  
50 of one person's testimony.

51 (b) Any fault allocated to a person immune from suit is considered only to accurately  
52 determine the fault of the person seeking recovery and a defendant and may not subject the person  
53 immune from suit to any liability, based on the allocation of fault, in this or any other action.

54 Section 3. Section **78-27-39** is amended to read:

55 **78-27-39. Separate special verdicts on total damages and proportion of fault.**

56 (1) The trial court may, and when requested by any party shall, direct the jury, if any, to

57 find separate special verdicts determining the total amount of damages sustained and the  
58 percentage or proportion of fault attributable to each person seeking recovery, to each defendant,  
59 and to any other person whether joined as a party to the action or not and whose identity is known  
60 or unknown to the parties to the action, including a person immune from suit who contributed to  
61 the alleged injury.

62 (2) (a) If the combined percentage or proportion of fault attributed to all persons immune  
63 from suit is less than 40%, the trial court shall reduce that percentage or proportion of fault to zero  
64 and reallocate that percentage or proportion of fault to the other parties in proportion to the  
65 percentage or proportion of fault initially attributed to each party by the fact finder. After this  
66 reallocation, cumulative fault shall equal 100% with the persons immune from suit being allocated  
67 no fault.

68 (b) If the combined percentage or proportion of fault attributed to all persons immune from  
69 suit is 40% or more, that percentage or proportion of fault attributed to persons immune from suit  
70 may not be reduced under Subsection (2)(a).

71 (c) (i) The jury may not be advised of the effect of any reallocation under Subsection (2).

72 (ii) The jury may be advised that fault attributed to persons immune from suit may reduce  
73 the award of the person seeking recovery.

74 (3) A person immune from suit may not be held liable, based on the allocation of fault, in  
75 this or any other action.

76 Section 4. Section **78-27-41** is amended to read:

77 **78-27-41. Joinder of defendants.**

78 (1) A person seeking recovery, or any defendant who is a party to the litigation, may join  
79 as a defendant, in accordance with the Utah Rules of Civil Procedure, any person other than a  
80 person immune from suit who may have caused or contributed to the injury or damage for which  
81 recovery is sought, for the purpose of having determined their respective proportions of fault.

82 (2) A person immune from suit may not be named as a defendant, but fault may be  
83 allocated to a person immune from suit solely for the purpose of accurately determining the fault  
84 of the person seeking recovery and a defendant. A person immune from suit is not subject to any  
85 liability, based on the allocation of fault, in this or any other action.

86 (3) (a) A person immune from suit may intervene as a party under Rule 24, Utah Rules of  
87 Civil Procedure, regardless of whether or not money damages are sought.

88 (b) A person immune from suit who intervenes in an action may not be held liable for any  
89 fault allocated to that person under Section 78-27-38.

90 (4) A party seeking to allocate fault shall identify in its answer those persons then known  
91 to that party who may be at fault and shall identify within a reasonable time any additional persons  
92 later discovered to have been at fault.

93 Section 5. Section **78-27-43** is amended to read:

94 **78-27-43. Effect on immunity, exclusive remedy, indemnity, contribution.**

95 Nothing in Sections 78-27-37 through 78-27-42 affects or impairs any common law or  
96 statutory immunity from liability, including, but not limited to, governmental immunity as  
97 provided in Title 63, Chapter 30, and the exclusive remedy provisions of Title [35A] 34A, Chapter  
98 3, Workers' Compensation Act. Nothing in Sections 78-27-37 through 78-27-42 affects or impairs  
99 any right to indemnity or contribution arising from statute, contract, or agreement.

100 Section 6. **Retrospective operation.**

101 This act has retrospective operation to March 3, 1998, for any actions for which:

102 (1) retrospective operation does not enlarge, eliminate, or destroy a vested right; and

103 (2) a final unappealable judgment or order has not been issued as of the effective date, by:

104 (a) the United States Supreme Court;

105 (b) the Utah Supreme Court;

106 (c) the Utah Court of Appeals;

107 (d) the United States Circuit Court of Appeals;

108 (e) the United States District Court; or

109 (f) the Utah district court.