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David W. Robertson
The University of Texas School of Law

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ESCHEWING ERSATZ PERCENTAGES: A SIMPLIFIED VOCABULARY OF COMPARATIVE FAULT

DAVID W. ROBERTSON*

I. THE CORE IDEA OF COMPARATIVE FAULT

A jurisdiction that opts for abandoning the contributory negligence regime and instituting a system treating victim fault on a comparative basis must face dozens, perhaps even hundreds, of difficult questions,¹ such as whether to adopt the pure form of comparative fault or some modified version,² whether to allocate responsibility among multiple tortfeasors on a comparative basis,³ and whether (and if so, how) the comparative system applies in liability fields other than negligence.⁴ But the core idea of the comparative fault approach is

* W. Page Keeton Chair in Tort Law, University of Texas. I am grateful to Joel Goldstein for inviting me to participate in this symposium and to David Anderson, Hans Baade, Mark Gergen, Richard Markovitz and Bill Powers for helpful comments and suggestions.

1. *See generally* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (2000) [hereinafter APPORTIONMENT RESTATEMENT]; VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (3d ed. 1994); HENRY WOODS & BETH DEERE, *COMPARATIVE FAULT* (3d ed. 1996).

2. The pure form allows plaintiffs to recover damages regardless of their degree of fault. *See, e.g.*, N.Y. C.P.L.R. § 1411 (McKinney 1976). Modified forms provide that plaintiffs are barred from recovery when their fault exceeds a certain level. *See, e.g.*, ARK. CODE ANN. § 16-64-122 (Michie 1987 & Supp. 1993) (barring recovery when the victim's fault is "equal to or greater in degree" than the tortfeasor's); MONT. CODE ANN. § 27-1-702 (1999) (barring recovery when the victim's fault is "greater than" the tortfeasor's).

3. *See Sitzer v. Anchor Motor Freight, Inc.*, 289 S.E.2d 679, 688 (W. Va. 1982) (stating that the decision to compare the fault of victims and tortfeasors "lead[s] ineluctably" to comparative allocation among multiple tortfeasors); *but see Zeller v. Cantu*, 478 N.E.2d 930, 934 (Mass. 1985) (acknowledging the "strong policy arguments support[ing] the apportionment of damages between joint tortfeasors on the basis of their relative degrees of fault" but holding that Massachusetts law is committed to a pro rata contribution system). In modified systems that elect to use the comparative-fault approach to allocate responsibility among tortfeasors, a further question arises: Is a tortfeasor who seeks contribution barred at the same level of fault that would bar a plaintiff? *See, e.g.*, *Liberty Mutual Ins. Co. v. General Motors Corp.*, 653 P.2d 96 (Haw. 1982) (answering no).

4. Fields of liability include negligence, strict liability, intentional torts, and nuisance. Subfields include bailment, breach of fiduciary duty, informed consent, misrepresentation, negligence per se, and professional malpractice. In each of these types of cases, whether and how to use a comparative fault approach entail tough questions.

very simple. It is well expressed in England's Law Reform (Contributory Negligence) Act of 1945:

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be *reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility of the damage.*⁵

In a bench-trial jurisdiction, something like the foregoing is all that needs to be said.⁶ In adopting a comparative fault system for maritime personal injury cases, the Supreme Court in *The Max Morris* simply stated that "in cases of marine torts, courts of admiralty [can] exercise a conscientious discretion, and give or withhold damages upon enlarged principles of justice and equity."⁷ This provided ample guidance for the trial judge in *The Lackawanna* (the first reported case applying the new system),⁸ who determined that a ferry passenger who "heedless[ly]" fell into an open coal hole in the deck should have his damages reduced by 2/3 because the ferry's negligence in leaving the hole unguarded "was less deserving of condemnation than the passenger's obvious carelessness in going into easily discoverable danger."⁹

Probably because of the viewpoint that juries should not be entrusted with a broad-sounding "justice and equity" mandate,¹⁰ early formulations of the comparative fault approach in jury-trial systems tended to take a slightly different form. Mississippi's 1910 enactment is typical:

[I]n all actions hereafter brought for personal injuries, or where such injuries have resulted in death, the fact that the person injured may have been guilty of contributory negligence shall not bar a recovery, but damages shall be

5. Law Reform (Contributory Negligence) Act, 1945, 8 & 9 George 6, c. 28, § 1 (Eng.) (emphasis added).

6. See generally DAN B. DOBBS, *THE LAW OF TORTS* 504, 508, 1025 (2000) (criticizing the APPORTIONMENT RESTATEMENT for an overly elaborate formulation of factors to be considered in assessing relative fault and for departing from the orthodox view that the appropriate comparison is *fault, i.e.,* culpability, and not "causation" or "responsibility"). Cf. *Sandford v. Chevrolet Div. of Gen. Motors*, 642 P.2d 624, 644 (Or. 1982) (Peterson, J., concurring) (objecting to the majority's effort to specify a process for comparing a plaintiff's negligence and a product defendant's strict liability and stating that "jurors have been equal to that task, possibly without benefit of rational definition or standard, and until the issue arises, I would do nothing and say nothing").

7. 137 U.S. 1, 13 (1890).

8. David R. Owen & J. Marks Moore, III, *Comparative Negligence in Maritime Personal Injury Cases*, 43 LA. L. REV. 941, 943 (1983).

9. *The Lackawanna*, 151 F. 499, 501 (S.D.N.Y. 1907).

10. For a radically differing viewpoint, see the Maine statute quoted *infra* note 30.

diminished by the jury in proportion to the amount of negligence attributable to the person injured.¹¹

The basic principle here, damages reduction *in proportion* to victim fault, is replicated in the 1908 Federal Employers' Liability Act (FELA),¹² the 1920 Jones Act,¹³ the 1920 Death on the High Seas Act¹⁴ and several early state statutes.¹⁵ This principle is no different in content from the "justice and equity" formulation of the Law Reform Act and *The Max Morris*. Because it is obvious that fault is a quality, not a quantity, it is equally obvious that the recurrent statutory term *proportion* must take its everyday English-language meaning—"the comparative relation in size, amount, etc. between things"¹⁶—rather than any precise mathematical meaning.¹⁷ Thus, the difference between

11. *Natchez & S. R. Co. v. Crawford*, 55 So. 596, 597 (Miss. 1911) (quoting Miss. Acts 1910, ch. 135, p.125). The statute, essentially unchanged, is presently codified as MISS. CODE ANN. § 11-7-15 (1972).

12. 45 U.S.C. § 53 (1994) provides that "damages shall be diminished by the jury in proportion to the amount of negligence attributable to [the injured railroad] employee."

13. The Jones Act, 46 U.S.C. app. § 688(a) (1994), granted seamen a negligence action against their employers and incorporated FELA by reference.

14. 46 U.S.C. app. § 766 (1994) provides that "the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly."

15. NEB. REV. STAT. § 25-21,185 (1995) (enacted in 1913) (providing that if the plaintiff's negligence was slight and the defendant's gross, "the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff"), *quoted in* SCHWARTZ, *supra* note 1, at 71-72 and *in* WOODS & DEERE, *supra* note 1, at 86. South Dakota "adopted identical legislation" in 1941. SCHWARTZ, *supra* note 1, at 72. *See also* WIS. STAT. § 331.045 (1931) (retaining the contributory negligence defense for cases in which the victim's fault was equal to or greater than the defendant's and otherwise tracking the Mississippi language calling for damages diminution "by the jury in the proportion to the amount of negligence attributable" to the victim), *quoted in* Richard V. Campbell, *Ten Years of Comparative Negligence*, 1941 WIS. L. REV. 289, 289 (1941). In 1955, Arkansas enacted the "Prosser Act" (drafted by Dean William L. Prosser), which provided for the diminution of damages "in proportion to the amount of negligence attributable" to the victim and called for special verdicts stating the amount of total damages and "[t]he extent to which such damages are diminished by reason of contributory negligence." The Prosser Act lasted only two years. *See* WOODS & DEERE, *supra* note 1, at 20-21, for the story.

16. WEBSTER'S NEW WORLD DICTIONARY 472 (3d ed. 1990).

17. *See* DOBBS, *supra* note 6, at 507 (stating that degree-of-fault assignments are always "rough estimate[s]"); SCHWARTZ, *supra* note 1, at 352 ("The process is *not* allocation of physical causation, which could be scientifically apportioned, but rather of allocating *fault*, which cannot be scientifically measured.") (emphasis in original); DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 421 (2d ed. 1998) ("It is not possible to articulate an algorithm by which a jury can determine percentages of responsibility."); John W. Wade, *Should Joint and Several Liability of Multiple Tortfeasors Be Abolished?*, 10 AM. J. TRIAL ADVOC. 193, 205 (1986) ("[T]he [fault-allocating] decision is essentially a judgmental one, affected by a number of objective, intuitive, intellectual, and emotional factors. As a result, percentages are approximations."); *Curtis Bay Towing Co. v. M/V Maryland Clipper*, 599 F.2d 1313, 1315 (4th Cir. 1979) ("While many times this allocation of fault cannot be made with absolute mathematical precision, still

the “just and equitable” criterion and the “proportionate” criterion for diminution of damages should be seen as purely cosmetic.

II. THE EVOLUTION OF A PERCENTAGE-FAULT VOCABULARY

Present-day analysts tend to think of comparative fault as necessarily entailing the use of percentages to express the parties’ relative degrees of fault.¹⁸ But as we have just seen, early comparative fault systems did not use the language of percentages. None of the early comparative fault statutes did so. Nor did the early courts in applying these statutes. Instead, they either simply elicited victim-fault-diminished general verdicts of damages¹⁹ or—if more control over and reviewability of the jury’s conclusions was desired—verdicts showing both full damages and fault-diminished damages.²⁰

We owe the present dominance of the percentage-fault vocabulary to Wisconsin,²¹ whose long experience with the use of special verdict procedures

some numerical approximation of the proportionate degrees of fault must be made to enable the district court to apportion damages and to enable an appellate court to review the district court’s decision intelligently.”); *Alvis v. Ribar*, 421 N.E.2d 886, 893 (Ill. 1981) (“Although it is admitted that percentage allocations of fault are only approximations, the results are far superior to the ‘all or nothing’ results of the contributory negligence rule.”); *McGuiggan v. Hiller Bros.*, 245 N.W. 97, 99 (Wis. 1932) (“[N]egligent acts differ in kind and quality, and we know of no legal yardstick by which we can classify, evaluate, and compare them.”).

18. See, e.g., Christopher Dove, *Dumb as a Matter of Law: The “Superseding Cause” Modification of Comparative Negligence*, 79 TEX. L. REV. 493, 494 (2000) (“In many states the legislature or judiciary eventually replaced the common-law contributory negligence scheme with a brand-new comparative negligence system, under which damages are apportioned using a percentage system.”); Owen & Moore, *supra* note 8, at 943. See also *supra* note 9 and accompanying text (discussing *The Lackawanna* where the court reduced plaintiff’s damages by two-thirds, as “the first [case] to apportion fault on a percentage basis in a maritime personal injury case”).

19. See, e.g., *Norfolk & W. Ry. Co. v. Earnest*, 229 U.S. 114 (1913) (affirming a general verdict for a negligent plaintiff in a FELA case); *Natchez & S.R. Co. v. Crawford*, 55 So. 596, 597 (Miss. 1911) (quoting instruction to jury that “if the jury believe from the evidence that the plaintiff in his conduct has been guilty of contributory negligence, then the sum total of the damages he would otherwise be entitled to shall be diminished in proportion of the amount of negligence attributable to him”).

20. See, e.g., *Long v. Payne*, 190 N.Y.S. 803 (N.Y. App. Div. 1921) (FELA case in which jury made findings of full damages as well as of victim-fault-diminished damages). See also the “Prosser Act,” *supra* note 15 (requiring the special verdict to reflect a dollar reduction of damages rather than fault percentages); Campbell, *supra* note 15, at 292 (“Should the jury be instructed to compute the reduction of the damages or to return it in terms of percentages? It has been customary under the comparative negligence acts of other jurisdictions [than Wisconsin] to have the jury write in the diminished [damages] amount.”).

21. See generally SCHWARTZ, *supra* note 1; WOODS & DEERE, *supra* note 1. The Schwartz and Woods comparative fault treatises both discuss Wisconsin’s long commitment to the use of special verdicts, but neither focuses on the evolution of the percentage vocabulary. Nor does the APPORTIONMENT RESTATEMENT, which simply states that “[b]y convention . . . percentages

in torts cases led its courts as early as 1920 to submit FELA cases to juries in a form calling for percentage-fault assignments.²² Although neither FELA²³ nor the comparative fault statute that the Wisconsin legislature enacted in 1931²⁴ used the language of percentages, the Wisconsin courts' experience with FELA cases had inured them to the use of percentage-assignment special verdicts, and they immediately began implementing the state's new comparative fault statute by asking juries to return their assessment of the parties' fault in percentage terms.²⁵

Requiring the jury to express its victim-fault-based reduction of damages in percentage terms is seen as a good way to focus the jury's attention and to provide a handle for trial and appellate review of its findings.²⁶ The highly influential Uniform Comparative Fault Act, which came out in 1977, gave the approach a big shove toward domination by mandating special jury interrogatories (and special findings in bench-tried cases) assigning fault percentages to the parties and to settling tortfeasors.²⁷ Since then, most of the judicial adoptions of comparative fault²⁸ and most of the more recent comparative fault statutes²⁹ have either required or sought to encourage the use

assigned by the fact-finder . . . add to 100 percent." APPORTIONMENT RESTATEMENT, *supra* note 1, § 7 cmt. g.

22. *See, e.g.*, *Richter v. Chicago, M. & St. P. Ry. Co.*, 186 N.W. 616 (Wis. 1922); *Kalashian v. Hines*, 177 N.W. 602 (Wis. 1920).

23. *See supra* note 12.

24. *See supra* note 15.

25. *See, e.g.*, *Mullen v. Larson-Morgan Co.*, 249 N.W. 67 (Wis. 1933). *See generally* *Campbell, supra* note 15, at 292-93.

26. *See* SCHWARTZ, *supra* note 1, at 369-72, 396-97 (discussing the advantages of special verdicts and interrogatories); *Honore v. Ludwig*, 247 N.W. 335, 337 (Wis. 1933) (indicating that "the use of questions based on percentages will serve better than more general questions" to focus and control the jury).

27. *See* UNIFORM COMPARATIVE FAULT ACT § 2, 13 U.L.A. 135-36 (1977) (amended 1979).

28. *See, e.g.*, *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992); *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984); *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983); *Alvis v. Ribar*, 421 N.E.2d 886 (Ill. 1981); *Scott v. Rizzo*, 634 P.2d 1234 (N.M. 1981); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979); *Placek v. City of Sterling Heights*, 275 N.W.2d 511 (Mich. 1979).

29. *See, e.g.*, ALASKA STAT. § 9.17.080 (Michie 1993); ARIZ. REV. STAT. ANN. § 12-2506 (West 1993); COLO. REV. STAT. § 13-21-111 (1987); CONN. GEN. STAT. § 52-572h (1991); HAW. REV. STAT. § 663-31 (1985); IDAHO CODE § 6-802 (1990); 735 ILL. COMP. STAT. 5/2-1116 (West 1993); IOWA CODE ANN. § 668.3 (West 1987); KAN. STAT. ANN. § 60-258a (1993); LA. CODE CIV. PROC. ANN. art. 1812 (West 2000); MASS. GEN. LAWS ANN. ch. 231, § 85 (West 1985); MINN. STAT. ANN. § 604.01 (West 1993); MONT. CODE ANN. § 27-1-702-703 (1993); NEV. REV. STAT. § 41.141 (1991); N.D. CENT. CODE § 32-03.2-02 (1993); OHIO REV. CODE ANN. § 2315.19 (West 1991); OR. REV. STAT. § 18.480 (1993); TEX. CIV. PRAC. & REM. CODE ANN. § 33.003 (West 1993); UTAH CODE ANN. § 78-27-39 (1992); WASH. REV. CODE ANN. § 4.22.070 (West 1988).

of special verdicts that include percentage-fault assignments to the parties and other relevant actors.

The translation of “in proportion” damages reduction to percentage-based damages reduction is so easy and obvious as to sometimes seem irresistible.³⁰ Thus, arguing in 1957 for the retention of the contributory negligence doctrine, future Justice Lewis Powell quickly fell into the vocabulary of percentages in discussing the “rule of comparative negligence” that he believed would be anathema in America.³¹ Similarly, Judge Henry Woods—who prefers general-verdict submissions of comparative fault cases,³²—assumes that a properly instructed jury under the Arkansas statute that requires the reduction of damages “in proportion to the degree of [the victim’s] fault”³³ would be told to reduce damages “by the percentage of plaintiff’s own negligence.”³⁴ Similar assumptions permeate the comparative fault literature³⁵ and case law.³⁶ Perhaps the most striking instance appears in Professor Dan Dobbs’s fine new book: “The language of percentage . . . is exactly the right language for fault apportionment under comparative fault rules”³⁷

30. *But see* ME. REV. STAT. ANN. tit. 14, § 156 (West 1964) (providing that the jury shall be instructed “to reduce the total damages by dollars and cents, and not by percentage, to the extent deemed just and equitable, having regard to the claimant’s share in the responsibility for the damages, and . . . to return both amounts with the knowledge that the lesser figure is the final verdict in the case”). *See also* S.D. CIVIL PATTERN JURY INSTRUCTIONS § 20-06 (1992) (commenting that “it is highly improper to require the jury to indicate or specify in their verdict or in answer to an interrogatory the percentage of plaintiff’s contributory negligence”), *quoted in* WOODS & DEERE, *supra* note 1, at 438. The Maine statute is “radically different” from other comparative fault statutes. DOBBS, *supra* note 6, at 507 n.2. Indeed, it is “unique.” *Wing v. Morse*, 300 A.2d 491, 498 (Me. 1973).

31. *See* Lewis F. Powell, Jr., *Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A. J. 1005 (1957).

32. *See* WOODS & DEERE, *supra* note 1, at 439 (“More than thirty-five years of trial experience under both the pure and modified systems of comparative negligence, and having cases submitted on both general verdicts and interrogatories have convinced the writer that in many cases a general verdict is preferable.”).

33. ARK. CODE ANN. § 16-64-122 (Michie 1987 & Supp. 1993).

34. WOODS & DEERE, *supra* note 1, at 463-64.

35. *See supra* notes 1, 18 and accompanying text.

36. *See, e.g.,* *Sullivan v. Fanestiel*, 317 S.W.2d 713, 714 (Ark. 1958) (action under the “Prosser Act,” *supra* note 15—which mandated a special verdict procedure *not* employing the language of percentages—in which jury findings of percentage negligence were elicited); *Maki v. Frelk*, 229 N.E.2d 284, 289 (Ill. App. Ct. 1967), *rev’d*, 239 N.E.2d 445 (Ill. 1968) (quoting the FELA provision requiring the reduction of damages “in proportion” to victim fault and immediately thereafter launching into a discussion of hypothetical fault percentages as a way of explaining the provision’s meaning).

37. DOBBS, *supra* note 6, at 511.

III. PERFECT LANGUAGE OR LINGUA FRANCA?

The percentage-based approach requires the trier of fact “to apportion fault as if it were a tangible and measurable commodity.”³⁸ But fault is not a tangible and measurable commodity; it’s a quality.³⁹ In the words of then-Judge Steven Breyer, “assessing ‘comparative fault’ is not so much an exercise in pure mathematics as it is an exercise in [normative] judgment.”⁴⁰

Moreover, the percentage-based approach treats the “commodity” of fault as though it had an ontological limit of 100 units for each case.⁴¹ But it takes only a moment’s reflection to realize that percentage-fault assignments do not and cannot represent some real part of some real whole. Take a simple two-party traffic accident case in which defendant rear-ends the plaintiff’s vehicle after the plaintiff comes to a sudden stop on a rainy road. If no complications are introduced into the ensuing litigation, the percentage-fault conceptualization will posit a 100-unit universe of putatively faulty conduct that is limited to the two motorists’ operation of their vehicles. But obviously what is included in the universe of faulty conduct is not a feature of life on earth but rather of a combination of the litigant’s choices and the laws of immunity, duty, and legal causation. If either counsel chooses to pursue other avenues and the substantive law permits it, the universe of fault might well “expand” to include a badly designed road, an erroneous weather report, one or two poorly designed vehicles, bad brakes, bad tires, bad taverns, bad eyesight, bad medicine, etc.⁴²

Plainly, percentage-fault assignments are normative expressions, not measurements. They provide the trier of fact with a way of “express[ing] in layman’s language”⁴³ a qualitative assessment of the parties’ relative blameworthiness. As such, they constitute a *lingua franca*, viz., a “hybrid language used as a medium of communication between peoples of different languages.”⁴⁴ The law’s borrowing of mathematicians’ language for communicating with laymen is a three-sided *lingua franca*. Like other such hybrids, it communicates roughly at best and fosters many misunderstandings.⁴⁵

38. SCHWARTZ, *supra* note 1, at 352.

39. *See supra* note 17 and accompanying text.

40. *Lyon v. Ranger III*, 858 F.2d 22, 26 (1st Cir. 1988).

41. *See infra* notes 77-78 and accompanying text.

42. I tell my students that it might even expand to include John Foster Dulles, on the view that everything bad that has happened in America in the last forty years stems in one way or another from the “domino theory” Dulles sold to President Eisenhower. This pedagogical ploy no longer works; students these days have never heard of Dulles.

43. *Lovesee v. Allied Dev. Corp.*, 173 N.W.2d 196, 199 (Wis. 1970).

44. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 760 (1981).

45. *See* 2 JOHN HOLM, PIDGINS AND CREOLES 554 (1989) (referring to “reduced linguistic explicitness” and “greater reliance on context” as typical features of hybrid languages).

IV. FIVE MISUNDERSTANDINGS⁴⁶1. *Taking percentage-fault assignments as cause-in-fact expressions*

Any jurisdiction that decides to adopt a comparative-fault approach to allocating responsibility among multiple tortfeasors will soon thereafter face the question whether to retain the doctrine of joint and several liability. That's a genuinely hard question.⁴⁷ But it can be made to seem easy if one erroneously assumes that percentage-fault assignments represent cause-in-fact shares of the loss. In *Bartlett v. New Mexico Welding Supply*,⁴⁸ the plaintiff suffered serious personal injuries when her car was rear-ended by the defendant's truck after the plaintiff was forced to slam on her brakes to avoid colliding with a negligently-maneuvered vehicle in front of her. The driver of the lead vehicle was unidentified. The trial court instructed the jury to "decide how much each party [including the unidentified driver] was at fault," and the jury returned findings of plaintiff 0%, defendant 30%, and unknown driver 70%.⁴⁹ Accepting the defendant's argument that its liability should be restricted to 30% of the damages because in a pure comparative fault system like New Mexico's, joint and several liability is "obsolete,"⁵⁰ the court first paraphrased the jury's finding of 30% fault to mean that "defendant's negligence contributed to the accident . . . to the extent of 30%"⁵¹ and then simply announced its conclusion that defendant could not justly be held for more than 30% because the defendant "caused [only] 30% of the damage."⁵² Inasmuch as it was plain that the plaintiff had suffered an indivisible injury as a result of the defendant's conduct, it is hard to imagine that the *Bartlett* court

46. These are all misunderstandings in the sense that they instantiate conceptual confusion. Whether the below-cited sources actually misunderstood—or instead made tricky rhetorical choices—cannot be known.

47. The APPORTIONMENT RESTATEMENT devotes over half of its 338 pages to it, exploring the implications of retaining full joint and several liability, of completely abolishing the doctrine, and of three intermediate positions. APPORTIONMENT RESTATEMENT, *supra* note 1, §§ 10-17, A18-19, B18-19, C18-21, D18-19, E18-19. For a good summary of both sides of the basic argument, see generally *American Motorcycle Ass'n v. Superior Court*, 578 P.2d 899 (Cal. 1978).

48. 646 P.2d 579 (N.M. Ct. App. 1982).

49. *Bartlett*, 646 P.2d at 580.

50. *Id.* at 585.

51. *Id.* at 580.

52. *Id.* at 584.

actually thought it was talking about cause in fact.⁵³ But that's what it said, thereby excusing itself from a difficult debate.⁵⁴

2. *Trying to use percentage-fault assignments to carve up legal (proximate) causation*

Until 1975, in ship collision cases United States admiralty courts applied a "divided damages" rule whereby damages were apportioned on a pro rata (50-50) rather than degree-of-fault basis. In *United States v. Reliable Transfer Co.*,⁵⁵ the Supreme Court abandoned the divided damages system and brought our ship-collision law into line with the pure comparative fault system that has long been used in other major maritime nations and in maritime personal injury cases in this country.

The pro rata system produced unpalatable results in situations in which one of the ships was guilty of far greater fault than the other, leading the courts to invent a bevy of ameliorative doctrines whereby the greater offender could

53. See *American Motorcycle Ass'n*, 578 P.2d 899, 905 ("[T]he mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury.").

54. The *Bartlett* mistake happens frequently and in high places. In *United States v. Reliable Transfer Co.*, 421 U.S. 397, 399 (1975), the Court quoted the trial judge's explanation that he assigned 25% fault to the Coast Guard and 75% to the involved vessel because "the fault [*i.e.*, blameworthiness] of the vessel was more egregious" and then proceeded to state: "The District Court found that the vessel's grounding was caused 25% by the failure of the Coast Guard to maintain the breakwater light and 75% by the fault of the Whalen." See also *Cent. State Transit & Leasing Corp. v. Jones Boat Yard, Inc.*, 206 F.3d 1373, 1375 (11th Cir. 2000) (stating that the trier of fact's assignment of 75% fault to one tortfeasor and 25% to another meant that the "district court attributed 75% of the damage to [one] and 25% of the damage to [the other]"); *Carroll v. Whitney*, 29 S.W.3d 14, 18 (Tenn. 2000) (interpreting a jury's assignment of 100% fault to two immune nonparties to mean that the defendants—whose conduct indisputably was a cause in fact of the fatality in suit—"were in no way responsible for [the] death"); *Slack v. Farmers Ins. Exch.*, 5 P.3d 280, 284 (Colo. 2000) (stating that the abolition of joint and several liability results in a system "wherein a tortfeasor is responsible only for the portion of the damages that he or she caused"); *Bhinder v. Sun Co.*, 717 A.2d 202, 210 (Conn. 1998) (concluding that "precluding the defendant from allocating fault [to a nonparty intentional tortfeasor] is inconsistent with the principle of comparative negligence that a defendant should be liable only for that proportion of the damages for which he or she was responsible" and citing—out of context—W. PAGE KEETON ET AL., *PROSSER & KEETON ON THE LAW OF TORTS* 345 (5th ed. 1984), which is a discussion of cause in fact); *Hoffman v. Jones*, 280 So. 2d 431, 437 (Fla. 1973) (explaining the core principle of comparative fault to mean that "[w]hen the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of the total damages he has caused the other party"); *Walton v. Tull*, 356 S.W.2d 20, 26 (Ark. 1962) (stating that Arkansas's modified version of comparative fault "den[ies] a recovery to a plaintiff whose own negligence was at least 50 per cent of the cause of his damage").

55. 421 U.S. 397 (1975).

sometimes be held liable for all of the damages.⁵⁶ Not surprisingly, in the wake of *Reliable Transfer* the lower courts began jettisoning these doctrines, on the view that the pure comparative fault system makes them unnecessary.

One such lower court decision was *Hercules, Inc. v. Stevens Shipping Co.*, in which a subrogated cargo insurer sought damages for goods lost when a tug and barge foundered at sea.⁵⁷ The trial judge attributed the loss to the combined fault of the stevedoring company that loaded the cargo, the barge owner, and the towboat company,⁵⁸ and held the stevedore liable for a proportionate share of the damages.⁵⁹ On appeal, the stevedore argued for exoneration on the view that its own fault was eclipsed by the later and arguably more dramatic fault of the barge and tug under “the doctrines of intervening cause and last clear chance.”⁶⁰ This argument got short shrift from the court:

The doctrines of intervening cause and last clear chance, like those of ‘major-minor’ and ‘active-passive’ negligence, operated in maritime collision cases to ameliorate the harsh effects of the so-called ‘divided damages’ rule, under which damages were divided evenly between negligent parties. In 1975, however, the Supreme Court [in *Reliable Transfer*] rejected the ‘divided damages’ rule, replacing it with a system of ‘proportional fault.’ . . . Under a ‘proportional fault’ system, no justification exists for applying the doctrines of intervening negligence and last clear chance. Unless it can truly be said that one party’s negligence did not in any way contribute to the loss, complete apportionment between the negligent parties, based on their respective degrees of fault, is the proper method for calculating and awarding damages in maritime cases. The doctrines of intervening negligence and last clear chance should not be used to circumvent this ‘proportional fault’ concept.⁶¹

56. These included a “major/minor fault” rule, an “active/passive negligence” rule, a “condition not cause” rule, and an “intervening negligence/last clear chance” rule. See FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., *ADMIRALTY IN A NUTSHELL* 176-78 (4th ed. 2001) [hereinafter *NUTSHELL*]; see also *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069, 1075 (11th Cir. 1985).

57. 765 F.2d. 1069, 1072 (11th Cir. 1985). The tug, barge, stevedore and shipper initially made counterclaims and cross-claims against each other, but by the time the case went to trial, the cargo insurer was “the only remaining party-plaintiff.” *Id.*

58. *Id.* The trial court also assigned fault to the shipper of the goods and held that the plaintiff insurer as subrogee could not recover against the shipper, its own subrogor. *Id.* This decision was not appealed.

59. *Id.* The other two defendants were protected by contractual exonerations, and the trial court properly treated the fault assigned to them as though it had been assigned to settling tortfeasors. See *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 210 n.10 (1994) (approving the treatment of a pre-accident contractual exoneration as a “quasi settlement”).

60. *Hercules*, 765 F.2d at 1075.

61. *Id.* at 1075 (citations omitted).

Reliable and *Hercules* set the stage for one of the Supreme Court's most remarkable admiralty decisions. In *Exxon Company v. Sofec, Inc.*,⁶² Exxon sought to recover the damages it incurred when the defendants' defective "Single Point Mooring System" (an apparatus designed to allow tanker ships to pump oil into a pipeline through floating hoses) caused the Exxon Houston to break away and go adrift during a storm, trailing a broken hose that severely restricted the ship's maneuverability.⁶³ For almost three hours the Houston's master fought to save the ship, eventually accidentally running the ship aground on a well-charted reef after failing to plot the ship's position.⁶⁴ The trial judge conducted a bifurcated trial in which the fault of the Houston master—*i.e.*, the *plaintiff's* own fault—was tried first and separately from any issue of the fault of the defendants.⁶⁵ At the conclusion of this extraordinary proceeding, the trial judge determined that the plaintiff's fault was so egregious as to constitute the "sole proximate cause" of the loss.⁶⁶ The Ninth Circuit affirmed,⁶⁷ and Exxon persuaded the Supreme Court to grant a writ of certiorari.

In pure comparative fault systems, a defendant's effort to designate the plaintiff's faulty conduct as the sole proximate (legal) cause of the harm is generally viewed as "a transparent effort to circumvent" the law of comparative fault.⁶⁸ But this was not the approach that Exxon took in the *Sofec* case in the Supreme Court.⁶⁹ Instead—relying centrally on *Hercules*, a case that as we have just seen did not even present a victim-fault issue—Exxon argued broadly that the full effects of *Reliable* could only be achieved by

62. 517 U.S. 830 (1996). The case is perceptively analyzed in Dove, *supra* note 18.

63. *Sofec*, 517 U.S. at 832-33.

64. *Id.* at 833.

65. *Id.* at 835.

66. *Id.*

67. 54 F.3d 570 (9th Cir. 1995), *aff'd*, 517 U.S. 830 (1996).

68. Justice v. CSX Transp., Inc., 908 F.2d 119, 124 (7th Cir. 1990) (Posner, J.); *see also* DOBBS, *supra* note 6, at 526 (indicating that holding that the plaintiff's fault supersedes the defendant's on legal cause grounds frequently amounts to "discard[ing] the comparative fault apportionment system"); David W. Robertson, *The Vocabulary of Negligence Law: Continuing Causation Confusion*, 58 LA. L. REV. 1, 31 (1997) (characterizing a group of such cases as having reinstated a rule of "contributory negligence for the fully feckless").

69. At two points in its original merits brief, Exxon did note that the decision below "resuscitated [or resurrected] contributory negligence as a complete defense," but the point was buried within the much broader line of argument. *See* Petitioners' Brief on the Merits, Exxon Co. v. Sofec, Inc., 517 U.S. 830 (1996) (No. 95-129), *available at* 1996 WL 4044, at *21, *32. Exxon's reply brief did not mention the narrower point at all. *See generally* Petitioners' Reply Brief on the Merits, Exxon Co. v. Sofec, Inc., 517 U.S. 830 (1996) (No. 95-129), *available at* 1996 WL 84600. At oral argument, Justice Breyer appeared to invite Exxon's counsel to say that in a pure comparative fault system, a plaintiff's own negligence cannot be a superseding cause, but counsel seemed to decline the invitation. *See* Transcript of Oral Argument, Exxon Co. v. Sofec, Inc., 517 U.S. 830 (1996) (No. 95-129), *available at* 1996 WL 128268, at *14-*16.

replacing the entire doctrine of proximate (legal) causation with a system in which a particular actor's place in the chain of legal causation would be reflected in percentage-fault or percentage-responsibility assignments.⁷⁰ The unanimous Court found this broad argument unpersuasive:

There is nothing internally inconsistent in a system that apportions damages based upon comparative fault only among tortfeasors whose actions were proximate causes of an injury.⁷¹

The Court signaled its awareness that the cause which in its view superseded the effects of the *Sofec* defendants' fault was the faulty conduct of the plaintiff,⁷² but there is no indication that its attention was ever directed to the tension between its holding and the central premise of pure comparative fault, *viz.*, that even an egregiously negligent plaintiff is entitled to a small fraction of his damages.⁷³ Exxon's strategy of trying to persuade the Court to use percentage assignments to carve up and parcel out "aliquot shares" of legal causation⁷⁴ has produced an unavoidably high-profile decision that in the view of perceptive commentators is "inconsistent with the maritime law preference for comparative fault."⁷⁵

70. Dove, *supra* note 18, at 514, deduces from the Ninth Circuit and Supreme Court opinions in *Sofec* that "Exxon's major contention . . . was that the entire proximate cause doctrine should be eliminated in the admiralty context." The briefs and oral argument, *supra* note 69, fully confirm the deduction. See Petitioners' Reply Brief on the Merits, 1996 WL 84600, at *9 ("The objectives of general admiralty law are not to relieve wrongdoers from their aliquot shares of the losses from marine casualties caused in fact by their misconduct . . .").

71. *Sofec*, 517 U.S. at 837.

72. See *id.* at 835 (stating that "the District Court found that Captain Coyne's (and by imputation, Exxon's) extraordinary negligence was the superseding and sole proximate cause of the Houston's grounding").

73. Judge Posner's opinion for the court in *Brotherhood Shipping Co. v. St. Paul Fire & Marine Ins. Co.*, emphasizes and cites cases holding that in a pure system, "if the plaintiff's negligence is deemed 99 percent responsible for the accident . . . and the defendant's negligence 1 percent responsible, the plaintiff is entitled to 1 percent of its damages." 985 F.2d 323, 325 (7th Cir. 1993).

74. See Petitioner's Reply Brief on the Merits, 1996 WL 84600, at *9.

75. NUTSHELL, *supra* note 56, at 156. The idea that comparative fault percentage assignments can be used to reflect an actor's place in the skein of legal causation did not originate with Exxon's appellate counsel. It permeates the literature. See, e.g., APPORTIONMENT RESTATEMENT, *supra* note 1, § 8 (using the terminology of "percentages of responsibility" in lieu of "percentages of fault" and including among the recommended "[f]actors for assigning percentages of responsibility . . . the strength of the causal connection between the person's risk-creating conduct and the harm"); UNIFORM COMPARATIVE FAULT ACT § 2(b) (1977) (providing that "[i]n determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed"); SCHWARTZ, *supra* note 1, at 92-105 (general discussion of the viewpoint); WOODS & DEERE, *supra* note 1, at 97-120 (general discussion of the viewpoint).

Despite the number of authorities who are sympathetic to the use of comparative fault assignments to reflect legal cause considerations, the idea seems unwise. Professor Dobbs is

3. *Siphoning the lion's share of fault out of the case*⁷⁶

The new Restatement (Third) of Torts—Apportionment of Liability ascribes it to “convention” that the trier of fact’s percentage-fault assignments must total 100.⁷⁷ But anyone who believes that percentage-fault assignments are real percentages—or even that they should be treated as though they are real—is likely to insist that the limit to 100 units of fault is not merely conventional but definitional.⁷⁸

An unyielding 100-unit limitation is problematic. Many judges believe that accurate fault apportionment “cannot be achieved unless that apportionment includes all tortfeasors guilty of causal negligence either causing or contributing to the occurrence in question, whether or not they are parties to the case.”⁷⁹ In courts holding this view,⁸⁰ fault percentages assigned

doubtless right in stating that “add[ing] a comparison of causal significance to the ordinary negligence case . . . [would require] a whole new conceptual apparatus” and that “cause in fact and proximate cause . . . [should retain their traditional role as] gatekeeping concepts.” DOBBS, *supra* note 6, at 509-10.

76. Although lions do drink, this subtitle will be seen as a mixed metaphor. My excuse is that it captures the key language of the two main cases in this subsection.

77. See APPORTIONMENT RESTATEMENT, *supra* note 1, § 7 cmt g.

78. AMERICAN HERITAGE DICTIONARY 920 (2d college ed. 1982) defines “percentage” as “[a] fraction or ratio with 100 fixed and understood as the denominator.” See also Bradley v. Appalachian Power Co., 256 S.E.2d 879, 885 (W. Va. 1979) (“We do state what may be the obvious, that the sum of the negligence of all the parties to a given accident cannot exceed 100 percent.”); Paul A. LeBel, *Reducing the Recovery of Avoidable “Seat Belt Damages:” A Cure for the Defects of Waterson v. General Motors Corporation*, 22 SETON HALL L. REV. 4, 19 (1991) (“By definition, of course, a ‘percentage’ is a particular share of one hundred.”).

79. Gauthier v. O’Brien, 618 So. 2d 825, 830 (La. 1993) (quoting Pocatello Ind. Park Co. v. Steel West, Inc., 621 P.2d 399, 403 (Idaho 1980)). See also *id.* at 833 (Lemmon, J., concurring) (stating that “a jury which is required to quantify the fault of all parties whose blameworthiness is shown on the record has a less complex task and is more likely to reach a more accurate result”); Field v. Boyer Co., 952 P.2d 1078, 1090 (Utah 1998) (Russon, J., dissenting) (dissenting from the majority’s refusal to allow the assignment of a fault percentage to the unknown assailant who attacked the plaintiff on defendants’ premises and stating that unless the fact finder can “allocate to the intentional tortfeasor who undisputedly injured plaintiff, his respective proportion of fault . . . [the fact finder cannot] fairly and honestly determine the proportion of fault attributable to the other defendants in this case”).

The foregoing viewpoint is widely held, but it is puzzling. The majority opinion in *Field* sets forth a much more plausible account of the fact-finding process:

We can imagine situations where the conduct of an unknown tortfeasor would [need to] be ‘considered’ by a court in determining the relevant percentages of fault attributable to a plaintiff and a defendant, but [a percentage of] fault [need] not be attributed to such an unknown tortfeasor. For example, an erratic driver might cause a defendant who was negligently following too closely to swerve and hit another car whose driver was negligently driving too fast. In apportioning fault between the defendant who was following too closely and the plaintiff who was speeding and who was hit, the court might consider the fault of the erratic driver (who drove on and was never identified or made a party to the litigation) in determining the relative fault of the plaintiff and the defendant.

to nonparties,⁸¹ to judgment-proof intentional tortfeasors⁸² or to immune tortfeasors⁸³ can use up the available scale of measurement, so that there is not enough left to permit the trier of fact to express a meaningful assessment of the fault of the plaintiff and defendant(s). Judges occasionally complain about this.⁸⁴ For example, then-Judge Breyer wondered why triers of fact should be required “to reduce, perhaps to inconsequential levels, . . . serious fault [of defendants], simply because [others] also failed to take proper care.”⁸⁵ Similarly, in deciding not to allow a percentage-fault assignment to a rapist who was enabled to attack the plaintiff because the defendant apartment complex did not supply the security measures it advertised and promised its tenants, the Louisiana Supreme Court noted:

Southmark, who by definition acted unreasonably under the circumstances in breaching their duty to the plaintiff, should not be allowed to benefit at the innocent plaintiff's expense by an allocation of fault to the intentional tortfeasor. . . . Given the fact that any rational juror will apportion *the lion's share of the fault* to the intentional tortfeasor . . . application of comparative fault principles in the circumstances presented in this particular case would operate to reduce the incentive of the lessor to protect against the same type of situation occurring again in the future. Such a result is clearly contrary to public policy.⁸⁶

In *Pepper v. Star Equipment, Ltd.*, the Supreme Court of Iowa referred to the problem under discussion as “fault siphoning.”⁸⁷ Holding that a trial judge

Nevertheless, . . . the court's allocation of fault to the plaintiff and the defendant [should] equal 100%, the absent driver's conduct being ‘considered’ only in determining whether the split between the plaintiff and the defendant should be 50/50, 60/40, or some other proportion.

Field, 952 P.2d at 1081.

80. For discussion of the varying positions on whose fault should be quantified, see DOBBS, *supra* note 6, at 532-34, 1088-89.

81. See, for example, *Bartlett v. New Mexico Welding Supply*, 646 P.2d 579, 580 (N.M. Ct. App. 1982), in which the defendant received a 30% assessment (and hence with the abolition of joint and several liability owed only 30% of the damages) only because the unknown driver got a 70% assignment. *Id.*

82. See, e.g., *Ozaki v. Association of Apartment Owners*, 954 P.2d 644 (Haw. 1998) (assessing fault as follows: 92% to murderer, 5% to victim, 3% to negligent owner of apartment complex); *Weidenfeller v. Star and Garter*, 2 Cal. Rptr. 2d 14 (Cal. Ct. App. 1991) (assessing fault as follows: 75% to assailant, 5% to victim, 20% to negligent tavern).

83. See, for example, *Carroll v. Whitney*, 29 S.W.3d 14 (Tenn. 2000), in which medical malpractice defendants escaped all liability solely because the jury made 70% and 30% fault assignments to two immune state-employed physicians who were not parties to the lawsuit.

84. See *infra* note 115 (in addition to the authorities treated immediately below).

85. *Lyon v. Ranger III*, 858 F.2d 22, 25 (1st Cir. 1988).

86. *Veazey v. Elmwood Plantation Assocs., Ltd.*, 650 So. 2d 712, 719 (La. 1994) (original emphasis on “innocent” omitted, emphasis added).

87. 484 N.W.2d 156, 158 (Iowa 1992).

erred in allowing a products liability defendant to implead—purely for fault-apportionment purposes—a third party defendant who was protected from liability by federal bankruptcy laws, the Court stated, “the presence of a third-party defendant in an action [should not be allowed to] siphon off a portion of aggregate fault from the defendant against whom the plaintiff is claiming.”⁸⁸ A dissenting judge insisted that, by refusing to allocate some of the available 100 units to the immune third party defendant, the majority was imposing “fault avulsion” on the defendant.⁸⁹ (“Avulsion” is “[t]he removal by erosion of soil from one property onto another.”⁹⁰) The Iowa Court’s “siphoning” (unnatural removal) vs. “avulsion” (unfair piling on) metaphors are colorful but not instructive. The percentage vocabulary’s insistence that the trier of fact must “apportion [a 100-unit universe of] fault as if it were a tangible and measurable commodity”⁹¹ is deeply obscurant here. The real question in *Pepper* was the defendant’s “just and equitable” share of the plaintiff’s personal injury damages. Talking about how to parcel out an arbitrarily-rationed 100 units of fault is not a good way to address or even to approach this question.⁹²

4. *Jury jokes*

Only a handful of reported cases discuss what factors a jury should consider in quantifying tortfeasors’ and victims’ fault,⁹³ and for the most part these discussions are not helpful.⁹⁴ Typically, we simply leave it to the jury to answer questions like the following, which is taken from a Wisconsin traffic accident case involving one plaintiff and two defendants:⁹⁵

QUESTION NO. 7

If you find by your answers to any subdivisions of Questions No. 1 and 3 that either the defendant [A] or the defendant [B], or both, were negligent, and if you further find by your answers to any subdivisions of Questions No. 2 and 4

88. *Id.*

89. *Id.* at 159 (Snell, J., dissenting).

90. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 92 (1981).

91. SCHWARTZ, *supra* note 1, at 352.

92. My long-ago mentor, Dean Leon Green, was fond of saying that a good legal doctrine is like a good horse: you can ride it to the vicinity of the problem you need to solve, and then you must get down and walk.

93. See SCHWARTZ, *supra* note 1, at 355 n.16 (“few decisions . . . make the attempt”). Noteworthy attempts include *Eaton v. McLain*, 891 S.W.2d 587, 591-93 (Tenn. 1994) and *Watson v. State Farm & Fire & Cas. Ins. Co.*, 469 So. 2d 967, 973-74 (La. 1985).

94. See DOBBS, *supra* note 6, at 508 (stating that such specifications are “not needed” and “run risks of overemphasizing particular facets of the negligence issue”); cf. *Sanford v. Chevrolet Div. of Gen. Motors*, 642 P.2d 624, 644 (Or. 1982) (Peterson, J., concurring) (stating that it is probably best to “say nothing”).

95. See SCHWARTZ, *supra* note 1, at 365.

that negligence of either the defendant [A] or the defendant [B] or both, was a cause of the collision, and if you find by your answer to any subdivision of Question No. 5 that the plaintiff was negligent, and if you further find by your answer to any subdivision of Question No. 6 that the negligence of the plaintiff was a cause of the collision, then answer this question: Taking the combined negligence which caused the collision as 100%, what percentage of such negligence is attributable to:

(a) the defendant [A]? _____%

(b) the defendant [B]? _____%

(c) the plaintiff? _____%

Total: 100%⁹⁶

Even in this relatively simple three-party case, these are odd questions to put to a jury. And in more complex cases—for example, cases in jurisdictions that call for assigning fault to nonparty tortfeasors—the complexity of the jury’s task can look downright funny.

Juries sometimes go along with the joke, returning fault assignments that could only have been meant as parodies of precision, such as 31.06%.⁹⁷ There has got to be a better way.

5. *Weird math*

One argument for using general verdicts in comparative fault cases stems from a desire to keep “horrendous mathematical processes out of sight.”⁹⁸ If the jury returns only a dollar damages number, the court will not have to concern itself with the details of any ridiculous wrangling over percentages that may have occurred.

A better way of reducing the visible incidence of weird math would be to eschew the percentage vocabulary, which contributes to various forms of mathematics-driven obfuscation. The first is a recurrent mistake in

96. *Id.*

97. *Duncan v. Kansas City S. Ry. Co.*, 773 So. 2d 670, 674 (La. 2000), was a grade crossing accident case in which the jury assigned 58.6% fault to the railroad, 26.4% to the motorist, and 15% to a governmental entity allegedly responsible for the condition of the crossing. Upon determining that the governmental entity should be exonerated, the trial judge “reapportioned” the governmental entity’s 15% to the other two tortfeasors, yielding an assignment of 68.94% to the railroad and 31.06% to the motorist. *Id.* See also *Liberty Mut. Ins. Co. v. Gen. Motors Corp.*, 653 P.2d 96, 96 (Haw. 1982) (assessing fault as follows: 52.5% to plaintiff, 47.5% to defendants); *Riley v. Reliance Ins. Co.*, 703 So. 2d 158, 161 (La. Ct. App. 1997) (assessing fault as follows: 60% to plaintiff, 23.75% to one tortfeasor, 16.25% to another); *Ligon v. Middletown Area Sch. Dist.*, 584 A.2d 376 (Pa. Commw. Ct. 1990) (assessing fault as follows: 32.5% to one tortfeasor, 67.5% to another).

98. David L. Nixon, *The Actual “Legislative Intent” Behind New Hampshire’s Comparative Negligence Statute*, 12 N.H. B.J. 17, 30 (1969).

conceptualizing the appropriate victim-fault reduction. As we have seen, the basic idea of comparative fault centers on a diminution of damages “in proportion to the plaintiff’s relevant fault.”⁹⁹ For example, in a simple two-party case in which the defendant’s fault is expressed as 80% and the plaintiff’s as 20%, the plaintiff should recover his full damages less a 20/100ths reduction. But courts and counsel often mistake this, holding or contending that the damages reduction in such a case should be 20/80ths. Obviously, if one believes in the validity of the jury’s normative numbers, a 20/80ths reduction would over-penalize the plaintiff.¹⁰⁰ Yet the mistaken contention is persistently (and often demonstrably confusedly) made.¹⁰¹

A second type of math-related mistake is simple computational error. A good example is *Davis v. Commercial Union Insurance Co.*, in which the trier of fact assigned 60% fault to the plaintiff, 10% to the product liability defendant, and 30% to the plaintiff’s employer, who was immune from tort liability by virtue of Louisiana’s workers’ compensation statute.¹⁰² After determining that under Louisiana law “an employer’s fault should not be considered in apportioning liability among the negligent parties,”¹⁰³ the court decided to “reapportion” the fault that had been mistakenly assigned to the employer.¹⁰⁴ So far, so good; there is plenty of authority supporting “[j]udicial reallocation of [fault] when an assignment of [fault] is legally erroneous.”¹⁰⁵ The easiest (and conceptually clearest) way to reallocate in *Davis* would have been simply to ignore the erroneous 30-unit assignment to the employer and hold the defendant liable for 10/70ths of plaintiff’s \$125,000 in damages, \$17,857.14. Instead, the court did it this way:

[The employer’s] thirty percent fault should be divided between [plaintiff] and [defendant] 6 to 1 which is in proportion to their previously determined degrees of fault. Applying this formula, [defendant’s] proportion of the thirty percent fault is 4.29 percent and [plaintiff’s] is 25.71 percent. Thus,

99. *DOBBS*, *supra* note 6, at 504.

100. *See Norfolk & W. Ry. Co. v. Earnest*, 229 U.S. 114, 121-22 (1913) (criticizing a jury instruction that called for diminution of damages “in proportion to [plaintiff’s] negligence . . . ‘as compared with the negligence of the defendant’” and noting that it should have said “in proportion to [plaintiff’s] negligence as compared with the entire negligence attributable to both [plaintiff and defendant]”); *Cameron v. Union Auto. Ins. Co.*, 247 N.W. 453 (Wis. 1933) (rejecting defendant’s argument that a plaintiff whose negligence was assessed at 20% should have his damages diminished by 20/80ths).

101. *See Ross v. Koberstein*, 264 N.W. 642 (Wis. 1936) (patiently explaining to defense counsel—whose client was assessed with 95% fault against the plaintiff’s 5%—that defendant was helped, not hurt, by the trial judge’s mistaken diminution of damages by 5/95ths instead of 5/100ths).

102. 892 F.2d 378, 381 (5th Cir. 1990).

103. *Id.* at 384.

104. *Id.*

105. APPORTIONMENT RESTATEMENT, *supra* note 1, § 7 cmt. h. *See also supra* note 97.

[defendant] is responsible [for its previously determined 10 percent plus an additional 4.29 percent] for a total of 14.29 percent of [plaintiff's] damages.¹⁰⁶

Under the court's approach, defendant owed $0.1429 \times \$125,000 = \$17,862.50$.¹⁰⁷ That is about five bucks too much. The overage is trivial, but the existence of the mistake is important; it reflects the rounding incident to cumbersome mathematical processes necessitated *only* by a self-imposed enslavement to the vocabulary of percentages.¹⁰⁸

Self-imposed enslavement can take extreme forms. *Zenner v. Chicago, St. P., M. & O. Railway Co.*¹⁰⁹ was a grade crossing accident case in which the jury assigned the deceased motorist 40% fault and the railroad 60%.¹¹⁰ Under the jury's findings, the railroad's negligent conduct consisted in the trainmen's failure to sound the train's whistle and ring its bell.¹¹¹ The appellate court determined that the evidence would not support the conclusion that the trainmen failed to sound the whistle and then reasoned:

It must now be taken as a verity that defendant discharged its statutory duty with respect to the whistle, and failed so to do with respect to the bell. Based upon its conclusion that defendant was negligent in two respects, the jury found defendant's negligence to constitute 60 per cent. of the total negligence involved in the accident, and appraised the negligence of deceased at 40 per cent. . . . [But when] the negligence of deceased is balanced against the single default on the part of defendant in [not ringing] the bell, we think it must be said . . . that the negligence of deceased as a matter of law is at least as great as that of defendant. . . . If the jury could legitimately assess the percentage of deceased's negligence at 40 per cent., in comparison with two distinct violations by defendant, there could be no rational ground for assessing his negligence at less than 50 per cent., with only one default by defendant remaining in the case.¹¹²

106. *Davis*, 892 F.2d at 384-85.

107. *Id.* at 385 n.7.

108. See also *Cartel Capital Corp. v. Fireco*, 410 A.2d 674 (N.J. 1980), in which the trier of fact assigned the plaintiff 41% fault, defendant Fireco 30%, and defendant Ansul (who settled with the plaintiff) 29%. The appellate court determined that the assignment to the plaintiff was legally erroneous and then proceeded to the reallocation process: "Ansul's 29% and Fireco's 30%, or 59%, constitute the total fault in the case. In a sense, the 59% is 100%. Thus, Fireco's responsibility is 30/59ths or 50.8%. . . . It follows that Fireco's proportionate share of the entire damages of \$113,400 is \$57,661.01. . . ." *Id.* at 685. Note that 50.8% of \$113,400 comes to only \$57,607.20. The court's damages figure of \$57,661.01 is exactly 30/59ths of \$113,400. Thus, the court actually used fractions to do it right, but it still felt enslaved enough to the percentage vocabulary to indulge in the somewhat misleading 50.8% expression.

109. 262 N.W. 581 (Wis. 1935).

110. *Id.* at 584.

111. *Id.* at 582.

112. *Id.* at 584.

The result of this reasoning was to bar recovery under the state's modified version of comparative fault. If the court had said only that narrowing defendant's culpability from two pieces of conduct to one necessitated lowering defendant's fault assignment from 60% to 50% or less, it would have been subject to some criticism for the formalism and sterility of resting its disposition on a mere counting of the parties' negligent acts and omissions rather than assessing their "entirely different kind and quality."¹¹³ But what the court actually said entailed the additional and far worse formalism of insisting that as a tortfeasor's culpability decreases, the victim's *must of necessity* increase. Such reasoning posits and indeed reifies a precisely reciprocal relationship¹¹⁴ between the parties' degrees of fault that the real world in no way reflects or supports. Whether the trainmen sounded the whistle or not, the deceased's conduct "remain[ed] exactly what it was."¹¹⁵ The posited precise reciprocity was a pure abstraction¹¹⁶ stemming entirely from the arbitrary limitation to a 100-unit universe of fault that is entailed in the percentage vocabulary.

V. A FAULT-LINE PROCESS FOR SETTING NORMATIVE NUMBERS

All of the foregoing misunderstandings could be eliminated or at least reduced in frequency and importance by eschewing the vocabulary of percentages in favor of a simpler, less rigid, and less cluttered language. The new language should meet the following criteria: (1) It should reflect the reality that reducing damages "in proportion" to the victim's degree of fault is in no way a mathematical process but rather a way of seeking to arrive at each defendant's "just and equitable" share of the damages; (2) It ought to make clear that the comparative fault process assesses "fault, not causation,"¹¹⁷ *i.e.*, that both cause in fact and legal causation are "gatekeeping concepts"¹¹⁸ that

113. Campbell, *supra* note 15, at 290. Professor Campbell explains: "The [process] is not one of simple mathematics. A person negligent in one respect may be held as a matter of law at least as negligent as one found negligent in two or more respects." *Id.* at 291.

114. *See also* LeBel, *supra* note 78, at 7, 19 (stating that a decision assigning 80% to defendant's fault in causing a traffic accident, 20% to plaintiff's fault in causing the accident, and another 20% to the plaintiff for not wearing a seat belt was "fundamentally flawed as a matter of logic" because "[i]f the plaintiff's negligence in failing to wear a seat belt is . . . twenty percent, then there is another eighty percent of fault" that must be posited and given legal effect).

115. DOBBS, *supra* note 6, at 532 (discussing *Walton v. Tull*, 356 S.W.2d 20, 26-27 (Ark. 1962), in which the court complained about the need for reducing a party's fault assignment simply because other actors' fault had to be taken into account).

116. In *Zenner*, it appeared that the deceased motorist had tried to outrace the train to the crossing. Trying to outrace a whistle-sounding and bell-ringing train might under some circumstances be more culpable than trying to outrace a bell-ringing train. But it might not. The point is that there can legitimately be nothing automatic about any such evaluation.

117. DOBBS, *supra* note 6, at 504.

118. *Id.* at 509.

are not part of the comparative-fault-assessment process; (3) It must focus the trier of fact's attention on "the relevant unjustified risks"¹¹⁹ taken by each of the parties rather than on the parties' "general moral worth;"¹²⁰ (4) Its vocabulary should not be arbitrarily rationed; and (5) It should use "the fundamental negligence analysis"¹²¹—without further elaboration—to assess each party's responsibility for the relevant unjustified risks. Judge Posner has recently set forth a crystal-clear summary of the fundamental negligence analysis:

[An actor] is negligent if the burden (cost) of the precautions that he could have taken to avoid the accident (B [. . .]) is less than the loss that the accident could reasonably be anticipated to cause (L), discounted (i.e., multiplied) by the probability [P] that the accident would occur unless the precautions were taken. So: $B < PL$. The cost-justified level of precaution (B)—the level that the [actor] must come up to on penalty of being found to have violated his duty of due care if he does not—is thus higher, the likelier the accident that the precaution would have prevented was to occur (P) and the greater the loss that the accident was likely to inflict if it did occur (L). Looked at from a different direction, the formula shows that the cheaper it is to prevent the accident (low B), the more likely prevention is to be cost-justified and the failure to prevent therefore negligent. Negligence is especially likely to be found if B is low and both P and L (and therefore PL , the expected accident cost) are high.¹²²

These variables are assessed from the viewpoint of a person of ordinary prudence "who found himself or herself in [the actor's] position."¹²³

For its lexicon, the new language would abandon the vocabulary of percentage-fault assignments and substitute a vocabulary borrowed from a valuable insight of Professor Richard Pearson: It would posit "a 'fault line,' with the absence of fault at one end having a value of zero and deliberate wrongdoing at the other having a value of ten."¹²⁴ The trier of fact would be

119. *Id.* at 507.

120. *Id.* at 506. Keeping considerations of the parties' general moral or aesthetic attractiveness out of the process is perhaps the most fundamental role of the judiciary. See generally David W. Robertson, *Alvin Rubin's Last Dissent*, 70 TEX. L. REV. 7 (1991).

121. DOBBS, *supra* note 6, at 508.

122. *Brotherhood Shipping Co. v. St. Paul Fire & Marine Ins. Co.*, 985 F.2d 323, 327 (7th Cir. 1993). Judge Posner's source is obviously Learned Hand's famous opinion in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). For earlier versions of what has come to be called "the Hand formula," see *The Glendola*, 47 F.2d 206, 207 (2d Cir. 1931); Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 42-43 (1915). In *Carroll Towing*, Judge Hand said he was speaking in "algebraic terms" but it should be noted that no one, including Hand himself thought that his construct was anything more than metaphorical mathematics. In *Mosian v. Loftus*, 178 F.2d 148, 149 (2d Cir. 1949), he wrote that "all such attempts [to quantify the variables] are illusory. . . ." See also *infra* note 145.

123. *Wassell v. Adams*, 865 F.2d 849, 855 (7th Cir. 1989) (Posner, J.).

124. Richard N. Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 LA. L. REV. 343, 348-49 (1980). Professor Pearson did not think

required to use this scale, consisting of whole numbers only, to communicate its normatively-based estimation of the extent to which each relevant actor's¹²⁵ relevant conduct departed from what was required of that actor under the circumstances.¹²⁶ The trier of fact's use of the scale would yield a whole number from zero through ten—to be called a *normative assignment*—for each actor being adjudged. Findings of fact would consist of (a) each successful plaintiff's total damages, and (b) each relevant actor's normative assignment.

The trial judge's role in comparative fault cases using the new lexicon would not differ in substance from her present role, but certain aspects of the work would become more sharply focused. (a) Because the new lexicon does not ration the available numbers, the judge would have to make a principled decision—under the facts shown and on the basis of substantive and procedural law and policy—as to which actors ought to be submitted to the trier of fact for potential normative assignments. (b) Once the findings of fact were made, the judge would then have to make a similar principled decision as to which of the normative assignments were relevant for purposes of determining each defendant's equitable share of the damages.¹²⁷ (c) The judge would then total the relevant normative assignments, yielding a *normative denominator*. (d) Each defendant would then be assigned a *normative fraction*, the numerator of which would be the defendant's normative assignment and the denominator the normative denominator. (e) Each defendant's equitable share of the damages would be arrived at by multiplying the total damages by the defendant's normative fraction. (f) Each defendant's ultimate liability to the plaintiff

his fault-line method should “be incorporated into a statute or . . . into the jury instructions.” *Id.* at 349. I do not mean to suggest that he would agree with any of my criticisms and proposals. But his basic insight is perfect for my purposes. For broadly similar suggestions, see *Sandford v. Chevrolet Div. of Gen. Motors*, 642 P.2d 624, 634-35 (Or. 1982); *Wing v. Morse*, 300 A.2d 491, 500 (Me. 1973); LeBel, *supra* note 78, at 31.

125. I am forced to use the awkward term “relevant actor” by the fact that so many jurisdictions have decided to assign fault to non-party tortfeasors. See *supra* note 81 and accompanying text. A much preferable approach is that of the UNIFORM COMPARATIVE FAULT ACT (1977), which provides that numerical fault assignments should be confined to plaintiffs, defendants, third-party defendants and settling tortfeasors. UNIFORM COMPARATIVE FAULT ACT, § 2(a)(2), 13 U.L.A. 136 (1977).

126. For each negligent actor, the baseline requirement—the conduct required under the circumstances—would come from an application of the *B < PL* inquiry. Analogous applications of the law of intentional tort and strict liability would set the baseline requirement for such actors. I realize that “what was required of [an] actor under the circumstances” ultimately begs the key substantive question. But my proposed new language is neither creating nor changing (but rather merely identifying) that question, so I feel free to beg it.

127. In some jurisdictions, the judge would be required to treat each normative assignment as relevant. In others—particularly those with the philosophy that accurate fact-finding requires the numerical assessment of the culpability of persons whose culpable contribution is not directly relevant to the determination of the defendants' liability—some of the normative assignments would be set aside by the judge. See *supra* notes 79 and 105 and accompanying text.

would then be determined by the jurisdiction's law of joint and several liability.¹²⁸

To illustrate how the proposed system would work—and to see some of the simplifications that it could produce—let us posit a hypothetical case governed by the Uniform Comparative Fault Act, the presently relevant features of which are: (a) the pure form of comparative fault applies in negligence and strict liability cases;¹²⁹ (b) intentional tort cases are not covered by the Act;¹³⁰ (c) in cases governed by the Act, the jury must return special verdicts assigning percentages of fault to parties and settling tortfeasors but not to nonparty (sometimes called *phantom*) tortfeasors;¹³¹ and (d) the doctrine of joint and several liability is retained.¹³² In our hypothetical case,¹³³ a thirteen-year-old girl who was raped by three seventeen-year-old boys at summer camp sues the camp for negligent supervision and security and the three rapists for battery. The trial judge instructs the jury to assign fault percentages to each of the four parties, and the jury finds as follows:

Plaintiff's total damages:	\$100,000
Plaintiff's fault (negligence in drinking beer with the three boys):	12%
Camp's fault (negligent supervision, etc.):	10%
Rapist A's fault (battery):	38%
Rapist B's fault (battery):	22%
Rapist C's fault (battery):	18%

We will assume that all of the findings of culpability *vel non* are supported by the facts and the law. What should the judgment provide? We will first discuss that question with the vocabulary of percentages and then turn to the fault-line method for a comparison.

The first question that must be answered before entering a judgment is whether the percentage-fault assignments to the three battery defendants were appropriate. Each opposing viewpoint has some plausibility. (a) Some judges will say yes, on the view that accurate fact-finding in the case governed by the Act (Plaintiff vs. Camp) depends on allowing the jury to assign fault to the

128. Whether and against whom the plaintiff would be barred from recovery would be determined by the particular jurisdiction's choice among the "pure," "equal to" and "greater than" systems outlined *supra* note 2.

129. UNIFORM COMPARATIVE FAULT ACT § 1, 13 U.L.A. 127 (1977).

130. *Id.*

131. *Id.* § 2(a).

132. *Id.* § 2(c).

133. The basic facts and jury findings are borrowed from *Morris v. Yogi Bear's Jellystone Park Camp Resort*, 539 So. 2d 70 (La. Ct. App. 1989).

other tortfeasors.¹³⁴ But (b) most judges will probably say no, on the view that cases not covered by the Act should not be subjected to its procedures, particularly when the Act itself precludes percentage-fault assignments to phantom tortfeasors.

The next question is whether the three battery defendants should be able to use the percentage assignments to avoid full joint and several liability. The clear answer is no; the Act specifically leaves the law of intentional tort undisturbed. Each rapist should be held jointly and severally liable for \$100,000.

The remaining question is the camp's exposure. We return to the opposing viewpoints on the appropriateness of the percentage-fault findings against the rapists. (a) A judge who believes that it was appropriate to assign fault percentages to the three battery defendants will presumably hold the camp jointly and severally liable for \$88,000. Counsel for the camp will argue strenuously that the case shows the injustice of joint and several liability, in all likelihood asking the rhetorical question: "How can my client be made to pay for 88% of the injury when it caused only 10% of it?" If the judge is experienced and intelligent, he will respond by saying, "Nonsense, your client has been found to have been a cause in fact and a legal cause of the entire loss; otherwise, it wouldn't be liable at all." If the judge is less experienced or intelligent, he may say, "I agree, but that's a matter for the legislature." (b) A judge who believes that the findings were inappropriate will have to order a new trial or reallocate the unwanted percentages.¹³⁵ The latter approach would yield an award of 10/22ds of plaintiff's damages, \$45,455.

Intrinsically this is a hard case, and the percentage vocabulary adds to its difficulty and mystery. Did the percentage vocabulary lead the trial judge to feel it necessary to submit the rapists' percentages of fault to jury assessment? Did the perceived need to assign percentages to three rapists "siphon" fault from the camp? From the plaintiff? Without knowing these things, we can have no confidence in the fairness of any judgment.

The case would look far simpler under the fault-line method. In the first place, there would be little impetus to seek normative assignments against the rapists. It seems to be only the illusion of carving up some notional 100-unit universe of fault that leads judges to feel it necessary to seek percentage assignments against phantoms. And even if normative assignments were sought against the rapists, a properly instructed jury would presumably give them 10 each—raping a thirteen-year-old is deliberate wrongdoing—and the

134. See *supra* note 79 and accompanying text.

135. See APPORTIONMENT RESTATEMENT, *supra* note 1, reporter's note to § 7 cmt. h (noting that a new trial, rather than reallocation, is more likely when the erroneous percentage assignment is large).

trial judge would certainly then see the wisdom of ignoring these assignments in considering the camp's liability.

Moreover, even if we make the unlikely assumption that the case is submitted in exactly the same posture and that the jury's findings are fully consistent as to the parties' respective degrees of fault, the case is still simpler under the fault-line method. On these assumptions, the normative assignments in the present case will be:

Plaintiff	1
Camp	1
Rapist A	4
Rapist B	2
Rapist C	2

On these findings, the rapists will again be jointly and severally liable for the full damages. A judge who believes the findings against the rapists were appropriate will hold the camp jointly and severally liable for 9/10ths of the damages. Defense counsel will be unable to make any semi-plausible causation arguments. A judge who believes the findings against the rapists were inappropriate will order a new trial or hold the camp for 1/2.

I think we have just seen that the fault-line method renders the *Bartlett* mistake virtually impossible,¹³⁶ makes it rather obvious that normative numbers are not appropriate for legal cause considerations,¹³⁷ eliminates the fault-siphoning problem,¹³⁸ guarantees against parodies of precision,¹³⁹ and cuts back on mathematical complexities.¹⁴⁰

Moreover, the fault-line method seems to me to take away whatever heat may be left in the recurrent argument that "comparing different types of culpability is like comparing apples and oranges"¹⁴¹ and hence impossible or at least inappropriate.¹⁴² The fault-line method reveals that debate as irrelevant

136. *See supra* Section IV.1.

137. *See supra* Section IV.2.

138. *See supra* Section IV.3.

139. *See supra* Section IV.4.

140. *See supra* Section IV.5. Restricting the jury to whole single-digit numbers helps. And I think fractions are easier to work with than percentages; as I remember grade school, fractions came right after long division and way before decimals and percentages.

141. APPORTIONMENT RESTATEMENT, *supra* note 1, reporter's note to § 8 cmt. a.

142. *Cf. Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (stating that balancing or comparing "incommensurate" interests is "like judging whether a particular line is longer than a particular rock is heavy"); Aaron D. Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797, 806 (1977) (suggesting that "[t]he short answer to the dilemma of how one can compare strict liability and negligence is that one must simply close one's eyes and accomplish the task").

by making it plain that no direct conduct-comparing occurs anywhere in the comparative fault process. The jury makes no such comparison; instead, it estimates each actor's extent of departure from the norm appropriate to that actor's situation and registers that normative estimation in numerical form. Regardless of whether the estimate is called a "percentage" or a "normative assignment," it is plain on reflection that it does not result from comparing one actor's conduct with another's but rather from comparing each actor's conduct with that actor's own behavioral norm. The shift from the percentage to the normative assignment vocabulary does not change that; it just makes it clearer.¹⁴³ Nor does the judge compare the conduct of the parties. Instead, she merely uses mathematical operations to try to give *comparable effect* to the jury's normative assessments. In retrospect, it is clear that we should have named these systems "damages apportionment" rather than "comparative fault."¹⁴⁴

VI. TEACHING TORTS

The fault-line proposal could be implemented by the courts in some states, but in many it would require legislative action. Meanwhile, torts professors should introduce their students to the proposed fault-line methodology early in their study of comparative fault, before the inevitable infatuation with the power of percentages sets in. The big problem with the percentage vocabulary is that it sounds and looks like measurement but is not. Reflecting on the fault-line methodology makes it clear, I think, that a jury's assignment of normative numbers to the actors' conduct *cannot* be measured, regardless of how that assignment is expressed.

We lawyers, notoriously poor at mathematical operations, seem readily seduced by the reality or any plausible illusion of quantification.¹⁴⁵ While

143. Those who favor "blindfolding the jury"—*i.e.*, trying to keep the jurors from knowing the legal effect of their findings—may consider that the percentage vocabulary is superior to the fault line method in this respect. But the emergent—and in my opinion superior—view holds that blindfolding is not a good idea. See *Porche v. Gulf Miss. Marine Corp.*, 390 F. Supp. 624, 632 (E.D. La. 1975) ("One of the purposes of the jury system is to temper the strict application of law to facts, and thus bring to the administration of justice a commonsense lay approach, a purpose ill-served by relegating the jury to a role of determining facts in vacuo, ignorant of the significance of their findings. See C. WRIGHT, LAW OF FEDERAL COURTS § 94 (1970).") Moreover, if the court doesn't tell the jury the potential effect of their findings, they are bound to guess, and the guess will often be wrong. See *generally* *Kaeo v. Davis*, 719 P.2d 387 (Haw. 1986).

144. Cf. *Wing v. Morse*, 300 A.2d 491, 499 (Me. 1973) (stating that Maine's odd statute, see *supra* note 30 and accompanying text, should clearly have been named the "Damage Apportionment Act").

145. Judge Posner, whose work is so helpful on so many tort-law fronts, is once again instructive here. In *United States Fidelity & Guaranty Co. v. Plovdba*, 683 F.2d 1022, 1026 (7th Cir. 1982), he made the helpful observation that "[t]hough mathematical in form, the Hand

damages numbers are real—*i.e.*, they do honestly purport to measure something—ostensible percentages of fault are not real. They are ersatz notional normative numbers. Lawyers who grasp this fact at an early stage in their careers will be a good step ahead of the rest of the pack.

formula does not yield mathematically precise results in practice; that would require that *B*, *P*, and *L* all be quantified, which so far as we know has never been done in an actual lawsuit.” *Id.* But then in *Wassell v. Adams*, 865 F.2d 849, 854-56 (7th Cir. 1989)—looking at the *B* element of the formula—he concluded that the “cost to [a rape victim] of schooling herself to greater vigilance” against an attack in defendants’ motel could rationally be set at something just less than 1/32d of \$20,000 per year. *Id.*