Comparative Fault and Common Sense*

Gregory C. Sisk**

TABLE OF CONTENTS

I. INTRODUCTION .................................................. 29
II. THE EVOLUTIONARY PATH TOWARD COMPARATIVE FAULT .... 30
III. COMPARATIVE FAULT AND COMMON SENSE .................... 36
   A. Indivisible Harm and Comparative Fault ................. 37
   B. Comparative Fault—Culpability and Causation .......... 38
      1. Comparing Culpability .................................. 39
      2. Comparative Causation .................................. 42
         a. Counterfactual Similarities ......................... 43
         b. Comparative Causal Uncertainty ..................... 44
         c. Minimal Threshold of Certainty ..................... 47
   3. The Common Sense of the Jury .............................. 49
IV. CONCLUSION .................................................... 51

I. INTRODUCTION

In 1986, the Washington Legislature adopted a broad reform of the principles governing tort liability law. The cornerstone of the Tort Reform Act was the adoption of a system of comparative fault for allocating responsibility in damages for tortious injury. Under this approach, a defendant tortfeasor's liability is several only, unless: (1) the plaintiff was without contributory fault; (2) the defendant acted in concert with another person; (3) the person at fault acted as an agent of the defendant; or (4) the case falls within one of three narrow statutory exceptions. The statute requires the trier of fact to allocate fault to every entity that caused the

---

*This is an expanded and edited version of a presentation made to the Washington Superior Court Judges Conference in Blaine, Washington, on April 20, 1994. The author would like to thank Robert Strassfeld for his correspondence, thoughtful suggestions, and encouragement in the exploration of these issues. In addition, the author recognizes his research assistants, Don McArthur and Jen Ballengee, for their editorial assistance.

**Associate Professor, Drake University Law School.


2. WASH. REV. CODE § 4.22.070 (1992). The statutory exceptions are: (a) causes of action relating to hazardous substances, (b) causes of action arising from tortious interference with contracts or business relations, and (c) causes of action arising from generic products. Id. § 4.22.070(3)(a)-(c).
plaintiff's damages, regardless whether they are a party to the lawsuit.\(^3\) Accordingly, each defendant is responsible to pay only its own proportionate share of the loss, unless one of the express limitations or exceptions permitting application of joint and several liability applies.

Notwithstanding the legislative decision to enact RCW 4.22.070, detractors of tort reform have persisted in their opposition by questioning the constitutional legitimacy of comparative fault. Objections to the comparative fault provisions of RCW 4.22.070 have been garbed in the constitutional clothing of due process,\(^4\) equal protection,\(^5\) and privileges and immunities.\(^6\) However, the common element in those constitutional complaints is the belief by the detractors of tort reform that the modification of joint and several liability is simply unfair.\(^7\) This argument is merely a replay of the old debate about the wisdom of tort reform, now perpetuated in the courts by those who did not prove persuasive before the Washington Legislature in 1986.\(^8\)

To demonstrate the fundamental wisdom of tort reform, this article will explore the meaning and application of comparative fault in both of its incarnations of comparative culpability and comparative causation. This study grounds the concept of comparative fault in the common sense of the community. Because the premise that the extent of liability should follow the degree of responsibility resonates with ordinary experience and understanding, the irresistible principle of comparative fault should prevail against any constitutional challenge.

II. THE EVOLUTIONARY PATH TOWARD COMPARATIVE FAULT

The adoption of tort reform constituted the next logical step in a principled progression away from the harsh and arbitrary common law rules of contributory negligence and joint and several liability toward the principle

---

3. *Id.* § 4.22.070(1).


6. *Id.* at 239-41.


8. *See generally* Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. PUGET SOUND L. REV. 1, 4-7 (1992) [hereinafter Sisk, *Interpretation*] (describing how, following the enactment of the 1986 Tort Reform Act, “the field of battle over tort reform has shifted from the political to the legal, from the legislature to the courts”).
of comparative fault among all who contributed to an injury. At common law, a plaintiff asserting a cause of action in tort was entitled to pursue any or all responsible tortfeasors and collect any part or all of the judgment from one or more of the defendants found to have contributed to her personal injury or property damage. Each individual defendant, however slightly at fault in comparison to other tortfeasors, was liable for the entire amount of the damages awarded to the plaintiff. At the same time, a plaintiff who was found to have been at fault by contributing to the event that led to her injury or damage was barred from any recovery, no matter how slight her contributory negligence.

Both rules—the bar of contributory negligence and the doctrine of joint and several liability—"grew out of the common law concept of the unity of the cause of action; the jury could not be permitted to apportion the damages, since there was but one wrong." If a plaintiff was at fault in part, she had to be treated as at fault in whole, and this contributory negligence barred recovery. Similarly, if a defendant were at fault in part, he had to be treated as at fault for the whole and could not ask for any reduction in liability. Thus, contributory negligence and joint and several liability evolved together and were rooted in the same rigid concept that an injury was a single event and could not logically be divided. In recognition of the conceptual connection between these two doctrines, the Washington Supreme Court recently observed that "[t]he joint and several liability rule developed when another common law rule provided that contributory negligence on the part of the plaintiff, no matter how slight, was a complete bar to recovery."

Slowly but deliberately over the past 20 years, the Washington Legislature abandoned the strict all-or-nothing rules that controlled the common law assessment of tort liability. In 1973, the legislature adopted a pure comparative negligence statute to replace the contributory negligence rule. The new system was based upon a concept of comparative fault, evaluating the relative culpability of the plaintiff as compared to the

---


defendant and the significance of the causal contribution made by each to the plaintiff's harm.\textsuperscript{13} That was the first evolutionary step.

In 1981, the Washington Legislature enacted a contribution statute, allowing a defendant who had borne the brunt of a joint and several liability judgment to seek contribution from other tortfeasors also found to be at fault.\textsuperscript{14} This statute was also based on the concept of comparative fault, allowing for the allocation of responsibility among the tortfeasors according to relative degree of fault. That was the second step.

After the statutory adoption of comparative negligence, the Washington Supreme Court declined itself to abolish or modify joint and several liability, but expressly recognized that the legislature had the power to make such a change.\textsuperscript{15} In 1986, the Washington Legislature accepted that invitation by adopting the Tort Reform Act,\textsuperscript{16} which, \textit{inter alia}, abolished the doctrine of joint and several liability in most cases in which the plaintiff is partially at fault for her injuries.\textsuperscript{17} That was the third and final step. Washington adopted

\textsuperscript{13} No constitutional challenge can be made to the statutory modification of joint and several liability without simultaneously bringing into question the constitutional validity of comparative negligence between plaintiffs and defendants. The conceptual basis for comparative negligence between plaintiff and defendant and for comparative fault among tortfeasors is the same — that responsibility should be allocated according to fault. The rules of joint and several liability and contributory negligence evolved together. Smith v. Department of Ins., 507 So. 2d 1080, 1091-91 (Fla. 1987). As stated above, both doctrines "grew out of the common law concept of the unity of the cause of action; the jury could not be permitted to apportion the damages, since there was but one wrong." Bartlett v. New Mexico Welding Supply, 646 P.2d 579, 584 (N.M. Ct. App. 1982). The conceptual underpinning for joint and several liability began to collapse with the decline of the rule of contributory negligence and the advent of comparative fault in tort law. With the adoption of comparative negligence between plaintiff and defendant and the abandonment of the indivisibility of the harm theory, the death knell had been sounded for joint and several liability as well. See McIntyre v. Balentine, 833 S.W.2d 52, 58 (1992) ("Having . . . adopted a rule [comparative negligence] closely linking liability and fault, it would be inconsistent to simultaneously retain a rule, joint and several liability, which may fortuitously impose a degree of liability that is out of all proportion to fault."); David K. DeWolf, \textit{Several Liability and the Effect of Settlement on Claim Reduction: Further Thoughts}, 23 GONZ. L. REV. 37, 40-41 (1987/88) ("[S]ince juries were now permitted to assess the relative fault of defendants and plaintiffs in percentage terms, there remained no obstacle to doing likewise for the relative shares of defendants’ liability."). Because no one can seriously contend that comparative negligence is constitutionally invalid after more than 20 years, the same ultimately must be said about comparative fault.


\textsuperscript{17} WASH. REV. CODE § 4.22.070 (1992).
comparative fault as modern tort law evolved toward a system that equates extent of responsibility with degree of fault.\textsuperscript{18}

As with any evolutionary change in the law, Washington adopted some compromises and limitations while on the path to the progressive system of comparative fault. The most significant statutory limitation is the preservation of a form of joint and several liability among defendants when the plaintiff is found to be without fault.\textsuperscript{19} Although a pure system of comparative fault would allocate responsibility among all parties by degree of fault, notwithstanding the absence of contributory fault by the plaintiff, conceptual purity is appropriately subordinated to the interests of justice. When the plaintiff is an innocent victim who did not contribute to her injury, the principle of corrective justice supports recovery of full compensation from any at-fault defendant on a joint and several liability basis.\textsuperscript{20}

By contrast, when the plaintiff is also culpable, he may no longer demand the fullest measure of recovery.\textsuperscript{21} Professor Richard W. Wright argues that

\textsuperscript{18} To paraphrase the California Supreme Court's decision in upholding the constitutionality of that state's partial revision of the doctrine, Washington's "modification of the common law joint and several liability rule was not an isolated or aberrant phenomenon but rather paralleled similar developments in the evolution and implementation of the comparative-fault principle in other states." Evangelatos v. Superior Court, 753 P.2d 585, 592 (Cal. 1988).

\textsuperscript{19} \textsc{Wash. Rev. Code} § 4.22.070(1)(b) (1992).

\textsuperscript{20} See Richard W. Wright, The Logic and Fairness of Joint and Several Liability, 23 Mem. St. U. L. Rev. 45, 72-73 (1992) [hereinafter Wright, \textit{Logic and Fairness of Joint and Several Liability}] (arguing that when the plaintiff bears "zero responsibility for any portion of his injury," the "plaintiff's corrective justice claim against each tortfeasor has priority" over the tortfeasors' claims for comparative allocation of liability among themselves); Richard W. Wright, Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure, 21 U.C. Davis L. Rev. 1141, 1183 (1988) [hereinafter Wright, \textit{Allocating Liability}] (same). Even when the plaintiff is without contributory fault, there may be countervailing factors that justify a proportionate reduction in recovery against joined defendants through the allocation of fault to a non-party. For example, defendants to an action should not be held liable for the share of fault attributable to a non-party because the plaintiff has failed or is unable to join a tortfeasor to the suit, because society has conferred immunity upon one of the tortfeasors, or because the plaintiff has released a defendant or potential defendant through settlement. See Sisk, Interpretation, supra note 8, at 44-72, 112-13 (discussing allocation of fault to immune, settling, or absent parties and the limited form of joint and several liability that applies under \textsc{Wash. Rev. Code} note 8, at 44-72, 112-13 (discussing allocation of fault to immune, settling, or absent parties and the limited form of joint and several liability that applies under \textsc{Wash. Rev. Code} when the plaintiff is without fault).

\textsuperscript{21} See Wright, \textit{The Logic and Fairness of Joint and Several Liability}, supra note 20, at 78 (stating that a contributorily negligent "plaintiff has behaved negligently and his negligent conduct, as well as each defendant's tortious conduct, was an actual and proximate cause of the entire injury," such that "it seems fair that the negligent plaintiff should share with the available and solvent tortfeasors the portion of the damages that equitably should have been shouldered by insolvent or otherwise unavailable tortfeasors under the comparative responsibility principle").
a contributorily negligent plaintiff is not a tortfeasor against himself and should be able to recover full compensation, reduced only by his percentage of comparative negligence and by a share of any uncollectible portion of the damages attributable to absent or insolvent entities. Rather than limiting the negligent plaintiff’s recovery against each defendant to an amount corresponding to that individual defendant’s proportionate share of the total damages, the plaintiff could continue to hold all available and solvent defendants jointly and severally liable. Under Professor Wright’s approach, the only limitation on a culpable plaintiff’s recovery (beyond a reduction for the plaintiff’s own comparative negligence) would be an equitable reallocation or sharing among the plaintiff and defendants of the uncollectible portion of the damages.

However, a crucial legal and moral threshold has been crossed once a plaintiff is found to have negligently contributed to his own harm. The plaintiff must then be recognized as a full participant in the tortious incident. To say that the culpable plaintiff was not an actual “tortfeasor” against himself is a distracting exercise in semantics and conclusory labeling. The plaintiff’s behavior may be different in degree of culpability from that exhibited by the defendants, but it is not different in kind. Not only is the corrective justice claim of a plaintiff reduced by his contributory fault, but the moral relationship among all the actors is transformed by their mutual culpability.

Prior to the re-examination and revision of fault theory in the present era of comparative fault, commentators insisted that a plaintiff’s contributory fault, which “involves an undue risk of harm to the actor himself,” was different in kind and moral significance from negligence “which creates an undue risk of harm to others.” However, a plaintiff’s negligent conduct ordinarily will have posed a risk of injury not only to himself but also to others, whether or not the risk was realized in an injury to those others. As Professor Aaron D. Twerski has said, “[f]or the most part, conduct that constitutes contributory negligence not only exposes the plaintiff to harm but also exposes others to harm.” It may be only happenstance that the plaintiff, as one of multiple actors whose fault caused the harmful incident, was the one who suffered injury rather than one of the defendants or another bystander.

22. Id. at 76-81.
23. See William L. Prosser, HANDBOOK OF THE LAW OF TORTS 418 (4th ed. 1971); see also Gary T. Schwartz, Contributory and Comparative Negligence: A Reappraisal, 87 YALE L.J. 697, 722-23 (1978) (arguing that the appearance of a “moral equivalency” of the plaintiff’s and defendant’s fault is misleading, because the defendant’s negligence has an “objectively egotistical or antisocial character,” while the plaintiff’s negligence is “conduct that runs an unjustified risk to the actor himself, rather than to others”).
Even in those circumstances where the plaintiff’s negligence has posed a risk only to himself and not to others, it remains fitting that comparative fault be applied among all parties to the case. To be sure, a person engaging in self-destructive behavior has not committed an actionable wrong. Indeed, one might even acknowledge a liberty interest in taking risks that may result in self-harm. But this assumes that the person is willing to fully and individually accept the consequences of such harm.

When instead that person invokes legal remedies to shift the burden of that harm to another who also contributed to the harmful result, society may properly take full account of the contributorily negligent behavior by treating the plaintiff as a blameworthy actor, together with the defendant. In other words, self-destructive behavior rises to the level of anti-social conduct when the person suffering from self-inflicted harm demands compensation for that harm through societal compensatory mechanisms. When a plaintiff’s own blameworthy conduct is a necessary cause of the injury, it is fitting that the plaintiff then be limited in recovery from each defendant to that portion of the damages which corresponds to the individual defendant’s comparative fault share of the total responsibility. The commonality of fault among all parties makes a comparison of that fault especially appropriate as the measure of responsibility. When there is a unity of culpability, the appeal of comparative fault is at its height.

Not one of the many other states that have adopted comparative fault among tortfeasors, whether in pure or limited form, has found the slightest constitutional infirmity. The courts in six different states have considered constitutional challenges to comparative fault statutes modifying or abolishing joint and several liability and all have uniformly turned those objections away. Although the Washington Supreme Court has yet to consider a

---

25. See Schwartz, supra note 23, at 722-23 (“Foolish behavior is, of course, disadvantageous to the actor, but it is difficult to identify any clear moral principle that it contravenes; the language of ‘wrongfulness’ seems largely out of place in the contributory negligence context.”).

26. See Schwartz, supra note 23, at 724 (“The plaintiff’s original act of contributory negligence may not have been morally improper, since it created only a risk to the plaintiff himself. When that risk eventuates in an injury to the plaintiff, however, and when the plaintiff then seeks to collect in tort for that injury against a negligent defendant, at the time of this lawsuit the harm involved in the plaintiff’s original conduct ‘reaches’ the defendant, another person.”).

27. Under such circumstances, a “liability-dividing” rule, like comparative fault, is necessary to ensure fairness among all parties. See Schwartz, supra note 23, at 725 (stating that the fairness idea is satisfied by a “liability-dividing rule like comparative negligence”).

constitutional challenge to comparative fault among tortfeasors, it has demonstrated its commitment to the principle of comparative fault by consistently refusing imaginative attempts to limit the effect of RCW 4.22.070. For example, the court has rejected any effort to avoid the allocation of fault to settling tortfeasors, reversed the mistaken and short-lived creation by the court of appeals of an additional, non-statutory exception to comparative fault in cases of successive impacts giving rise to an indivisible injury, and ruled that fault must still be allocated to a bankrupt defendant who had been dismissed from a lawsuit pursuant to an agreed order of dismissal.

III. COMPARATIVE FAULT AND COMMON SENSE

Rather than discussing the wisdom of comparative fault in the disguised and distracting language of constitutionality, I wish to forthrightly address the


30. Gerrard v. Craig, 122 Wash. 2d 288, 295-99, 857 P.2d 1033, 1037-39 (1993). In Gerrard, the court of appeals had created a new, non-statutory exception to comparative fault under Wash. Rev. Code § 4.22.070 (1992) in cases of chain automobile collisions when there is a single unitary injury and the injury cannot be attributed to either the initial or successive impact. See Gerrard v. Craig, 67 Wash. App. 394, 407-08, 836 P.2d 837, 845 (1992), rev’d 122 Wash. 2d 288, 857 P.2d 1033 (1993). In holding that such an exception was necessary because there was no logical basis for dividing the injury, the court of appeals confused indivisibility of harm and indivisibility of fault. That a single unitary injury resulted was not the issue; rather, the question was whether the fault of the parties could be allocated. Except in the extremely rare case of indivisible fault, as contrasted with mere unitary harm, the comparative fault principle of Wash. Rev. Code § 4.22.070 (1992) must be faithfully applied. See generally Sisk, Interpretation, supra note 8, at 38-41 (discussing indivisibility of fault and indivisibility of harm). As noted above, the supreme court reversed the court of appeals and held that the defendant automobile driver was not jointly and severally liable with another settling driver and thus could not obtain contribution from the settling driver. Gerrard, 122 Wash. 2d at 293-94, 857 P.2d at 1036.

underlying principled and common sense basis of a comparative fault system. Instead of focusing myopically upon particular arguments tied to individual constitutional clauses, this article looks at the big picture and emphasizes that comparative fault — the allocation of liability according to extent of fault — comports with common sense and practical understanding. The beauty of comparative fault is that it resonates with our ordinary experiences in culpability and causation.

A. Indivisible Harm and Comparative Fault

The detractors of tort reform argue that comparative fault is arbitrary and irrational, insisting that responsibility may not be apportioned when the harm is indivisible. When there is a single injury, they claim, it is illogical and impossible to separate responsibility. If a tortfeasor’s negligence was a proximate cause of the injury, they argue, then it is impossible to contend that her conduct was only a partial cause of the injury for which responsibility should be shared with other tortfeasors. Causation, they say, cannot be divided. Based upon that reasoning, the detractors contend that the very

32. I will not here engage in a point-by-point refutation of the constitutional arguments presented by the detractors of tort reform. I have conducted a painstaking analysis of these challenges in a previous law review article on the constitutional validity of comparative fault. Sisk, Constitutional Validity, supra note 9; see also Thomas J. McLaughlin & Bradley L. Fisher, Apportioning the "Indivisible:" Comparative Liability, 27 GONZ. L. REV. 207, 216 (1991/92) (concluding that Washington’s adoption of comparative fault as a basis for apportionment of liability is a constitutionally valid legislative choice).

33. See McLaughlin & Fisher, supra note 32, at 210 (observing that “many laypersons would no doubt be surprised to discover that liability has not always been a function of fault”).

34. See Hametiaux, supra note 4, at 200-04 (arguing that responsibility may not be allocated when harm is indivisible and thus that joint and several liability is a fundamental principle protected by the Washington Constitution).

35. See Wiggins et al., supra note 5, at 238 (“Cause in fact cannot logically be allocated—an actor either caused an event or did not.”); Hametiaux, supra note 4, at 205 (“Causation is not a matter of degree. Joint or concurrent tortfeasors each contribute to the entire harm. As a consequence, the harm is indivisible.”). The same argument, of course, could be made to challenge the inherent logic of comparative negligence between plaintiff and defendant. See McLaughlin & Fisher, supra note 32, at 212-13 (“By definition, a contributorily negligent plaintiff’s conduct is also a proximate cause of an entire indivisible injury.”). See generally supra note 13 and accompanying text (explaining that conceptual basis for comparative negligence and comparative fault is the same). In fact, comparative fault—including the element of comparative causation—does not involve division of causation at all. The initial finding of contributory negligence by the plaintiff or of liability on the part of the defendant constitutes an undivided finding of but-for causation, thus reflecting the conclusion that the plaintiff or defendant’s tortious conduct was an actual cause of harm. The comparative fault analysis does not divide causation as such but rather evaluates the contribution to the harm made by each party in terms of varying degrees of
idea of comparative fault is "conceptually untenable" and thus constitutionally flawed.

That assertion is merely another way of articulating the now-discarded concept of the unitary nature of the cause of action, a theory that provided the common law foundation both for the bar of contributory negligence and for joint and several liability. Today, we must recognize and maintain the fundamental distinction between indivisible harm and comparative fault. Through the adoption of comparative fault, the Washington Legislature rejected the "tortured analysis" that "harm which is indivisible leaves no logical basis for apportionment."  

When multiple actors have been identified as contributing to a single injury, the trier of fact still must determine and apportion the responsibility based upon the varying degrees of culpability and upon the relative significance of the causal contributions. "It does not follow that simply because the harm is indivisible that there is no basis for apportionment. It is the responsibility for causing the harm which should be the focus of the inquiry."  

B. Comparative Fault—Culpability and Causation

RCW 4.22.015, which defines "fault," directs the trier of fact to consider "both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and damages." That definition of "fault" applies with full force to the analysis of comparative fault among culpability and the relative significance of causal factors for the discrete purpose of assigning legal responsibility.

36. Harnetiaux, supra note 4, at 203 ("The arbitrary formula superimposing fault as a basis for dividing the indivisible remains conceptually untenable and thus violative of the injured victim's right to due process of law.").

37. See supra notes 10-11 and accompanying text; see generally Sisk, Constitutional Validity, supra note 9, at 436-39.

38. See Larry Pressler & Kevin V. Schieffer, Joint and Several Liability: A Case for Reform, 64 DEN. U. L. REV. 651, 677 (1988); see also Stratton v. Parker, 793 S.W.2d 817, 818 (Ky. 1990) (finding in contrast with the common law theory that "it was impossible to divide a single indivisible injury into parts and determine which part each of the joint tortfeasors was responsible for," several states have now adopted approaches that, "while recognizing that a single injury is indivisible . . . allocate among tortfeasors the degree of percentage of legal causation of an injury" and thereby make liability "depend upon the degree of fault of each").


By statutory command we must look both at culpability of behavior and the significance of causal contribution.

1. Comparing Culpability

Both the law and ordinary experience indicate that wrongdoers act with different kinds and degrees of culpability. The law separates culpability into categories such as: (1) intentional misconduct, when a party acts with the subjective purpose of causing harm or the knowledge that harm is substantially certain to occur;\textsuperscript{42} (2) reckless misconduct, when a party acts with actual knowledge of an unreasonable risk of harm;\textsuperscript{43} and (3) negligence, when a party fails to observe an objective standard of reasonable care, even if the party acts without knowledge of the risk of harm.\textsuperscript{44} Our sense of justice is more greatly offended by the intentional wrongdoer who acted with malicious purpose than by the reckless or negligent person. Likewise, we find more blameworthiness in the reckless person who persisted in acting despite appreciation of the risk of harm than in the negligent person who failed to recognize the risk but acted without reasonable care. Although we often place culpable behavior into separate categories, modern commentators have recognized that those categories merely represent "different points on a continuum of fault."\textsuperscript{45} Intentionality, recklessness, and negligence are distinguished largely by different degrees of the actor’s knowledge of possible harmful consequences, ranging "from a low level of objective knowledge (negligence) to a very high level of subjective knowledge (intent)."\textsuperscript{46}

\textsuperscript{41} See generally Sisk, Interpretation, supra note 8, at 21-41 (discussing the meaning of "fault" in WASH. REV. CODE § 4.22.070 (1992)).

\textsuperscript{42} W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 8, at 34 (5th ed. 1984). As discussed in detail in one of my earlier works on comparative fault, intentional wrongdoing is not included within the definition of fault in Washington. Sisk, Interpretation, supra note 8, at 22-26. However, when the independent acts of a negligent tortfeasor and an intentional tortfeasor combine to cause injury to a plaintiff, the negligent tortfeasor should be permitted to allocate fault to the intentional tortfeasor so that the negligent tortfeasor will remain liable only for its proportionate share of the fault. Supra at 26-38.

\textsuperscript{43} KEETON, ET. AL., supra note 42, at § 34, pp. 212-14.

\textsuperscript{44} KEETON, ET. AL., supra note 42, at § 31, pp. 169-73.

\textsuperscript{45} Teresa Tracy, Comment, Comparative Fault and Intentional Torts, 12 LOY. L.A. L. REV. 179, 186 (1978).

\textsuperscript{46} Jake Dear & Steven Zipperstein, Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations, 24 SANTA CLARA L. REV. 1, 2 (1984); see also WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 31, at 145-46 (4th ed. 1971) ("As the probability of injury to another, apparent from the facts within his knowledge, becomes greater, his conduct takes on more of the attributes of intent, until it reaches that substantial certainty of harm which juries, and sometimes courts, may find
Even when all actors exhibit culpability of the same kind or category, the concept of fault defines a spectrum of culpability. The blameworthiness of the conduct will vary depending upon the identity of the actors, the nature of their conduct, the knowledge possessed by the actors, their states of mind, their respective capacities to avoid the harm, the significance and value of the purposes sought by their activities, the significance and value of the interests affected, the foreseeability and magnitude of the risk, and other factors.\(^47\) Multiple actors, although contributing to the same injury, may nonetheless be at fault in different degrees, that is, in different shades of culpability.

As an interesting illustration of many of these factors, the Supreme Court of Louisiana in *Watson v. State Farm Fire & Casualty Insurance Company*\(^48\) considered an action brought to recover for wrongful death arising out of a hunting accident in which the plaintiff’s decedent was fatally shot by a twelve-year-old boy.\(^49\) After the court held that the jury was clearly wrong in concluding that the defendant boy and his father were without fault in the accidental death of the plaintiff’s decedent, the court engaged in its own evaluation of the evidence and provided its own assessment of respective fault.\(^50\) In its analysis, the court identified the following factors, among others, as affecting its evaluation of respective fault.

First, the court considered the parties’ awareness of the danger. The plaintiff’s decedent was arguably at fault for walking along the road within range of the boy’s rifle and without making any effort to call to the boy, even though the decedent himself had placed the boy at that stand and directed the boy to watch for deer in the area where the decedent was later shot.\(^51\) However, the decedent’s alleged negligence in this regard was inadvertent,\(^52\)

\(^{47}\) See Robert N. Strassfeld, *Causal Comparisons*, 60 Fordham L. Rev. 913, 944-46 (1992). Professor Strassfeld proposes that the normative evaluation of blameworthiness occur in the context of a comparative proximate or legal causation determination. I think these normative factors are better considered as an assessment of culpability rather than causation. The proper classification is, however, of little importance (other than perhaps for purposes of distinct and understandable instructions to the jury), as “[d]egrees of fault and proximity of causation are inextricably mixed.” See UNIF. COMPARATIVE FAULT ACT § 2, commentary at 50 (Supp. 1994).

\(^{48}\) 469 So. 2d 967 (La. 1985).

\(^{49}\) Id. at 968. The decision is particularly interesting because it provides a complete and transparent analysis of the allocation of fault as applied to the specific facts of a particular case. In the vast majority of instances, the allocation of fault is made by the jury without any explanation of its reasoning. In this case, because the *Watson* court had the power under Louisiana law to make its own assessment of fault after it had reversed the jury’s verdict, *id.* at 973, we are provided with a full explanation of the factors considered in determining degree of fault and their concrete application to the facts of the case.

\(^{50}\) Id. at 972-74.

\(^{51}\) Id. at 970.

\(^{52}\) Id. at 974.
in that he apparently acted without conscious knowledge of the risk in walking along the road. The decedent's negligence in another respect was not inadvertent; he had deliberately declined to wear a bright hunting vest, although one had been offered to him, and he was aware of the risk.\(^{53}\) By contrast, the defendants' actions were not inadvertent in any respect, as the degree of their knowledge of the risk was high. The defendant boy and his father "were aware that the high-powered rifle was deadly and that it was imperative to discern a target with certainty before firing."\(^{54}\)

Second, the court considered the magnitude of the risk of harm. The court recognized that a high degree of risk was present, both in the firing of a rifle by the boy and in the father's failure to properly train the boy and supervise the firing of a weapon. The firing of a high-powered rifle quite obviously has the "direct potential for fatal consequences."\(^{55}\)

Third, the court considered the significance or value of the interests sought by the conduct that led to the death. The court noted that the boy and his father "had no higher motive than sport" when the act of negligence occurred.\(^{56}\) This plainly was an interest of relatively little societal value and thus the defendants' participation in that activity did not serve to mitigate their blameworthiness.

Fourth, the court considered the respective capacities of the parties, whether superior or inferior, to avoid the negligent conduct. The court concluded that the age and experience of the plaintiff's decedent and the boy's father "would require a greater imposition of fault on them for their negligent conduct, in comparison to that of the twelve-year-old youth."\(^{57}\) Indeed, the boy's inexperience was such that he had fired the rifle on only two prior occasions, had no formal training in the use of the firearm, had not learned how to sight game along the scope, and had never before seen a live deer.\(^{58}\)

Finally, the court inquired whether there were any extenuating circumstances that might have required the defendants to act in haste and without the opportunity for proper thought. Given that the defendants were merely engaged in sport hunting, "their actions were not dictated by any emergency or other circumstance which could lessen the fault attributed to this poor judgment."\(^{59}\)

Based upon its balancing of these factors, the court apportioned 20% of

\(^{53}\) Watson, 469 So. 2d at 970, 974.
\(^{54}\) Id. at 974.
\(^{55}\) Id.
\(^{56}\) Id.
\(^{57}\) Id. at 974.
\(^{58}\) Watson, 469 So. 2d at 969-70.
\(^{59}\) Id. at 974.
the fault to the plaintiff’s decedent and 40% each to the two defendants.  

Although others might well reach different conclusions about the proper allocation of fault under these particular circumstances, the *Watson* case well illustrates the nature of the culpability factors and evaluative reasoning that allows a finder of fact to conclude that multiple parties, guilty of the same category of wrongdoing, such as negligence, may nonetheless be said to have acted with different degrees of culpability. Each of the factors considered by the *Watson* court, as well as its application of those factors to the facts of the case, finds strong parallels in the kind of everyday judgments of blameworthiness that we all reach in ordinary experience.

2. Comparative Causation

In addition to evaluating the culpability of the actors, we find ourselves in everyday life making evaluations of the extent to which individuals or circumstances contributed to a particular result. Commentators have offered several approaches for weighing multiple causal factors as a means for apportioning liability. However, as with comparison of relative culpability, the strongest foundation for comparative causation again lies in ordinary experience. In many contexts, we speak meaningfully about events as having more than one necessary cause and about one of those causes as being more important than another. As Professor Robert N. Strassfeld observes:

We might wish to say . . . that Lenin’s participation in the Bolshevik Revolution was a more important cause of its success than was Stalin’s, or that the absence of a skilled labor force is a more important cause of economic backwardness than is limited natural resources. Or, we might have reason to say that James is happier today than he was last week partly because he earned an A on his torts exam, but more because his love life has improved.  

Articulating this ordinary experience in the language of the law or in theoretical discourse is more difficult. But however hard it may be to translate the concept of comparative causation into theoretical terminology, we should not underestimate the ability of a jury to apply its common sense and practical wisdom to the problem and to reach sensible and justifiable conclusions about apportionment of fault.

60. *Id.*

a. Counterfactual Similarities

One theoretical means of explaining comparative causation is through application of counterfactual similarities. A judgment of counterfactual similarity involves using imaginative alternatives to the actual course of events to determine whether something similar to the event would have occurred in the absence of a particular cause.\(^\text{62}\)

Thus, we may conclude that \(A\) was a more important cause of \(P\) than was \(B\) if we can say that “had \(B\) not occurred, something would have occurred which more closely approximates \(P\) than had \(A\) not occurred,” or to state it in formulaic terms:

\(A\) was a more important cause of \(P\) relative to \(\emptyset\) than was \(B\) if—

1. \(A\) and \(B\) were each a cause of \(P\) relative to \(\emptyset\), and
2. either \(A\) was necessary for \(P\) or \(B\) was not necessary for \(P\), and
3. had \(B\) not occurred, something would have occurred which more closely approximates \(P\) than had \(A\) not occurred.\(^\text{63}\)

To put this theory to use in an everyday life context, Professor Strassfeld returns to the example of law student, James. Remember, we said that “the happy turn of events in his love life is a more important cause of his current happiness than is his \(A\) in torts.”\(^\text{64}\) To apply the approach of counterfactual similarity, we could say the following:

The change in James’ love life was a more important cause of his current happiness than was his torts grade, since had James not earned an \(A\) on his

\(^{62}\) See generally Strassfeld, supra note 47, at 934-44.

\(^{63}\) Strassfeld, supra note 47, at 935 (borrowing the formula from Raymond Martin, The Past Within Us: An Empirical Approach to Philosophy of History 78 (1989)). The terms \(A\), \(B\), and \(P\) are “placeholders” for a statement expressing certain causal factors (\(A\) and \(B\)) and a resulting situation (\(P\)). The term \(\emptyset\) is a placeholder for a statement expressing a “comparison-situation.” Martin, supra, at 77. The comparison situation “is a situation resembling in most respects the one in which the event that is to be explained ... occurred, but in which \(P\) has not occurred.” Strassfeld, supra note 47, at 932. As Strassfeld explains, with reference to the example of James which was mentioned above:

Probably the most common such comparison that we make is a comparison of the state of affairs before and after the occurrence of our suspected cause. In the example above, the comparison situation is James’ state of mind a week earlier, and adding the term [\(\emptyset\)] we might say: James is happier today than he was a week ago, partly because he earned an \(A\) on his torts exam, but more because his love life has improved.

Strassfeld, supra note 47, at 932. (citation omitted).

\(^{64}\) Strassfeld, supra note 47, at 937.
torts exam, his mood would more closely approximate his current level of happiness than it would had his love life not improved.\textsuperscript{65}

To apply this counterfactual similarity approach to a tort case example, consider the following hypothetical.\textsuperscript{66} The defendant railroad maintained an oil-saturated platform at its railroad depot. An individual lit his pipe and dropped the match on the platform, which burst into flame. The fire spread and eventually destroyed the plaintiff’s neighboring buildings. We could conclude that the railroad’s maintenance of an oil-saturated platform was a more important cause of the fire than was the individual’s careless discarding of a lit match because the odds are greater that a fire still would have occurred even without the dropping of the match than that a fire would have occurred without the platform being saturated with oil:

The risk of fire created by the oil-soaked platform could have been realized by many potential causes, including lightning, vandals, another person’s match or cigarette, sparks from a locomotive, or, perhaps, even a package of fireworks dropped by a passenger leaping to board a train. Absent the conditions created by the defendant [railroad], however, it is most likely that [the individual’s] match would have burned out harmlessly, or that any fire that it caused could have been extinguished easily before it spread to the plaintiff’s property.\textsuperscript{67}

b. Comparative Causal Uncertainty

The counterfactual similarity approach has its limits, as it does not apply if multiple causes were both necessary and indispensable to the result.\textsuperscript{68} However, in ordinary experience, we also speak of one cause as being more important than another based upon the degree of confidence with which we can say that one or the other was truly a causal factor.\textsuperscript{69} Professor Aaron

\textsuperscript{65} Id.

\textsuperscript{66} The facts for this hypothetical are drawn from Stone v. Boston & Albany RR. 51 N.E. 1 (1898). The counterfactual similarity analysis is borrowed from Strassfeld, supra note 47, at 938-39.

\textsuperscript{67} Strassfeld, supra note 47, at 939.

\textsuperscript{68} The counterfactual similarity approach outlined above for determining whether A was a more important cause than B works only if we conclude either that B was not a necessary cause (which is tantamount to saying that it was not an actual cause at all) or that something similar to B would have existed as a near substitute for that cause. To state the point differently, this counterfactual similarity approach would not permit characterizing one of the causes as more important if B was both a necessary cause and if P or something like P would not have occurred without B.

\textsuperscript{69} In this part of the presentation, I discuss probability of causation only in terms of the uncertainty of proof that remains after considering particularized evidence concerning
Twerski argues that rather than "tortur[ing] ourselves with an all-or-nothing rule in causation," we should factor "the uncertainty of the causal connection into a fault apportionment" by allowing the jury "to consider the likelihood on a percentage basis that a party's activities caused harm."\textsuperscript{70}

what actually occurred in a specific case, that is, the probability of causation that reflects "the degree of belief that a person has in the actual existence of that fact." See Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1063 (1988) [hereinafter Wright, *Causation*]. By contrast, I do not suggest that the trier of fact should make comparative causation evaluations based upon abstract statistical evidence of probabilities that are not grounded in the particularized evidence of a specific case. See id. at 1049-67 (explaining the vital distinction between (1) particularized evidence of causation grounded in the facts of a particular occasion and case-specific probabilities based upon that evidence, which courts regard as properly probative of what actually occurred, and (2) abstract evidence of causal probabilities based upon "naked statistics" associated with causal generalizations developed independent of particularized evidence specific to a particular occasion, which courts generally do not find adequately probative on the issue of actual causation). See generally David McCord, *A Primer for the Nonmathematically Inclined on Mathematical Evidence in Criminal Cases: People v. Collins and Beyond*, 47 WASH. & LEE L. REV. 741 (1990) (explaining theories of mathematical evidence and the opposing probabilistic and anti-probabilistic approaches to the use of such evidence in court cases).

Professor Wright's article is cited in this footnote for the limited purpose of explaining the distinction between particularized evidence that gives rise to a degree of belief as to the causes of a specific incident and naked statistical evidence giving rise to abstract probabilities about risks. Professor Wright, however, would reject the idea of comparative causation as "conceptually meaningless," whether or not the comparison were made based upon particularized evidence. See Wright, *Allocating Liability*, supra note 20, at 1146 ("There is no way, based purely on causation, to identify one cause of an injury as more important or significant than any other cause of the same injury."). However, as discussed above and below, both as a matter of theory and of practical application of common sense, it is indeed meaningful to speak of different causes as being more or less significant or important for purposes of allocating responsibility in the comparative fault analysis.

70. Aaron D. Twerski, *The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 413-14 (1978) [hereinafter Twerski, *Comparative Causation*] (emphasis in original). In correspondence between Professor Strassfeld and myself on this issue, Professor Strassfeld noted that the general thrust of the Twerski approach differs from my proposal below, because Professor Twerski's approach is primarily "geared to the separate question [of whether we can] use apportionment to resolve problems of comparative uncertainty," rather than to the use of "differences in our levels of belief in the causal relevance of competing causes for purposes of apportioning liability amongst them." However, Professor Strassfeld agrees "that we can stand that first question on its head and look to 'comparative uncertainty' as an aid in apportionment," although he notes that comparative uncertainty may raise other questions in its own right, including whether there are different types of uncertainty and whether we should discount recoveries to reflect uncertainty when only a single cause is at issue. Letter from Robert N. Strassfeld to Gregory Sisk (Sept. 24, 1992) (on file with the author). I briefly discussed an aspect of the former issue in supra note 69 and briefly discuss the latter issue infra at notes 74-76 and accompanying text.
Consider, for example, this hypothetical: Fred’s automobile (which had the right of way) is struck at a controlled intersection by Ralph’s automobile which ran a stop sign. Ralph was intoxicated and the stop sign was partially obscured by a tree on the corner. Assuming no negligence on the part of Fred,\(^7\) there are two possible causes for the accident: Ralph’s negligence in being intoxicated (cause A), and the City’s negligence in failing to trim the tree that was partially obscuring the stop sign (cause B).

Fred brings suit against both Ralph and the City. Upon discovering that Ralph has no insurance and has limited assets, Fred enters into a settlement with Ralph for a nominal amount. Under RCW 4.22.070, the trier of fact must determine the percentage of fault attributable to both Ralph, as the settling party, and to the City as the other alleged tortfeasor.\(^7\) Because Ralph has been removed from any subsequent judgment by entering a settlement with Fred, the City will not be jointly and severally liable with Ralph and, instead, is responsible to Fred only for the City’s own proportionate share of the damages.\(^7\) The respective fault of Ralph and the City must be compared in order to determine the City’s separate share of responsibility, which will be proportionately reflected in the damage award to Fred.

For purposes of this hypothetical, let us also set aside the possibility that apportionment of fault might focus upon the different nature of the tortfeasors’ respective culpable conduct. A jury reflecting the common sense values of the community might very well conclude that Ralph was more at fault because the degree of culpability involved in intoxicated driving is greater than the degree of culpability involved in failing to trim a tree, measured by such factors as the dangerousness of the behavior, society’s condemnation of intoxicated driving, etc. In a complete analysis of

---

\(^7\) Because this hypothetical case involves a fault-free plaintiff, WASH. REV. CODE § 4.22.070 (1992) would preserve joint and several liability among the defendants against whom judgment is entered. See § 4.22.070(1)(b). However, there might still be a need to allocate fault among the two tortfeasors if one of the tortfeasors is not brought into the lawsuit or is not retained in the lawsuit until the time that judgment is entered, for example, because the plaintiff failed to join that tortfeasor, the plaintiff released that tortfeasor through settlement, or that tortfeasor was immune from liability or had an individual defense such as the expiration of the statute of limitations. See generally Sisk, Interpretation, supra note 8, at 48-72. As discussed below, at notes 72-73 and accompanying text, for purposes of this hypothetical, I will assume that the plaintiff settles with the other driver, thereby requiring allocation of fault as between the settling tortfeasor and the non-settling tortfeasor. See Sisk, Interpretation, supra note 8, at 112-21.


\(^7\) See id. at 294, 840 P.2d at 886 ("Under RCW 4.22.070(1)(b), only defendants against whom judgment is entered are jointly and severally liable and only for the sum of their proportionate shares of the total damages."). See generally Sisk, Interpretation, supra note 8, at 112-21.
comparative fault, involving both comparative culpability and comparative causation, this evaluation would be a necessary part of the jury’s fact-finding responsibility. But, for present purposes, and to simplify the analysis, let us focus upon comparative causation.

At trial, the evidence establishes as an absolute certainty that the accident would not have occurred but for Ralph’s negligence in driving while intoxicated (cause A) (that is, a careful driver would have seen even the partially obscured stop sign). However, there is substantial uncertainty based upon the evidence as to whether the City’s negligence (cause B) contributed to the accident. To impose full liability upon the City, Fred contends that, notwithstanding Ralph’s intoxication, Ralph would have stopped and avoided the collision had the stop sign not been obscured. To avoid liability, the City contends that even if the stop sign had not been obscured, Ralph was so intoxicated that he would not have stopped and the collision would have occurred. In the alternative, and more importantly for our analysis, the City argues that if Ralph had not been intoxicated, he would have seen Fred and been able to avoid the accident, even with the stop sign being obscured.

The case is submitted to the jury. By a close decision on the preponderance of the evidence, the jury concludes that the collision would not have occurred but for the obscured stop sign (that is, that Ralph would have stopped if the sign were not obscured). The jury also concludes that the collision would not have occurred but for the intoxication (that is, that notwithstanding the obscured sign, Ralph would have avoided the accident if he had not been intoxicated). In other words, the jury concludes it slightly more probable than not that the obscured stop sign was a cause of the accident, while it concludes to a moral certainty that the intoxicated driving was a cause of the accident. Thus, the jury’s ultimate conclusion is that both A and B were necessary causes and that the collision would not have occurred in the absence of either cause.

But given the virtual certainty that A was a necessary cause and the higher element of doubt that B was a necessary cause, would it not be appropriate for the jury to also conclude that A was a more important cause of the collision?

The formula for this analysis could be stated as follows:

A was a more important cause of P relative to \( \emptyset \) than was B if—

1. A and B were each a cause of P relative to \( \emptyset \), and
2. the evidence establishes with a higher degree of certainty that A was necessary for P than that B was necessary for P.

c. Minimal Threshold of Certainty

The factor of uncertainty should play a comparative role in the multiple cause context only after a minimal threshold level of certainty is met for each
cause. We already have a way of dealing with uncertainty in the single cause case. If the trier of fact is left in a situation of equipoise, the party with the burden of proof by a preponderance of the evidence loses. Thus, for example, if there is only a 20% possibility that a purported factor was an actual cause, then the trier of fact should conclude that it was not an actual cause. The plaintiff, as the party seeking to alter the status quo and obtain a transfer of wealth, is obliged to reach past the 50% probability mark before any recovery could be granted. The 50% marker ensures a sufficient amount of certainty on causation so as to take the case beyond the realm of speculation.

In effect, there is a two-step process for determining liability and assessing responsibility in multiple party cases in comparative fault jurisdictions such as Washington. The jury should be instructed both to determine under a preponderance of the evidence standard whether a particular actor is liable (a determination that includes a finding of actual causation), and then to allocate fault (including a comparison of the significance of causal contribution) among the various actors found liable. If we break out these separate steps of fact-finding, the jury is required to (1) decide whether a defendant's conduct was a cause by at least greater than a 50% degree of certainty, in order to conclude that there is any liability, and then (2) to compare the significance of each tortfeasor's causal contribution to that of every other actor, which may include comparing relative degrees of certainty about causal contributions. In other words, the comparative


75. See David A. Fischer, Proportional Liability: Statistical Evidence and the Probability Paradox, 46 VAND. L. REV. 1201, 1220 (1993) (arguing that, under the principle of corrective justice, when the evidence shows a "less than fifty percent chance that the defendant caused the harm," then "there is undoubtedly no rational basis for a belief that the defendant caused a particular plaintiff's harm"). In addition, Professor Saul Levmore explains that a threshold level of certainty, like preponderance of the evidence, generally minimizes error in litigation in terms of over- or under-payment of damages by accused tortfeasors and also provides an incentive to plaintiffs to work harder "to develop further evidence and to identify tortfeasors with great certainty." Saul Levmore, Probabilistic Recoveries, Restitution, and Recurring Wrongs, 19 J. LEGAL STUD. 691, 693-96 (1990). Professor Levmore would depart from the preponderance of the evidence rule, in favor of a form of proportional liability in certain problem areas involving recurring wrongs. Id. at 693-725. The Washington Tort Reform Act allows in only one unique context for a form of proportional recovery by a plaintiff, without requiring the plaintiff to establish each of the elements of a claim by a preponderance of the evidence. Under WASH. REV. CODE § 4.22.070(3)(c) (1992), the comparative fault rule does not apply to cases involving the assessment of liability on a market share basis for injuries caused by certain generic products, such as drugs, when the manufacturer cannot be identified. See generally Sisk, Interpretation, supra note 8, at 136-42 (discussing the generic products or market share liability exception).
uncertainty equation would be applied only among causal candidates that had been determined to be actual causes by at least a slightly-more-than 50% degree of certainty.\textsuperscript{76}

Among those candidates for causal contribution that pass the 50% marker, there yet may be meaningful differences in certainty, that is, different degrees of belief with respect to those causal candidates as to which the evidence was significantly disputed as compared to those as to which the evidence was compelling. For example, a comparison might appropriately be made between an actor whose causal responsibility was 51% certain versus another candidate whose causal responsibility was 75% certain. The references to specific percentages are, of course, only hypothetical and for illustrative purposes, because proof of causation is seldom subject to mathematical precision. Moreover, “a judgment on what actually happened requires going beyond a mere comparison of mathematical probabilities to the establishment of some minimal level of belief.”\textsuperscript{77} The jury must evaluate the particularized evidence of causation relevant to the specific case before it and not merely engage in abstract probability reasoning.

3. The Common Sense of the Jury

However much lawyers and judges may struggle to articulate these concepts and translate them into legal doctrine or analytical theory, juries are already applying the concepts to individual cases. In their deliberations, juries undoubtedly do give serious weight to value judgment factors in assessing degrees of culpability, to evaluations of the significance of causal contribution by considering whether a similar result would have occurred for other reasons, and to differing degrees of uncertainty in assessing which causes are more important than others.\textsuperscript{78}

\textsuperscript{76} The two-step process further confirms that there is no actual division of causation involved in comparative fault. The first step of the process involves proof of actual causation by each actor of the entirety of an indivisible harm. The second step of the process involves a comparison among multiple causes for differences in importance or significance for the purpose of assigning responsibility as part of an equitable system of tort liability.

\textsuperscript{77} Wright, Causation, supra note 69, at 1065. Indeed, empirical research confirms that jurors reason by constructing episodes or stories that plausibly account for the evidence rather than by statistical or probabilistic analysis. Nancy Pennington & Reid Hastie, A Cognitive Theory of Juror Decision Making: The Story Model. 13 CARDOZO L. REV. 519 (1991). However, differing degrees of uncertainty, whether measured in terms of probability or otherwise, remain even under the “story” model of juror decision-making. The level of confidence that a juror may have in the story that “best” accounts for the evidence, as compared to alternative possible stories, “may be quite high or quite low.” Id. at 527.

\textsuperscript{78} As Professor Twerkski says:

Jurors, not being schooled in the separate pigeon holes created by tort teachers,
Moreover, jurors were undoubtedly making comparative fault determinations among joint tortfeasors even prior to the formal adoption of comparative fault in the 1986 Tort Reform Act. In the hypothetical case, if the jury were not permitted to apportion fault between the City and the intoxicated driver, Ralph, based upon different degrees of culpability or relative uncertainty in causation, the jury might well deny recovery to the plaintiff altogether, rather than choosing to impose full responsibility upon the City when the jury believed that the intoxicated driver was more at fault. Just as juries often evaded the contributory negligence bar during the common law period by formally finding a culpable plaintiff to be without fault while simultaneously reducing the award of damages to account for that culpability, juries likewise may be expected to apply an informal form of comparative fault among tortfeasors even in the absence of a modification of joint and several liability.

The adoption of comparative fault in Washington was a recognition of practical reality, the common sense decision-making capacity of the jury, and principles of equity. The Washington Comparative Fault Act, RCW 4.22.070, confirms the fact-finding powers of the jury and upholds the integrity of the jury in bringing ordinary experience and human understanding into the courtroom.

are still naive enough to believe that an accident does not take place in five stages. Duty, standard of care, cause-in-fact, proximate cause and damages are supposed to be analytical aids. They are not descriptive of the process of accomplishing a tort. Thus, juries will have to be excused if they view the entire injury event as a unitary whole and factor the probability of causation together with fault in arriving at a percentage apportionment. It is inevitable that the issues will be merged in the minds of the jurors.

Twerski, Comparative Causation, supra note 70, at 414.
79. See 1 COMPARATIVE NEGLIGENCE § 1.20[2], at 1-33 to 1-34 (1994).
80. See Sisk, Interpretation, supra note 8, at 183 (suggesting that “RCW 4.22.070 may properly be denominated as the Washington Comparative Fault Act”).
81. In this way, the comparative fault provision of the Tort Reform Act is sharply different in nature and effect from the cap on the amount of non-economic damages that was invalidated by the Washington Supreme Court in Sofie v. Fibreboard Corp., 112 Wash. 2d 636, 771 P.2d 711, 720-27, amended, 780 P.2d 260 (1989). The Sofie court ruled that the provision in the Tort Reform Act, WASH. REV. CODE § 4.56.250 (1992), that placed a ceiling on the amount of non-economic damages that could be awarded, unconstitutionally intruded upon the jury’s function of determining the amount of a plaintiff’s damages. Sofie, 112 Wash. 2d at 656-59, 771 P.2d at 722-23. By contrast, § 4.22.070 “strengthens the role of the jury in deciding tort actions by ensuring that the jury’s determinations on the apportionment of fault are enforced in the entry of the judgment.” Sisk, Constitutional Validity, supra note 9, at 442 (discussing the constitutional validity of WASH. REV. CODE § 4.22.070 under the constitutional guarantee of the right to a jury trial).
IV. CONCLUSION

Because most constitutional challenges ultimately resolve into an argument that the position disfavored by the complainant is irrational or unreasonable, an exploration of the intuitively equitable and common sense nature of comparative fault provides a sufficient answer to the detractors of tort reform. Washington’s Comparative Fault Act is characterized by the touchstone principle of fairness that both plaintiffs and defendants should be held responsible for their actions to the extent to which they contribute to the harm. Under a tort system of liability based on comparative fault, the “primal concept that . . . the extent of fault should govern the extent of liability . . . remains irresistible to reason and all intelligent notions of fairness.”
