University of Arkansas at Little Rock Law Review

Volume 11 | Issue 3 Article 3

1988

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Recommended Citation

Leonard Charles Schwartz, *The Myth of Nonapportionment Between a Plaintiff and a Defendant Under Traditional Tort Law and Its Significance for Modern Comparative Fault*, 11 U. ARK. LITTLE ROCK L. REV. 493 (1989).

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THE MYTH OF NONAPPORTIONMENT BETWEEN A PLAINTIFF AND A DEFENDANT UNDER TRADITIONAL TORT LAW AND ITS SIGNIFICANCE FOR MODERN COMPARATIVE FAULT

*Leonard Charles Schwartz**

I. Introduction

Under traditional tort law (that is, tort law before modern comparative fault), can the loss suffered by the plaintiff be apportioned between the plaintiff and the defendant?[1] Many courts and commentators have stated that with the exception of "avoidable consequences," traditional tort law takes an all-or-nothing approach and does not allow apportionment.[2] This article debunks the myth of nonapportionment. It shows that traditional tort law does allow apportionment, but that the method of apportionment generally differs from that of modern comparative fault.

Section II shows the wide extent to which traditional tort law allows apportionment. Section III shows that the myth of nonapportionment arose primarily because of changes in the terminology of tort law. Section IV discusses the role of the *Restatement of Torts*[3] in the persistence of the myth of nonapportionment. Section V discusses the significance of traditional apportionment for modern comparative fault.

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1. "Plaintiff," in this article, means a person who has suffered a loss. "Defendant" means any person, other than the plaintiff, whose conduct is a cause of the plaintiff's loss. "Conduct" includes action and a failure to act. Thus, in a multi-car collision among X, Y, and Z, when considering the loss suffered by X, X is the plaintiff, and Y and Z are the defendants regardless of who is suing whom and regardless of whether a person is a litigant. This article is only tangentially concerned with situations where there are many defendants.

2. This myth has been asserted in *e.g.*, Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Kirby v. Larson, 400 Mich. 585, 256 N.W.2d 400 (1977); Annotation, *Modern Development of Comparative Negligence Doctrine Having Applicability to Negligence Actions Generally*, 78 A.L.R.3d 339 (1977); Annotation, *The Doctrine of Comparative Negligence and Its Relation to the Doctrine of Contributory Negligence*, 32 A.L.R.3d 463 (1970).

For a discussion of "avoidable consequences," *see infra* text accompanying notes 97-108.

3. Restatement of Torts (1934).

Important to the understanding of apportionment is the distinction between a casualty, an invasion of a legally protected interest, harm, loss, and damages. "Casualty," in this article, means any unfortunate or undesired occurrence. "Invasion of a legally protected interest" means an actionable wrong. "Harm" means a detriment. "Loss" means the compensatory value of the harm suffered.[4] "Damages" means the monetary remedy for an invasion of a legally protected interest.

When the defendant touches the plaintiff, and the plaintiff does not want to be touched by the defendant, there is a casualty. The touching, however, does not necessarily involve an invasion of a legally protected interest, such as where the touching is not offensive.[5] The touching also does not necessarily involve any harm, such as where there is no physical injury or pain and suffering. Sometimes a casualty is an invasion of a legally protected interest only if there is harm, such as where the defendant creates a nuisance.[6] Sometimes a casualty is an invasion of a legally protected interest even if there is no harm, such as where the defendant trespasses on the plaintiff's land.[7] Sometimes a casualty is not an invasion of a legally protected interest even if there is harm, such as where the defendant alienates a third person's affection for the plaintiff, but the common law action for alienation of affection has been statutorily abolished.[8]

Damages are allowed only where there is an invasion of a legally protected interest. If an invasion involves no loss, damages generally are nominal.[9] If an invasion involves loss, damages generally are compensatory.[10]

Also important to the understanding of apportionment is the distinction between causation and blameworthiness. "Causation" means causation in fact, which refers to the substantial factors that bring about a casualty, an invasion of a legally protected interest, harm, or

4. This article is not concerned with the criteria by which harm is valuated. Economic harm can be valuated by at least two methods: (1) objective market value and (2) subjective personal value. Schwartz, *Particular Loss, Average Loss, and Actuarial Loss: The Ethics and Economics of Alternative Remedies for Wrongful Conduct*, 18 CONN. L. REV. 115, 115 n.1 (1985).

5. RESTATEMENT (SECOND) OF TORTS §§ 18-19 (1965).

6. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 87 (4th ed. 1971).

7. *See* RESTATEMENT (SECOND) OF TORTS § 158 (1965).

8. *See* W. PROSSER, *supra* note 6, § 124.

9. C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 20 (1935).

10. *Id.* § 77. Punitive damages, if allowed, generally must bear some relationship to loss. *Id.* § 85.

loss.[11] This article is only tangentially concerned with "legal cause" or "proximate cause," which refer to limitations on liability despite causation in fact.[12] "Blameworthy" means a failure to meet some standard of right conduct, often described by terms such as "malicious," "intentional," "reckless," and "negligent."

The issue of apportionment arises where the total loss involves more than one substantial causal factor. In addition to the issues of determining the total harm suffered by the plaintiff and determining the amount of money that is commensurate with the harm, there is the issue of allocating liability for the total loss.[13] Methods of allocating liability between a plaintiff and a defendant can be divided into two broad categories: nonapportionment rules and apportionment rules. Under a nonapportionment rule, either the defendant is liable for the entire loss or the plaintiff bears the entire loss. Under an apportionment rule, the defendant is liable for part of the loss and the plaintiff bears the rest of the loss.[14]

II. Apportionment Under Traditional Tort Law

Under traditional tort law, apportionment between a plaintiff and a defendant was allowed if there were distinct harms or a reasonable basis for determining the contribution of each cause to a single harm.[15] If there was no reasonable basis for apportioning the loss based on causation, or at least if no party offered evidence that the loss was apportionable, traditional tort law took an all-or-nothing approach to damages.[16] Either the defendant was liable for the entire

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11. *See* W. Prosser, *supra* note 6, § 41.

12. *Id.* § 42.

13. Schwartz, *The Many Meanings of Comparative Fault: An Economic Analysis of Alternative Methods of Apportioning Liability*, 17 N.C. Central L.J. 191 (1988).

14. For a discussion of the possible methods of apportionment, *see id.*

If there are many defendants, under a nonapportionment rule, either one or more defendants is liable for the entire loss or the plaintiff bears the entire loss. Under an apportionment rule, each defendant is liable for part of the loss and the plaintiff bears the rest of the loss. *Id.*

Under a nonapportionment rule, if two or more defendants are each liable for the entire loss, the plaintiff generally decides what share of the judgment will be enforced against each defendant. Thus, even a nonapportionment rule involves an apportionment. But the apportionment is by the plaintiff, not the judge or jury. *Id.*

Apportionment of loss has also been called apportionment of harm and apportionment of damages. Restatement (Second) of Torts § 433A (1965). If the harm is caused only by defendants (and not also by the plaintiff) and if damages (the money remedy owed by the defendants) are compensatory, apportionment of the loss is also apportionment of damages. But if the harm is caused partly by the plaintiff, "apportionment of damages" is misleading.

15. Restatement (Second) of Torts §§ 433A, 465 (1965), discussed *infra* text accompanying notes 103-08.

16. Restatement (Second) of Torts §§ 433A, 465 (1965). If apportionment could

loss or the plaintiff could not recover any damages.[17]

The rule allowing apportionment was quite broad. Apportionment was allowed where the conduct of the plaintiff and the defendant caused similar harm. For example, loss could be apportioned where the plaintiff's stream was polluted by both the plaintiff and the defendant,[18] or where the plaintiff suffered from offensive odors caused by both the plaintiff and the defendant,[19] or where the plaintiff's land was flooded because both the plaintiff and defendant did not maintain their respective drainage ditches.[20] In a multiple defendants situation, where, for example, the plaintiff's grazing land was injured by his own livestock as well as that of several neighbors, each neighbor was liable for only the loss caused by his own livestock.[21]

If one of the substantial causal factors was an act of nature, the plaintiff must bear the loss caused by the act of nature. For example, where the extent to which the plaintiff's property was flooded was increased by the defendant's negligence, the plaintiff must bear the loss that he would have suffered even if the defendant had not been negligent.[22] The same rule applied where the extent of the plaintiff's

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not be based on the causation of loss, traditional tort law refused to apportion damages according to any other criterion such as the degree of blameworthiness. Causation of loss was considered an objective and reasonable criteria for apportionment. The degree of blameworthiness, on the other hand, was considered subjective and arbitrary. Syroid v. Albuquerque Gravel Prods. Co., 86 N.M. 235, 522 P.2d 570 (1974) (refusing to impose comparative negligence). *See* W. PROSSER, *supra* note 6, § 52, at 313-14.

17. *See infra* text accompanying notes 74-92.

18. Bowman v. Humphrey, 132 Iowa 234, 109 N.W. 714 (1906); Walters v. Prairie Oil & Gas Co., 85 Okla. 77, 204 P. 906 (1922).

19. City of New Albany v. Slider, 21 Ind. App. 392, 52 N.E. 626 (1899); Correll v. City of Cedar Rapids, 110 Iowa 333, 81 N.W. 724 (1900); Randolf v. Town of Bloomfield, 77 Iowa 50, 41 N.W. 562 (1889).

20. Philadelphia & R.R. Co. v. Smith, 64 F. 679, 680 (3d Cir. 1894).

> One who decisively contributes to bring a mischief on himself may not impute it to another, but he who does hurt to his neighbor cannot escape liability for the damage thereby occasioned by showing that the person he has injured has also sustained other or additional damage of the same character through separate acts or omissions of his own. In such cases, each party is chargeable with the consequences of his own conduct, and neither of them is at liberty to shift his burden to the shoulders of the other.

Id. at 680.

21. Pacific Live Stock Co. v. Murray, 45 Ore. 103, 109, 76 P. 1079, 1080 (1904).

> It was also competent for the defendant to show . . . that the plaintiff and other parties had cattle grazing on the same land with his sheep during the time of the alleged trespass, and that part of the injury complained of was caused by such cattle. He is liable only for the mischief done by his sheep, and not for that done by animals belonging to other parties.

Id.

22. McAdams v. Chicago, R.I. & P. Ry. Co., 200 Iowa 732, 205 N.W. 310 (1925) (the

loss was also increased by the plaintiff's negligence or a risk the plaintiff assumed.[23]

Apportionment sometimes involved a distinction between the defendant's negligent conduct and the defendant's nonnegligent conduct.[24] Apportionment could also involve the distinction between loss for which recovery is barred by the statute of limitations and loss for which recovery is not barred by the statute of limitations.[25]

Loss could be apportioned where the defendant caused a casualty, and the plaintiff aggravated or failed to mitigate the harm. For example, where the defendant negligently started a fire which spread to the plaintiff's land, but the plaintiff waited three days, after discovering the fire, before trying to put it out, the plaintiff could not recover damages for the loss caused by the failure to act promptly.[26] Where a collision was caused by the defendant, but the plaintiff's vehicle caught on fire because the plaintiff negligently left the vehicle without turning off the motor, the plaintiff could not recover damages for the loss caused by the fire.[27] Where the plaintiff did not seek medical care after being injured by the defendant, the plaintiff could not recover

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defendant partly dammed a river); Sherwood v. St. Louis S.W. Ry., 187 S.W. 260 (Mo. App. 1916) (the defendant did not provide sufficient drainage under an embankment); Standley v. Atchison, T. & S. F. Ry. Co., 121 Mo. App. 537, 97 S.W. 244 (1906) (the defendant partly dammed a stream); Rix v. Town of Alamogordo, 42 N.M. 325, 77 P.2d 765 (1938) (the defendant poorly designed, built, and maintained a drainage canal system); Wilson v. Hagins, 116 Tex. 538, 295 S.W. 922 (1927) (the defendant built an embankment and ditch that diverted water onto the plaintiff's land); Radburn v. Fir Tree Lumber Co., 83 Wash. 643, 145 P. 632 (1915) (the defendant obstructed the natural flow of water); Nitro-Phospate & Odam's Chemical Manure Co. v. London & St. Katherine Docks Co., 9 Ch. D. 503 (1878) (the defendant did not maintain an embankment at the required height); Workman v. Great Northern Ry., 139 Rev. Rep. 749, 32 L.J.Q.B. 279 (1863) (the defendant built an embankment that allowed flood waters to accumulate).

23. Gould v. McKenna, 86 Pa. 297 (1878). In *Gould*, the plaintiff and the defendant had adjoining buildings. The defendant extended his building, pitching his roof toward the openly constructed party wall using only a one-foot apron. During an unusually heavy rainstorm, water leaked through the wall, injurying the plaintiff's property. The court held that the defendant was liable only for the loss arising from the insufficiency of the apron, and was not liable for the loss from the rain that would have leaked through the wall anyway or that was beyond the foreseeable amount of rain.

24. Jenkins v. Pennsylvania R. Co., 67 N.J.L. 331, 51 A. 704 (1902). In *Jenkins* the plaintiff's property was injured by smoke from the defendant's trains. Some smoke was emitted negligently and some smoke was unavoidable. The court held that the defendant was liable only for the loss caused by the smoke that was emitted negligently.

25. Frederick v. City of Joplin, 201 S.W. 1147 (Mo. Ct. App. 1918). In *Frederick* the plaintiff's land was flooded because of improper grading and drainage by the defendant. Some of the loss was barred by the statute of limitations. The court held that the trier of fact should apportion the total loss between that which is actionable and that which is not actionable.

26. Talley v. Courter, 93 Mich. 473, 53 N.W. 621 (1892).

27. *See* Socony Vacuum Oil Co. v. Marvin, 313 Mich. 528, 21 N.W.2d 841 (1946).

damages for the loss caused by the failure to seek treatment.[28] And where the plaintiff continued to load liquid chemicals into a cargo tank on the defendant's ship after discovering that the cargo tank was severely contaminated, the defendant was liable only for the chemicals loaded before the plaintiff discovered that the tank was severely contaminated.[29]

Apportionment was also allowed where the defendant aggravated the plaintiff's pre-existing harm.[30] Such apportionment was allowed regardless of whether the pre-existing harm was caused by the plaintiff's conduct,[31] a risk that the plaintiff assumed,[32] a third person's conduct,[33] an act of nature,[34] or unknown causes.[35]

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28. *E.g.*, City of Duncan v. Nicholson, 118 Okla. 275, 247 P. 979 (1926). Because of the negligent conditions of the defendant's premises, the plaintiff fell and broke bones in his arm and hand. The plaintiff thought the injury was merely a sprain and did not seek treatment for 20-25 days. The plaintiff refused treatment that would require anesthetic. If the plaintiff had received treatment, he would have recovered completely. The court found the defendant not liable for the increased harm caused by the plaintiff's failure to procure timely treatment. *Accord* Hendler Creamery Co. v. Miller, 153 Md. 264, 138 A. 1 (1927); Wingrove v. Home Land Co., 120 W. Va. 100, 196 S.E. 563 (1938).

29. Federal Ins. Co. v. Sabine Towing & Trans. Co., 783 F.2d 347 (2d Cir. 1986) (suit by an insurance company subrogating to the rights of the insured).

30. A pre-existing harm can be distinguished from a predisposition to harm. With a pre-existing harm, such as a fractured skull, the harm is actual and certain. With a predisposition to harm, such as an egg-shell skull, the harm is potential and contingent. For a discussion of apportionment for a pre-existing harm, *see infra* text accompanying notes 31-35. For a discussion of apportionment for a predisposition to harm, *see infra* text accompanying notes 36-44.

31. For example, where the plaintiff stepped in front of a moving train (thus causing a collision), and the train negligently did not stop quickly after the collision (thus dragging or rolling over the plaintiff), the plaintiff could not recover damages for the loss caused by the original collision. He could, however, recover damages for the additional loss caused by the defendant's failure to stop quickly. Cleveland, C.C. & St. L. Ry. v. Klee, 154 Ind. 430, 56 N.E. 234 (1900); Weitzman v. Nassau Elec. R.R., 33 A.D. 585, 53 N.Y.S. 905 (1898); Teakle v. San Pedro, L.A. & S.L. R.R., 32 Utah 276, 90 P. 402 (1907).

And where the plaintiff fell off a bridge girder upon which he was playing, and was electrocuted when he hit a power line that the defendant had not properly insulated, damages should be based on the fact that the plaintiff would have died or been maimed anyway. Thus, the plaintiff's loss was apportioned between the loss that the plaintiff would have suffered anyway and the extra loss, if any, that was caused by the electrocution. Dillon v. Twin State Gas & Elec. Co., 85 N.H. 449, 163 A. 111 (1932).

32. For example, where an employee's fingers were caught in some rollers (a risk he assumed) and the rollers were turned off, and the employer negligently restarted the rollers (thus increasing the extent of the employee's harm), the employee could not recover damages for the loss that he originally suffered. But he could recover damages for the additional loss caused by the employer. Raasch v. Elite Laundry Co., 98 Minn. 357, 108 N.W. 477 (1906).

And where the plaintiff's house was so poorly built or maintained that it would have soon collapsed, and the house collapsed prematurely when the defendant excavated a hole four feet away, the defendant was liable only for the loss of the use of the house for the estimated life of the house. Dodd v. Holme, 100 Eng. Rep. 1296 (1834).

33. Modave v. Long Island Jewish Medical Center, 501 F.2d 1065 (2d Cir. 1974) (the plaintiff was injured in an automobile collision; the plaintiff's injuries were aggravated by the

Loss could also be apportioned where the plaintiff's prior conduct, although not itself a cause of a casualty, increased the extent of the plaintiff's loss from a casualty caused by the defendant. For example, where the plaintiff failed to wear a seat belt and was injured in a collision caused by the defendant, the plaintiff could not recover damages for the extent to which his loss was increased by the failure to wear a seat belt.[36] Similarly, apportionment was allowable where a motorcyclist failed to wear a helmet[37] and where a passenger stood up in a moving truck.[38] Where the plaintiff failed to tie down the load on his truck, and the truck hit a pile of gravel that the defendant negligently placed on the road, and the load crashed into the cab of the plaintiff's truck, the plaintiff could not recover damages for the extent to which his loss was increased by his failure to tie down the load.[39] Where the plaintiff knew that his land would be flooded by the defendant, but the plaintiff did not take precautions to minimize the expected harm, the plaintiff could not recover damages for the loss the

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malpractice of two hospitals at which she was treated; held: each hospital is liable only to the extent that it aggravated the plaintiff's loss); Gates v. Fleischer, 67 Wis. 504, 30 N.W. 674 (1886) (the plaintiff was treated by several doctors; in an action against one of them for malpractice, the court held that the jury should separate the harm caused by the defendant's malpractice from the prior or subsequent harm caused by other doctors and any other cause).

34. Louisville, N.A. & C. Ry. v. Jones, 108 Ind. 551, 9 N.E. 476 (1886) (the plaintiff's pre-existing disease was aggravated by a derailment of the defendant's train); Nelson v. Twin City Motor Bus Co., 239 Minn. 276, 58 N.W.2d 561 (1953) (the plaintiff's arthritis was aggravated when the plaintiff was caught in the doors of the defendant's bus and was dragged for several feet); Dallas Ry. & Terminal Co. v. Ector, 131 Tex. 505, 116 S.W.2d 683 (1938) (the plaintiff's kidney condition was aggravated by a collision of the defendant's street cars); Texas Coca-Cola Bottling Co. v. Lovejoy, 138 S.W.2d 254 (Tex. Civ. App. 1940) (the plaintiff had three prior abdominal operations; the plaintiff's condition was aggravated when the plaintiff drank some broken glass from the defendant's bottle).

35. Felter v. Delaware & H.R. Corp., 19 F. Supp. 852 (M.D. Pa. 1937), *affirmed*, 98 F.2d 868 (3d Cir. 1938). In *Felter* the plaintiff's house caught on fire from unknown causes. The defendant negligently blocked a railroad crossing, thus delaying the fire trucks for 15-20 minutes. The court held the defendant liable for the extent that its conduct increased the plaintiff's loss.

36. *E.g.*, Pritts v. Walter Lowery Trucking Co., 400 F. Supp. 867 (W.D. Pa. 1975) (applying Pennsylvania law); Truman v. Vargas, 275 Cal. App. 2d 976, 80 Cal. Rptr. 373 (1969); Spier v. Barker, 35 N.Y.2d 444, 363 N.Y.S.2d 916, 323 N.E.2d 164 (1974); Parise v. Fehnel, 267 Pa. Super. 79, 406 A.2d 345 (1979); Sams v. Sams, 247 S.C.2d 467, 148 S.E.2d 154 (1966). *See generally* Schwartz, *The Seat Belt Defense and Mandatory Seat Belt Usage: Law, Ethics, and Economics*, 24 IDAHO L. REV. 275 (1988).

37. Halvorson v. Voeller, 336 N.W.2d 118 (N.D. 1983).

38. *See* Dziedzic v. St. John's Cleaners & Shirt Launderers, Inc., 53 N.J. 157, 249 A.2d 382 (1969) (dictum) (the plaintiff was standing up in the defendant's truck when the defendant caused a collision).

39. *See* Spruce Equip. Co. v. Maloney, 527 P.2d 1295 (Alaska 1974) (dictum).

plaintiff could have avoided.[40] Where a fire started in the tenant's premises and the tenant failed to call the fire department promptly, but the fire spread quickly because the landlord's building was poorly constructed, the landlord could not recover damages for the extent to which the loss was caused by the faulty construction.[41] Where the plaintiff was driving some livestock at night without a reasonable number of assistants, and the livestock became entangled in the wire from one of the defendant's downed telegraph poles, the plaintiff could not recover damages for the extent to which his loss was enhanced by his failure to have a reasonable number of assistants.[42] And where a drunken passenger was thrown from a street car that was driven too rapidly around a curve, the passenger could not recover damages for the extent to which his loss was enhanced by his drunkenness.[43]

Apportionment was also allowed in the opposite situation where the defendant's prior conduct, although not itself a cause of a casualty, increased the extent of the plaintiff's loss from a casualty caused by the plaintiff or a third person. For example, where a plaintiff's hand was caught in some machinery due to his own negligence or a risk he assumed, and not due to any negligence of the defendant, but the plaintiff's entire arm was crushed because of the defendant's negligent maintenance of an emergency brake, liability was apportioned between the loss that the plaintiff would have suffered and the additional loss caused by the defendant's failure to maintain the emergency brake.[44]

In summary, apportionment under traditional tort law was concerned with causation of loss. As shown by the above examples, causation of loss is not necessarily related to causation of a casualty. A person can be a cause of loss regardless of whether he is a cause of a casualty. Furthermore, a person can be a cause of loss regardless of whether his conduct occurs before or after the casualty.

Traditional tort law was based on the principle that a defendant was liable for only the loss the defendant caused. A defendant was not liable for the loss caused by other tortfeasors, the plaintiff, or acts

40. Morrison v. Queen City Elec. Light & Power Co., 193 Mich. 604, 160 N.W. 434 (1916).

41. East Hampton Dewitt Corp. v. State Farm Mut. Auto. Ins. Co., 490 F.2d 1234 (2d Cir. 1973).

42. Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195 (1866).

43. O'Keefe v. Kansas City W. Ry., 87 Kan. 322, 124 P. 416 (1912).

44. Scheurer v. Banner Rubber Co., 227 Mo. 347, 126 S.W. 1037 (1910); DeGrazia v. Piccardo, 15 Pa. Super. 107 (1900).

of nature. A fundamental goal of traditional tort law was the determination of the amount of loss the defendant caused.

Since apportionment was allowed in such a wide variety of situations, why did the myth of nonapportionment arise?

III. The Historical Origins of the Myth of Nonapportionment

A. Tort Law Before the Abolition of the Forms of Action

The coexistence of apportionment and the myth of nonapportionment can perhaps be explained best by considering the history of the terminology of tort law. The present categorization of torts into classes based on the kind of blameworthiness ("malicious," "intentional," "reckless," "negligent," etc.) arose only after the abolition of the forms of action in the nineteenth century.[45]

Before the procedural reforms of the nineteenth century, noncriminal wrongs were classified according to the forms of action, such as trespass, nuisance, detinue, debt, and case. Trespass, for example, was an action for a direct and unauthorized interference with person, land, or chattels.[46] Nuisance was an action for a partial obstruction with the use of a freehold.[47]

Actions on the case are of special interest. This form of action arose in the fourteenth century. Originally, actions on the case were allowed where the technicalities of trespass were not satisfied (such as where the interference was not direct and unauthorized), and was generally called "trespass on the case."[48] In the fifteenth century actions on the case were also allowed where the technicalities of nuisance were not satisfied (such as where the plaintiff was not a freeholder).[49] Gradually actions on the case were also allowed where the technicalities of the other forms of action were not satisfied. Thus there were actions of trespass on the case, nuisance on the case, detinue on the case, debt on the case, etc.[50] By the sixteenth century "action on the case" was considered a distinct form of action, replacing earlier terms such as "trespass on the case."[51] "Case" quickly encompassed not only situations similar to, but technically not the

45. *See infra* text accompanying notes 65-84.
46. C. Fifoot, History and Sources of the Common Law 66 (1949).
47. *Id.* at 3.
48. *Id.* at 74-75.
49. *Id.* at 93-94.
50. *Id.* at 76-78.
51. *Id.* at 77-78.

same as, the specific forms of action, but also newly actionable wrongs (such as defamation) unrelated to the specific forms.[52] In essence, action on the case became a residual form of action wherever none of the specific forms of action were applicable.

Judicial enforcement of the distinctions between the forms of action was cyclical. Sometimes the courts ignored or gave only lip service to the technicalities of the forms of action.[53] For example, the requirement that a freeholder must sue for nuisance, rather than on the case, was abolished in 1601. A plaintiff could, therefore, elect to sue on the case where previously only nuisance was proper.[54] At other times the technicalities were strictly enforced.[55] If a plaintiff chose the wrong form of action the suit would be dismissed on procedural grounds, without looking at the merits of the case.

For trespass and case, the liability of the defendant was based sometimes on blameworthiness and sometimes not on blameworthiness.[56] In modern terminology, the defendant was sometimes subject to strict liability. But except for some new torts (such as malicious prosecution, for which liability was imposed sometimes only for malicious conduct),[57] there was no purpose in distinguishing various categories of blameworthiness. Although the distinction between blameworthy and nonblameworthy conduct was sometimes important, the particular type of blameworthiness was not important. For example, if a defendant committed a trespass, it was immaterial whether he did it maliciously, intentionally, recklessly, or negligently, just as it was immaterial whether he did it with a rock, a knife, or a fist. Thus "malice," "intent," "recklessness," "negligent," etc., were not part of the categorization of trespass and case.[58]

The categorization of blameworthiness apparently arose from the distinction between trespass and case. If an interference was direct, the plaintiff must sue for trespass. If the interference was indirect, the

52. *Id.* at 129.

53. *Id.* at 67.

54. Cantrel v. Church, 78 Eng. Rep. 1072 (1601) *see* C. FIFOOT, *supra* note 46, at 93-95.

55. C. FIFOOT, *supra* note 46, at 67.

56. *Id.* at 154-64. Furthermore, liability in some situations apparently was based on blameworthiness during some periods, but not during others. *Id.*

57. W. PROSSER, *supra* note 6, § 119.

58. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 375-77 (5th ed. 1942). Although such terms were not part of the categorization of torts, such terms were used where the defendant was liable only if his conduct was blameworthy. *E.g.*, Waldon v. Marshall, Y.B. 43 Edw. 3, fo. 33, pl. 38 (1370) (veterinarian negligently killed a horse he was trying to cure), *reprinted in* C. FIFOOT, *supra* note 46, at 81.

plaintiff must use action on the case.[59] The law made a distinction between direct and indirect, but not among the various categories of blameworthiness. Until the nineteenth century, this distinction was strictly enforced.[60]

Generally the difference between direct and indirect interference was clear. For example, if a defendant threw a log that hit the plaintiff, the interference was direct. If a plaintiff tumbled over a log thrown by the defendant, the interference was indirect.[61] But sometimes the distinction was not clear, such as where the defendant threw a lighted squib at a third party who (in self-defense) threw it at the plaintiff.[62] In cases where the directness of the interference was not clear, courts considered the kind of blameworthiness to decide which form of action was proper. Trespass was the proper form if the defendant acted intentionally. Action on the case was the proper form if the defendant was merely negligent.[63]

Shortly before the abolition of the forms of action, the kind of blameworthiness sometimes was considered as important as directness. If a direct injury was caused by mere negligence, the plaintiff was given the choice of suing for trespass or on the case, where previously only trespass was proper.[64]

B. Tort Law After the Abolition of the Forms of Action

The categorization of blameworthiness became more important after the abolition of the forms of actions in the nineteenth century. Freed of the old classification of noncriminal wrongs, the legal profession developed a new classification based on blameworthiness.[65] The distinction between intent and negligence, already important in deciding whether trespass or case was the proper form of action,[66] was a keystone of the new categorization.

Some commentators have written that negligence and strict liability each became a "separate tort" or an "independent basis of liability."[67] But the change was more terminological than substantive. Instead of intentionally, negligently, and accidentally being merely

59. C. FIFOOT, *supra* note 46, at 184-85. *See supra* text accompanying notes 46 & 48.
60. C. FIFOOT, *supra* note 46, at 184-87.
61. Reynolds v. Clarke, 92 Eng. Rep. 410 (1725).
62. Scott v. Shepherd, 96 Eng. Rep. 525 (1773).
63. *See* C. FIFOOT, *supra* note 46, at 184-95.
64. Williams v. Holland, 131 Eng. Rep. 848 (1833).
65. *See*, W. PROSSER, *supra* note 6, §§ 4-5.
66. *See supra* text accompanying notes 63-64.
67. *E.g.*, W. PROSSER, *supra* note 6, § 28 at 139.

different ways of committing a direct or an indirect tort, directly and indirectly were merely different ways of committing an intentional tort, a negligent tort, or a strict liability tort. The new terminology emphasized the blameworthiness of the defendant's conduct rather than that the conduct caused harm.[68]

Ironically, trespass (that is, a direct interference with person or property) was now called an intentional tort, although liability originally was imposed if the interference was done negligently or sometimes even accidentally.[69] Perhaps the association of intent with trespass arose from cases in which directness was unclear and for which (prior to the abolition of the forms of actions) trespass was the proper form if the defendant acted intentionally.[70]

The emphasis on blameworthiness supplemented, but did not replace causation. If the defendant's conduct was not a substantial causal factor of the plaintiff's loss, the defendant was not liable, regardless of the blameworthiness of his conduct. Likewise, if the plaintiff's conduct was not a substantial causal factor of his loss, the plaintiff was not barred from recovery, regardless of the blameworthiness of his conduct.[71]

The new emphasis based on blameworthiness was not without effect, however. Occasionally strict liability was reduced to liability based on blameworthiness,[72] or liability based on blameworthiness was expanded to strict liability.[73] Furthermore, an elaborate system of guidelines arose regarding whether conduct was blameworthy.[74]

The emphasis on blameworthiness did not change the apportionment rules based on causation where loss was apportionable. But it did affect the all-or-nothing approach where loss was nonapportionable. Differences in the kind of blameworthiness became the basis for liability for a nonapportionable loss caused by both a plaintiff and a defendant. If the defendant's kind of blameworthiness was worse than the plaintiff's kind of blameworthiness, the defendant was liable for the entire loss. If the plaintiff's kind of blameworthiness was at least as severe as the defendant's kind of blameworthiness, the plain-

68. 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 459-61 (2d ed. 1937).

69. *See* W. PROSSER, *supra* note 6, §§ 4, 7-15.

70. *See supra* text accompanying notes 61-63.

71. *See* RESTATEMENT (SECOND) OF TORTS §§ 431, 465 (1965).

72. Stanley v. Powell, [1891] 1 Q.B. 86 (the defendant was not liable for accidentally shooting the plaintiff in the eye).

73. Rylands v. Fletcher, 3 L.R.-E. & I. App. 330 (H.L. 1868) (the defendant accidentally flooded the plaintiff's mine shaft; the defendant was liable although the injury was indirect).

74. *See* RESTATEMENT (SECOND) OF TORTS §§ 282-328 (1965).

tiff could not recover any damages. For example, where blameworthiness was divided into the categories of intentional, reckless, and negligent, a defendant whose conduct was intentional was liable to a plaintiff whose conduct was merely reckless or negligent. Similarly, a defendant whose conduct was reckless was liable to a plaintiff whose conduct was merely negligent.[75]

The imposition of liability was dependent upon the degree of blameworthiness, as well as the kind of blameworthiness,[76] in some states during the nineteenth century. For a nonapportionable loss caused by a plaintiff and a defendant, the defendant was liable for the entire loss if his degree of blameworthiness was greater than the plaintiff's.[77] Although this was a comparative blameworthiness criterion, it should not be confused with modern apportionment by blameworthiness. Rather, this comparison of blameworthiness retained the traditional all-or-nothing approach to the awarding of damages for a nonapportionable loss.[78]

The new categorization based on blameworthiness, however, did change the terminology concerning multiple causation. The terminology shifted from the fact of causation to the nature of the blameworthiness involved in causation. Regarding the plaintiff's conduct, phrases such as "contributory negligence" and "assumption of risk" became common.

Some commentators have written that contributory negligence and assumption of risk each became a "separate defense" or a new "limit on liability."[79] But the change was more terminological than

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75. RESTATEMENT (SECOND) OF TORTS §§ 481, 482, 501, 503 (1965).

76. Whether two categories of blameworthiness differ in kind or degree depends on how the categories are defined. For example, consider the relationship of recklessness to negligence where negligence is defined as conduct that the actor should know will involve an unreasonable risk of harm. If recklessness is defined as conduct that the actor should know will involve a high probability of an unreasonable risk of substantial harm, the difference is one of degree (concerning the degree of probability and the degree of harm). But if recklessness is defined as conduct that is a conscious disregard of an unreasonable risk of harm, the difference is one of kind (a subjective standard instead of an objective standard). Schwartz, *supra* note 12.

77. Galena & Chicago Union Ry. v. Jacobs, 20 Ill. 478 (1858); Union Pac. Ry. v. Henry, 36 Kan. 565, 14 P. 1 (1887).

78. W. PROSSER, *supra* note 6, § 67, at 434; V. SCHWARTZ, COMPARATIVE NEGLIGENCE §§ 1.5, 2.1 (2d ed. 1986).

79. *E.g.*, W. PROSSER, *supra* note 6, § 65, at 416.

Contributory causation, however, limited the plaintiff's recovery of damages since medieval times and "negligence" was used in contributory causation cases since 1606. Bayly v. Merrel, 79 Eng. Rep. 331 (1606). In *Bayly* the defendant hired the plaintiff to transport a load, the weight of which was fraudulently understated by the defendant. The court held that the plaintiff cannot recover damages for the harm to his horses because his negligence in overloading his horses and not checking the weight was a cause of the harm.

substantive.[80] Instead of contributory negligence and assumption of risk being merely different ways in which a plaintiff could be a cause of his own harm, causation of harm was considered as merely a result of contributory negligence and assumption of risk. The new terminology emphasized the blameworthiness of the plaintiff's conduct, rather than that the conduct caused harm.

With the change in emphasis from causation to blameworthiness, the terms "legal cause" and "proximate cause" became common. These terms did not concern the fact of causation. Rather, they concerned limitations on liability despite causation in fact.[81] One important aspect of proximate cause was superseding cause. Where multiple causes were sequential in time, liability was sometimes imposed on the last wrongdoer.[82]

The interplay of causation, proximate cause, contributory negligence, assumption of risk, and categories of blameworthiness can be illustrated by the last clear chance doctrine. Where the plaintiff negligently subjected himself to a risk of harm and the defendant failed to avoid the harm, the last clear chance doctrine allowed the plaintiff to recover damages for a nonapportionable loss in some situations despite his contributory negligence. The plaintiff's contributory negligence did not bar recovery if, after exposing himself to a risk, the plaintiff (1) was unable to avoid the harm by reasonable vigilance and the defendant realized or had reason to realize the peril or (2) was able to avoid the harm and the defendant realized that the plaintiff was inattentive and unlikely to avoid the harm.[83] According to the last clear chance doctrine, if the plaintiff was helpless, the defendant's conduct was a superseding cause. And if the defendant knew that the plaintiff was inattentive, the defendant's conduct was more blameworthy.[84]

Some courts and commentators have stated that these rules regarding the plaintiff's lack of causation,[85] and the defendant's more severe kind of blameworthiness[86] or last clear chance,[87] were "exceptions" to the contributory negligence doctrine.[88] But the better view

80. 8 W. HOLDSWORTH, *supra* note 68, at 459-61.
81. *See supra* notes 10-11 and accompanying text.
82. RESTATEMENT (SECOND) OF TORTS §§ 440-53 (1965).
83. *Id.* §§ 479-80.
84. *See* W. PROSSER, *supra* note 6, § 66.
85. *See supra* text accompanying note 71.
86. *See supra* text accompanying note 75.
87. *See supra* text accompanying notes 82-84.
88. *E.g.*, Kirby v. Larson, 400 Mich. 585, 256 N.W.2d 400 (1977); V. SCHWARTZ, *supra* note 78, § 1.2; H. WOODS, COMPARATIVE FAULT §§ 1:6-1:7 (2d ed. 1987).

is that they were integral parts of a tort liability system that considered both causation and blameworthiness.

The abolition of the forms of action involved not only a change in emphasis from causation to blameworthiness, but also a change in emphasis from causation of loss to causation of casualty. Under this view, if there were successive casualties, the loss was apportionable.[89] However, if there were a single casualty or substantially coincident casualties, the loss was nonapportionable, even if there were a reasonable basis for determining the contribution of each cause.[90]

Thus, if the plaintiff's prior negligence merely increased the extent of the plaintiff's loss, but was not a cause of the casualty, the plaintiff's conduct was not considered "contributory negligence," and the loss was nonapportionable.[91] However, if the plaintiff's subsequent negligence increased the extent of the plaintiff's loss, the loss was apportionable under the "avoidable consequences" doctrine.[92] Even if there were successive casualties, the emphasis was on which person caused each casualty rather than how much loss each person caused.

Thus the change in emphasis from causation of loss to causation of casualty sometimes led to a recognition of apportionment in only limited situations. Instead of considering whether there were distinct harms or a reasonable basis for determining the contribution of each cause, the emphasis was on whether the casualties were successive or substantially coincident, and whether the plaintiff's negligence was prior or subsequent.

An example of the view that causation of casualties was more important than the causation of loss is *Alcoa Steamship Co. v. Charles Ferran & Co.*[93] In *Alcoa* the defendant's negligent repair of the plaintiff's ship was the cause of a fire. The extent of the plaintiff's loss was increased by the negligence of the plaintiff, some of which occurred

89. *See* cases cited *supra* notes 31-35.

90. Morgan v. Gore, 96 Colo. 508, 44 P.2d 918 (1935); Herrell v. St. Louis-S.F. Ry., 324 Mo. 38, 23 S.W.2d 102 (1929) (dictum).

91. *E.g.*, Britton v. Doehring, 286 Ala. 498, 242 So. 2d 666 (1970) (the defendant caused a collision; the plaintiff's failure to wear a seat belt increased the extent of his loss); Mahoney v. Beatman, 110 Conn. 184, 147 A. 762 (1929) (the defendant caused a collision; the plaintiff's speeding increased the extent of his loss); Hamilton v. Boyd, 218 Iowa 885, 256 N.W. 290 (1934) (the defendant caused a collision; the plaintiff was riding on the trunk, which increased the extent of his loss).

92. *See infra* text accompanying notes 97-102.

93. Alcoa Steamship Co. v. Charles Ferran & Co., 242 F. Supp. 962 (E.D. La. 1965), *modified*, 251 F. Supp. 823 (E.D. La. 1966), *affirmed*, 383 F.2d 46 (5th Cir. 1967), *cert. denied*, 395 U.S. 964.

before the fire started and some after the fire started. In the first trial, the court held that the plaintiff could not recover damages for the loss caused by its own prior or subsequent negligence.[94] On rehearing, however, the apportionment based on causation of loss was modified. The court held that, since the plaintiff's prior negligence did not cause a casualty, the plaintiff's recovery of damages is not reduced by the loss caused by its prior negligence. Apportionment was allowed for only the loss caused by its subsequent negligence.[95]

After the abolition of the forms of action, the distinction between successive and coincident casualties, and between the plaintiff's prior and subsequent negligence, often became as important as the distinction between direct and indirect interference had been before the abolition of the forms of action. There was, however, one big difference. Before the abolition of the forms of action, the directness of the interference was important only for procedure and did not affect the substantive rights of the parties. After the abolition, the timing of events affected substantive rights.

Although the new terminology emphasized blameworthiness for casualties, rather than causation of loss, courts still allowed apportionment of loss in a wide variety of circumstances. Even after the abolition of the forms of action, causation generally determined not only the existence of liability, but also the extent of liability. A defendant was liable for only the loss that he caused, not for the loss caused by the plaintiff, other persons, or acts of nature. Where there were distinct harms or a reasonable basis for determining the contribution of each cause, the loss generally was apportionable.[96]

Thus apportionment of loss coexists with the myth of nonapportionment. This coexistence mainly involves terminological problems. Since the modern terminology of tort law emphasized blameworthiness for casualties, rather than causation of loss, there was an incompatibility between substantive law and terminology. There was no standardized terminology for dealing with apportionment based on causation of loss.

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94. *Alcoa Steamship Co.*, 242 F. Supp. at 974.

95. Alcoa Steamship Co. v. Charles Ferran & Co., 251 F. Supp. 823, 832 (E.D. La. 1966), *affirmed*, 383 F.2d 46 (5th Cir. 1967), *cert. denied*, 395 U.S. 964.

96. *See supra* text accompanying notes 15-44.

IV. The Restatement of Torts and the Persistence of the Myth

The original *Restatement of Torts*[97] helped perpetuate the myth of nonapportionment and the importance of the timing of events. The *Restatement* used the terms "avoidable consequences" (which referred only to the plaintiff's conduct after a casualty) and "contributory negligence" (which referred only to the plaintiff's conduct that caused a casualty). The *Restatement* supported apportionment of loss for avoidable consequences,[98] but not for contributory negligence.[99] The *Restatement* did not support apportionment where the plaintiff's negligence caused a predisposition to harm, and perhaps not even when the plaintiff's harm was pre-existing.[100]

Regarding the confusing terminology, William Prosser wrote that situations of multiple causation of harm by a plaintiff and a defendant are often labeled "avoidable consequences" regardless of whether the plaintiff's conduct was prior, contemporaneous, or subsequent.[101] Prosser suggested "that the doctrines of contributory negligence and avoidable consequences are in reality the same, and that the distinction which exists is rather one between damages which are capable of assignment to separate causes, and damages which are not."[102]

The traditional rules on apportionment were clarified by the *Restatement (Second) of Torts*:[103]

> Apportionment of Harm to Causes
>
> (1) Damages for harm are to be apportioned among two or more causes where
>
> (a) there are distinct harms, or
>
> (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
>
> (2) Damages for any other harm cannot be apportioned among two or more causes.[104]

97. Restatement of Torts (1934).

98. Restatement of Torts § 918 (1939).

99. Restatement of Torts § 467 (1934).

100. *Id.* § 461. *See supra* note 30. On the other hand, the *Restatement* did support apportionment among defendants based on harms that differed in kind and (for nuisances only) harms that differed in extent. Restatement of Torts §§ 879 comment a, 881 (1939).

101. W. Prosser, *supra* note 6, § 65, at 422-24.

102. *Id.* at 424.

103. Restatement (Second) of Torts § 433A (1965).

104. *Id.*

Apportionment applies to all situations in which there are several causes of harm:

> The rules stated in this Section apply whenever two or more causes have combined to bring about harm to the plaintiff, and each has been a substantial factor in producing the harm . . . . The rules stated apply also where one or more of the contributing causes is an innocent one, as where the negligence of a defendant combines with the innocent conduct of another person, or with the operation of a force of nature, or with a pre-existing condition which the defendant has not caused, to bring about the harm to the plaintiff. The rules stated apply also where one of the causes in question is the conduct of the plaintiff himself, whether it be negligent or innocent.[105]

Furthermore: "Such apportionment may also be made where the antecedent negligence of the plaintiff is found not to contribute in any way to the original accident or injury, but to be a substantial contributing factor in increasing the harm which ensues."[106]

The scope of apportionment recognized by the *Restatement* is about as broad as that recognized by the courts.[107] The *Restatement* clarified some of the terminological confusion by giving a new term for the concept, "apportionment of harm to causes."[108]

Despite the abundance of authority allowing the apportionment of loss between a plaintiff and a defendant, the myth of nonapportionment persists. One reason for the persistence of the myth is that the terminology of blameworthiness and casualty is too deeply imbedded. This problem can be illustrated by cases on the apportionability of loss between a plaintiff who did not wear a seat belt and a defendant who was at fault for a collision.[109] Some cases recognized the principle of apportionment, but were uncertain on whether to call it contributory negligence, avoidable consequences, or some other term.[110] Other cases denied apportionment in such situations because it did not fit any of the standardized terms: It was not contributory negli-

105. *Id.* comment a.

106. *Id.* § 465, comment c.

107. *See supra* text accompanying notes 15-44. The *Restatement*, however, seems to apply only to situations in which the defendant is negligent or reckless, whereas case law allows apportionment for all torts.

108. RESTATEMENT (SECOND) OF TORTS § 433A (1965).

109. *See generally* Schwartz, *supra* note 36; Annotation, *Nonuse of Seat Belt as Failure to Mitigate Damages*, 80 A.L.R.3d 1033 (1977); Annotation, *Automobile Occupant's Failure to Use Seat Belt as Contributory Negligence*, 15 A.L.R.3d 1428 (1967).

110. *E.g.*, Mays v. Dealers Transit, Inc., 441 F.2d 1344 (7th Cir. 1971) (decided under Indiana law).

gence because that term was used only where the plaintiff's recovery was totally barred; and it was not avoidable consequences because that term was used only where the plaintiff's negligence occurred after the casualty.[111]

The persistence of the myth is not related to the discussion of apportionment by blameworthiness (such as comparative negligence). The merits of apportionment by causation of loss have not been raised by the opponents of apportionment by blameworthiness. The proponents of apportionment by blameworthiness have not criticized apportionment by causation of loss; they simply deny that it exists.[112]

Perhaps the main reason for the persistence of the myth of nonapportionment is the failure to distinguish apportionment by blameworthiness and apportionment by causation of loss. Although these methods of apportionment are fundamentally different,[113] some courts have considered them to be practically the same. Some courts disallow apportionment by causation of loss,[114] or allow it only in theory under impractical conditions,[115] because they disallow apportionment by blameworthiness. This confusion also has been made where apportionment is allowed, but the decision is unclear on whether it is allowing apportionment by blameworthiness, apportionment by causation of loss, or both.[116]

V. Traditional Apportionment and Modern Comparative Fault

Comparative fault has many meanings, including apportionment by causation of loss and apportionment by blameworthiness.[117]

Apportionment by causation of loss is based on the extent to which each cause contributed to the total loss. Since the amount of loss is the sole criterion, apportionment by causation is not possible if there is no reasonable basis for determining the contribution of each cause.[118]

Apportionment by blameworthiness is based on the degree of

111. *E.g.*, Britton v. Doehring, 286 Ala. 498, 242 So. 2d 666 (1970).

112. *E.g.*, Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Kirby v. Larson, 400 Mich. 585, 256 N.W.2d 400 (1977).

113. *See infra* text accompanying notes 117-29.

114. Britton v. Doehring, 286 Ala. 498, 242 So. 2d 666 (1970).

115. Barry v. Coca Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1967).

116. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

117. Schwartz, *supra* note 13.

118. *See supra* text accompanying notes 103-04.

blameworthiness of each person. This involves not only an ordinal comparison of whether one person is more blameworthy than the other, but also a cardinal comparison of the extent to which one person was more blameworthy than the other.[119] Since the degree of blameworthiness is the sole criterion, apportionment by blameworthiness is not possible if the blameworthiness differs in kind rather than degree.[120] For example, if intent and negligence are considered as differing in kind, apportionment by blameworthiness is possible among persons whose conduct was intentional and among persons whose conduct was negligent; but apportionment is not possible between a person whose conduct was intentional and a person whose conduct was negligent.

With apportionment by causation of loss, the relative degree of blameworthiness is immaterial. With apportionment by blameworthiness, the relative amount of loss caused by each person is immaterial. Apportionment by causation of loss and apportionment by blameworthiness are not necessarily incompatible. But where both methods of apportionment are allowed, problems on priority can arise.

One alternative is that apportionment by causation of loss has priority over apportionment by blameworthiness.[121] Under this alternative, apportionment by blameworthiness is allowed only to the extent that there is no reasonable basis for determining the contribution of each cause, and thus apportionment by causation of loss is not possible.[122] If there is a reasonable basis, apportionment is by causation of loss, regardless of the kind or degree of blameworthiness. For example, if the trier of fact decides that 60% of the loss was caused by the defendant, neither party could appeal on the ground that the other

119. Schwartz, *supra* note 13.

120. For the distinction between kind and degree of blameworthiness, see *supra* note 76.

121. Causation of loss is the primary criterion for apportionment in some comparative fault states. *E.g.*, Wing v. Morse, 300 A.2d 491 (Me. 1973); Baird v. Harrington, 202 Miss. 112, 30 So. 2d 82 (1947); Kohler v. Dumke, 13 Wis. 2d 211, 108 N.W.2d 581 (1961).

Sometimes apportionment by causation of loss is possible only to some extent. Under this alternative, loss would first be apportioned by causation. The loss from each cause might be apportioned further by blameworthiness. *E.g.*, Pittsburgh S.S. Co. v. Palo, 64 F.2d 198 (6th Cir. 1933) (a seaman's arm was injured in two separate accidents, four days apart; dictum that the loss from one accident should be apportioned by causation from the loss from the other accident and then the loss from each accident should be apportioned by blameworthiness; decided under the Jones Act); The Calliope, [1970] 2 W.L.R. 991 (a ship was injured in two collisions; held: the loss from one collision should be apportioned by causation from the loss from the other collision and then the loss from each collision should be apportioned by blameworthiness; admiralty case; dictum applying the same principle to all tort cases).

122. Apportionment by causation of loss is possible only where there are distinct harms or a reasonable basis for determining the contribution of each cause to a single harm. *See supra* text accompanying notes 103-04.

party's degree of blameworthiness was greater or that the other party's kind of blameworthiness was worse.

A second alternative is that apportionment by blameworthiness has priority over apportionment by causation.[123] Under this alternative, apportionment by causation of loss is allowed only if blameworthiness differs in kind, and thus apportionment by blameworthiness is not possible.[124] If blameworthiness differs in degree, apportionment is by blameworthiness, regardless of the apportionability of the harm to causes. For example, if both the plaintiff and defendant are negligent, and the trier of fact decides that the plaintiff was twice as negligent as the defendant (thus allowing the plaintiff to recover damages for only 33% of his loss), the plaintiff could not appeal on the ground that 50% of the loss was caused by the defendant, and the defendant could not appeal on the ground that 80% of the loss was caused by the plaintiff.

A third alternative is to allow causation and blameworthiness to be considered together, with neither having priority. Since the decision of the trier of fact is based on blameworthiness as well as causation of loss, neither party could appeal on the ground that the apportionment was disproportionate to the degree of blameworthiness or amount of loss caused by each party. This alternative gives the trier of fact great discretion in deciding the relative importance of blameworthiness and causation of loss.[125]

The first alternative is superior to the others. Causation has always been the essence of all tort liability. Although there sometimes was liability without blameworthiness, there never was liability without causation.[126] Since no one should be liable for more harm than he causes, causation rather than blameworthiness should be the primary basis for the extent of liability, as well as the fact of liability.[127] Furthermore, apportionment by blameworthiness is inherently subjective

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123. Blameworthiness is the sole or primary criterion for apportionment in some comparative fault states. *E.g.*, State v. Kaatz, 572 P.2d 775 (Alaska 1977); Metropolitan Dade County v. Cox, 453 So. 2d 1171 (Fla. App. 1984); Amend v. Bell, 89 Wash. 2d 124, 570 P.2d 138 (1977).

124. Apportionment by blameworthiness is possible only if the blameworthiness of each party differs in degree, rather than in kind. *See supra* text accompanying notes 119-20.

In some jurisdictions, apportionment is allowed only among negligent persons—hence merely comparative negligence, rather than all types of comparative blameworthiness. *See generally* H. WOODS, *supra* note 88, §§ 7:1-7:5.

125. This method of apportionment is used in states where the courts do not understand the difference between apportionment by blameworthiness and apportionment by causation of loss. *See supra* note 116 and accompanying text.

126. *See supra* text accompanying note 71.

127. *See supra* note 20.

and arbitrary.[128] But apportionment by causation of loss, since it is possible only if there is a reasonable basis for determining the contribution of each cause, is objective and rational.[129] Apportionment by causation of loss involves a lower risk that decisions will be based on prejudice or caprice. Thus, apportionment by blameworthiness should be allowed (if at all) only when apportionment by causation of loss is not possible.

128. Syroid v. Albuquerque Gravel Products Co., 86 N.M. 235, 522 P.2d 570 (1974) (refusing to impose comparative fault). *See* W. PROSSER, *supra* note 6, § 52, at 313-14.

129. *See supra* text accompanying notes 103-04.