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DIVIDING RESPONSIBILITY: THE ROLE OF THE PSYCHOLOGY OF ATTRIBUTION

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CONTENTS

The United States has a rich legal history addressing how to apportion responsibility between multiple negligent actors, generating legal doctrine including contributory negligence and comparative negligence. Under these doctrine, the trier-of-fact—most often a jury—is responsible for apportioning responsibility for the harm. This Article examines how jurors approach complex negligent tort cases in which responsibility can be attributed to multiple negligent actors including a negligent plaintiff. In an empirical study participants read a negligent tort vignette about a car accident and then apportioned responsibility

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between the defendant, plaintiff, and other external factors. The findings indicated that participants' apportionments of responsibility to the defendant varied widely. Some of the variability is explained by individual differences in attributional tendencies—the extent to which an individual attributes the behavior of another to that individual's disposition or the situational factors surrounding that behavior. The findings also highlighted the influence of human cognition on the apportionment of responsibility. Participants preferred apportionment values that were multiples of ten (on a zero to one hundred percent scale). These findings could have profound implications for the distinction between the forty-nine percent and fifty percent rules associated with modified comparative negligence.

INTRODUCTION

In negligence cases, some determinations of responsibility are straightforward, but many are not. For example, suppose Beth swerves her truck in and out of vehicles attempting to dodge rush hour traffic.[1] While changing lanes abruptly, Beth ignores the traffic signal, runs a red light, and crashes into the side of Anne's car as Anne appropriately begins rolling through the intersection upon seeing a green signal. Anne is ejected from the car resulting in severe injuries. These facts suggest that Beth is responsible for the harm to Anne. If she had appropriately stopped at the red light, her truck would not have crashed into Anne's car.

Although the first version of this scenario implies relatively straightforward responsibility, additional considerations can complicate the scenario making determinations of responsibility less straightforward. An alternative version could expose that Anne was not wearing her seat belt. Now, Anne's actions have likely contributed to her harm. Had she been wearing a seat belt, she might not have been ejected from the car and her injuries would likely have been less severe. In most jurisdictions, a trier-of-fact must now also determine if Anne's actions—in addition to the defendant's—were negligent, and the extent to which they contributed to her harm.[2]

Beyond the actions of Beth and Anne, there might also be other contributing factors—including the actions of other people—outside of either Beth or Anne's control. For example, in yet another version of the scenario, the manufacturer of Beth's truck might have installed

1. This example is loosely based on RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 cmt. b, illus. 3 (AM. LAW. INST. 2000).

2. Assuming this jurisdiction does not maintain a seat belt statute precluding recovery.

a faulty brake system, contributing to Beth's inability to stop quickly even if she had noticed the red light last minute and attempted to stop. Or, bad weather—such as black ice in the intersection—might offer further complications. A myriad of possible versions of this scenario involving the addition of multiple negligent individuals and complicating circumstances add to the difficulty of determining responsibility. And these complications are often evidenced in real cases, not just hypotheticals.

The trier-of-fact often has the unenviable task of sorting through these complicated factors to determine responsibility. Sometimes, this means apportioning legal responsibility between the plaintiff and defendant (or multiple defendants). The legal system has implemented an array of doctrines and rules for determining legal responsibility when multiple actors contribute to the harm through their negligent actions—including contributory negligence and comparative negligence. According to the strict common law doctrine of contributory negligence, a plaintiff would be barred from recovery if she[3] contributed in any amount to her own injuries.[4] Comparative negligence, in contrast, still allows a plaintiff to recover even when she contributed to her own harm.[5] This rule asks the trier-of-fact to assign responsibility in proportion to the parties', and any other relevant persons', wrongful conduct that caused the injury.[6]

Although these rules govern the implications of various apportionments of responsibility (e.g., what happens when the plaintiff is more responsible than the defendant), they do not offer the trier-of-fact guidance on how to actually apportion responsibility. Instead, they rely on subjective determinations of fault by the trier-of-fact. Thus, to fully understand the application of the legal doctrines and rules, it is necessary to evaluate the impact of human psychology. In this Article, I ask the following questions: In complex negligent tort cases in which responsibility can be attributed to multiple causal influences (including the plaintiff's own negligence), how does the trier-of-fact make judgments regarding responsibility? Additionally, are decision makers uniform in how they judge the same case?

This Article will examine how the trier-of-fact—often jurors—approaches apportioning responsibility. The Article will begin by re-

3. I will use the pronouns "she" and "her" instead of "he or she" and "him or her" for simplicity when a specific gender is not otherwise specified.

4. VICTOR E. SCHWARTZ WITH EVELYN F. ROWE, COMPARATIVE NEGLIGENCE § 1.02, at 5 (5th ed. 2010); Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (1809).

5. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 cmt. a (AM. LAW. INST. 2000).

6. *Id.*

viewing the legal doctrine associated with apportioning liability. Then, it will discuss the importance of the jury in making these determinations. Next, the Article will discuss social psychological literature concerning social attributions, which suggests there may be variability in how individual jurors approach apportioning responsibility. Finally, the majority of the Article is spent discussing the current study, which examines how participants apportion responsibility. This is done with a focus on assessing variability in perceptions and a discussion of the implications of these findings.

I. Apportionment of Liability

A. Contributory Negligence

The common law doctrine of contributory negligence governs a plaintiff's ability to recover when their own negligence is a contributing factor to their harm.[7] The doctrine's origins can be traced back to the 1809 English case *Butterfield v. Forrester*.[8] This "principal authority" on contributory negligence determined that even if a defendant is found negligent, a plaintiff who contributes to their harm cannot recover damages.[9] Citing *Butterfield v. Forrester*,[10] American jurisprudence adopted contributory negligence in 1824 in *Smith v. Smith*[11] (Massachusetts) and *Washburn v. Tracy*[12] (Vermont).[13] The Restatement (Second) of Torts further codified the rule that a plaintiff's negligence was an absolute bar on recovery.[14] If a plaintiff's negligent behavior contributed in any degree to their own harm—even just one percent—she would be unable to recover any proportion of her damages from the defendant.[15] The doctrine acts as a complete defense

7. Schwartz, *supra* note 4, § 1.02, at 5.

8. *Butterfield*, 103 Eng. Rep. at 926; Schwartz, *supra* note 4, § 1.02, at 5.

9. Schwartz, *supra* note 4, § 1.02, at 5.

10. 11 East 60, 103 Eng. Rep. 926, 927 (1809); Schwartz, *supra* note 4, § 1.02, at 5.

11. 19 Mass. 621, 664 (1824) (concluding "that this action cannot be maintained, unless the plaintiff can show that he used ordinary care; for without that, it is by no means certain that he himself was not the cause of his own injury.").

12. 2 D.Chip. 128, *1 (1824) (determining that "if it appear that the injury complained of would not have happened, but for a want of ordinary care and diligence in the plaintiff, the plaintiff is not entitled to recover.").

13. Peter Nash Swisher, *Virginia Should Abolish The Archaic Tort Defense of Contributory Negligence and Adopt a Comparative Negligence Defense in Its Place*, 46 U. Richmond L. Rev. 359, 361 (2011).

14. *See* Restatement (Third) of Torts: Apportionment of Liability intro., at 3 (Am. Law. Inst. 2000).

15. *Id.*

even in cases where the defendant's negligence greatly outweighs the plaintiff's contribution to their own harm.[16]

Although once widely accepted[17], the doctrine of contributory negligence has been greatly criticized. One criticism is that the rule lacked satisfactory reasoning or justification for its extremely harsh stance against plaintiffs whose negligence contributes only minimally to the harm.[18] The doctrine had the effect of "strongly deterring plaintiffs who might act unreasonably while eliminating any deterrence of negligent defendants . . . ."[19] However, no reason was provided for why a plaintiff's negligence should be more strongly deterred than a defendant's. Further, it seemed to go against the principle tenets of tort law focused on deterring defendant negligence and accountability for harm to others.[20] As articulated by Professor Dan B. Dobbs:

> [This] rule was extreme. The plaintiff who was guilty of only slight or trivial negligence was barred completely, even if the defendant was guilty of quite serious negligence, as contemporary courts have had occasion to observe in criticizing the rule. The traditional contributory negligence rule was extreme not merely in results but in principle. No satisfactory reasoning has ever explained the rule. It departed seriously from ideals of accountability and deterrence [in tort law] because it completely relieved the defendant from liability even if he was by far the most negligent actor. A regime of accountability would, in contrast, hold the defendant liability for a proportionate share of the harm [under the doctrine of comparative negligence].[21]

A second criticism of contributory negligence suggests that it is unpredictable in how it is applied.[22] The logic suggesting unpredictability is as follows: The trier-of-fact is asked to categorically determine whether the plaintiff and defendant is negligent or not.[23] If the plaintiff is negligent, then recovery is barred. This categorical (yes or no) determination fails to appropriately represent the often nuanced and complex causes of the harm.[24] By precluding recovery for even the slightest contributory negligence by the plaintiff, some triers-of-fact

16. Swisher, *supra* note 13, at 359.

17. Arthur Best, *Impediments to Reasonable Tort Reform: Lessons from the Adoption of Comparative Negligence*, 40 IND. L. REV. 1, 1 (2007) (noting forty-four states applied contributory negligence during "an 'avalanche' of tort reform").

18. SCHWARTZ, *supra* note 4, § 1.02, at 5–6; Best, *supra* note 17, at 4 n.19.

19. Best, *supra* note 17, at 4.

20. Swisher, *supra* note 13, at 360.

21. *Id.* (quoting DAN B DOBBS, THE LAW OF TORTS, § 199, at 494–95 (2000)).

22. Best, *supra* note 17, at 4.

23. *Id.*

24. *Id.*

find their hands legally tied to an outcome they find unsatisfactory.[25] To reach an intuitively satisfactory outcome, a trier-of-fact might be tempted into concluding a plaintiff was not negligent, even when they actually believe the plaintiff's negligence contributed to the harm.[26] Although this is a failure to apply the law, it arguably satisfies a trier-of-fact's desire for fairness and compensates for the failures associated with the doctrine of contributory negligence. However, without an empirical examination of the trier-of-fact's decision-making process, the extent to which triers-of-fact are taking matters into their own hands is unknown. But, if this is occurring in some cases, then there is ample potential for variable application of the doctrine leading to unpredictability in case outcomes.

B. Comparative Negligence

The legal concept of comparative negligence emerged as an alternative to contributory negligence in the early-twentieth century. Peter Nash Swisher attributes the first United States articulation of the concept to Chalmers Mole and Lyman Wilson's 1932 law review article.[27] In a period of intense tort reform, most states legislatively replaced the common law doctrine of contributory negligence with comparative negligence.[28] The theory of comparative negligence emerged from admiralty law and the Federal Employers' Liability Act.[29] According to the Federal Employers' Liability Act, an interstate railroad employee would not be barred from recovering damages from her employer because of contributory negligence.[30] Instead, the plaintiff's damage award would be diminished in proportion to her negligent contribution to the harm.[31] In the period of 1969 through 1984, thirty-seven states adopted comparative negligence as an alternative to contributory negligence.[32] Now, only four states—Alabama, Maryland, North

25. *Id.*

26. *Id.*

27. Swisher, *supra* note 13, at 364 n.28 (citing A. Chalmers Mole & Lyman P. Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 333 (1932)).

28. Best, *supra* note 17, at 1; SCHWARTZ, *supra* note 4, § 1.04, at 12. This reform occurred through both judicial and legislative reform. However, in most states reformed was legislatively driven.

29. Swisher, *supra* note 13, at 365.

30. SCHWARTZ, *supra* note 4, § 1.04(a), at 12–13.

31. *Id.* § 1.04(a), at 13.

32. Best, *supra* note 17, at 6. As detailed by Best, during this time (1969-1984) the adoption of comparative negligence was either through the court or legislature and could consist of a "pure" or "modified" form. The majority of states that adopted comparative negligence adopted a "modified" version through legislative enactment.

Carolina, and Virginia—and the District of Columbia maintain the doctrine of contributory negligence.[33]

Comparative negligence is a doctrine that apportions the cost of an accident on the basis of the relative fault of all parties.[34] Although the doctrine refers to a comparison of *fault* between the plaintiff and the defendant, within the United States comparative negligence generally involves the division of damages between the plaintiff and defendant.[35]

Comparative negligence encompasses two broad formulations of the doctrine: (1) pure comparative negligence and (2) modified comparative negligence.[36] Pure comparative negligence allows a plaintiff to recover no matter the proportion of her negligence, even if it is greater than the defendant's negligence.[37] Under this formulation, no plaintiff is barred from recovery because of her own negligence.[38] The plaintiff's damages are simply reduced in proportion to her contribution to the harm.[39] If the trier-of-fact determines the plaintiff is responsible for sixteen percent of the harm, then the plaintiff can recover eighty-four percent of the damages from the defendant. Similarly, even if the plaintiff is responsible for the majority of the harm, sixty-three percent, she can still recover thirty-seven percent of the damages from the defendant. It is inconsequential that the plaintiff is primarily responsible for the harm. Pure comparative negligence has been adopted in twelve states including Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, and Washington.[40]

Under the doctrine of modified comparative negligence, if the plaintiff's negligence reaches a certain threshold, she is barred from recovery.[41] There are three versions of modified comparative negligence each setting a different threshold.[42] Under the "forty-nine percent rule," if a plaintiff's negligence is less than that of the defendant—forty-nine percent or less—then the damage award is re-

33. SCHWARTZ, *supra* note 4, § 1.01, at 3–4. Upon my review in April 2019, Alabama, Maryland, North Carolina, Virginia, and the District of Columbia still maintained the doctrine of contributory negligence in some form. *See* app'x tbl.1.

34. SCHWARTZ, *supra* note 4, § 2.01, at 32.

35. *Id.* (noting that some suggest the doctrine of comparative negligence may be more appropriately referred to as "damage apportionment" or "comparative damages.").

36. *Id.* § 2.01(a), at 32.

37. *Id.* § 2.01(a), at 33.

38. Swisher, *supra* note 13, at 365.

39. SCHWARTZ, *supra* note 4, § 2.01, at 33.

40. *See* app'x tbl.2.

41. *See generally* SCHWARTZ, *supra* note 4, § 2.01(b)(3), at 33–34.

42. *Id.* § 2.01(b)(3), at 34.

duced by the percentage of the plaintiff's fault.[43] However, if the plaintiff's negligence is at fault for fifty percent or more of the harm—equal to or greater than the defendant's fault—then the plaintiff is barred from recovering damages.[44] This rule has been adopted in ten states including Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, Nebraska, North Dakota, Tennessee, and Utah.[45]

A second variant of this rule—the "fifty percent rule"—allows the plaintiff to recover if her proportion of fault is equal to or less than the defendant's fault.[46] But, the plaintiff cannot recover damages if her proportion of harm crosses beyond the fifty percent threshold.[47] The difference between this and the forty-nine percent rule is a mere one percent, but occurs at a theoretically and logically crucial dividing line: the fifty/fifty point. The difference between these rules hinges on whether a plaintiff can recover when her proportion of negligence is the *sam*e as the defendant's negligence or if the plaintiff's negligence must be *less* than the defendant's negligence. The majority of states have adopted the fifty percent rule including: Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Vermont, West Virginia, Wisconsin, and Wyoming.[48]

The final variant of modified comparative negligence is only used by one state: South Dakota.[49] This version of the rule focuses on comparing the plaintiff's negligence to the defendant's negligence.[50] If by comparison "a plaintiff's negligence is slight and the defendant's is gross" then "the plaintiff can recover" damages.[51] However, as with the other variants of comparative negligence, those damages are reduced by the percentage of fault attributed to the plaintiff.[52]

II. Multiple Defendants and Distributing Damages

This Article has focused on apportioning responsibility for harm when the plaintiff and a single defendant are both negligent. As described in the Introduction of this Article, however, it is possible for

43. *Id.*
44. *Id.*
45. *See* app'x tbl.3.
46. Schwartz, *supra* note 4, § 2.01(b)(3), at 34.
47. *Id.*
48. *See* app'x tbl.4.
49. Schwartz, *supra* note 4, § 2.01(b)(2), at 33.
50. *Id.* § 2.01(b)(3), at 33. *See* app'x tbl.5.
51. Schwartz, *supra* note 4, § 2.01(b)(3), at 33.
52. *Id.*

there to be multiple tortfeasors—whether named defendants or not. The comparative negligence of the plaintiff determines the amount by which the damage award is reduced because of the plaintiff's fault. This is a reduction of the overall amount that the plaintiff can recover for her harm. This Part will briefly consider the doctrine governing the division of responsibility between multiple tortfeasors and the consequential division of damages.

The doctrine of joint tortfeasors allows for the joinder of multiple defendants into one lawsuit if any of the defendants' actions "made a substantial contribution to the cause of a single, indivisible injury."[53] This avoids the complication of multiple lawsuits, while allowing the negligence to be apportioned between multiple defendants.[54] Thus, in a comparative negligence jurisdiction, the trier-of-fact may be asked to apportion negligence between the plaintiff and multiple defendants.

How are damages divided when there are multiple tortfeasors? Under the old common law rule of joint and several liability, every defendant who had a part in causing the harm to the plaintiff is responsible for the full amount of the damages.[55] As described by the United States Supreme Court in 1933, "The rule is settled by innumerable authorities that if, injury be caused by the concurring negligence of the defendant and a third person, the defendant is liable to the same extent as though it had been caused by his negligence alone."[56] Under this doctrine, a plaintiff could bring a claim against only one of her tortfeasors and collect all of her damages, regardless of how small that defendant's contribution to the harm. Recent trends have included a movement away from joint and several liability in multiple states.[57] These states tend to adopt a system of several liability, where defendants are only responsible for their corresponding proportion of damages.[58]

III. The Role of the Jury

The trier-of-fact, most often a jury, is a cornerstone of the civil justice system.[59] Either litigant may request a jury to determine negli-

53. *Id.* § 15.03, at 332.

54. *Id.* § 15.02, at 332.

55. *Id.* § 15.03, at 332–33.

56. Miller v. Union Pacific R. Co., 290 U.S. 227, 236 (1933).

57. Schwartz, *supra* note 4, § 15.04, at 334.

58. *Id.* § 15.04, at 334–35.

59. Lawrence M. Friedman, *Some Notes on the Civil Jury in Historical Perspective*, 48 DePaul L. Rev. 201, 203 (1998).

gence.[60] The role of the jury is especially influential in negligent tort cases because it is responsible for evaluating the appropriateness of the parties' actions in addition to deciding the facts of the case.[61] With regard to comparative negligence, courts have been reluctant to alter the apportionment of negligence between the parties.[62] For example, the Supreme Court of Minnesota stated, "Upon a review of a jury's apportionment of negligence between tortfeasors . . . we will not substitute our judgment for that of the jury unless there is no evidence reasonably tending to sustain the apportionment or the apportionment is manifestly and palpably against the weight of the evidence."[63]

Considering the important role the trier-of-fact plays in apportioning responsibility and the courts' reluctance to alter that apportionment, it is crucial to understand how juries are going about dividing responsibility. Arguably, the best way to understand how juries apply legal standards is by examining existing social science research and conducting further studies. This Article examines how human psychology influences apportionments of responsibility using a negligent tort scenario. The following Section reviews the pertinent literature concerning the psychology of attribution and discusses how that psychology might influence apportionments of responsibility.

IV. Psychology of Attribution

Research at the intersection of law and psychology provides invaluable information regarding the psychology of juries.[64] Despite the fact that individual jurors are present for the same trial and listen to the same evidence, they rarely agree when taking their initial vote.[65] This suggests there are pre-existing differences between jurors that influence their assessments of a case.[66] Although some variability is likely attributable to personal beliefs, there might also be systematic differences associated with cultural backgrounds and demographic features that impact an individual's cognitive tendencies.[67] For the purposes of

60. Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91 Geo. L.J. 633, 633 (2003).

61. Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 Chi.-Kent L. Rev. 587, 590 (2001).

62. Schwartz, *supra* note 4, § 18.01, at 410.

63. Martin v. Bussert, 193 N.W.2d 134, 139 (1971).

64. *See generally* Brian H. Bornstein, The Jury Under Fire: Myth, Controversy, and Reform (2017).

65. Shari Diamond, *Scientific Jury Selection: What Social Scientists Know and Do Not Know*, 73 Judicature 178, 178 (1990).

66. *Id.*

67. *See generally id*.

understanding how a trier-of-fact might apportion responsibility, it is useful to consider how ordinary people interpret the actions of others.

Social psychologists have long been concerned with how laypeople, as "naïve psychologists," navigate the related tasks of forming causal judgments and making social inferences.[68] Causal judgments involve the observer (juror) identifying the causal agent—or agents—to attribute the outcome (the harm).[69] Most theories of attribution recognize a distinction between the internal, or dispositional, nature of the actor (e.g., abilities, traits, or motives) and the external, or situational, influences (e.g., task difficulties, incentives, or peer pressures).[70] Early research on attributional tendencies suggested that people tend to attribute more causal influence to dispositional factors, and they infer attributes about an individual despite the situational influences on his or her behavior.[71] These effects were labeled the fundamental attribution error—defined as "the tendency for attributors to underestimate the impact of situational factors and to overestimate the role of dispositional factors in controlling behavior."[72]

Günter Bierbrauer demonstrated the fundamental attribution error by examining participants' impressions of the influences operating in the classic Milgram situation.[73] Participants viewed a realistic Milgram study reenactment (using verbatim dialog) of a "Teacher's" obedience to an authority figure directing them to shock the "Learner" to the point of delivering the maximum shock (the "Learner" was really a confederate that was not actually being shocked).[74] There were different conditions in which the participants played the role of the "Teacher" in the reenactment or merely observed the reenactment.[75] Regardless, participants underestimated the influence of the situational forces that compelled obedience from the "Teacher" in the reenactment.[76] Participants demonstrated the fundamental attribution error by tending to assume that the obedience reflected something about the "Teacher's" character.[77]

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68. Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, 10 SCI. DIRECT 174, 175 (1977), https://www.sciencedirect.com/science/article/pii/S0065260108603573.

69. *Id.*

70. *Id.* at 175–76.

71. *Id.* at 179

72. *Id.* at 183.

73. *Id.* at 184–85.

74. Ross, *supra* note 68, at 184–85.

75. *Id.*

76. *Id.*

77. *Id.*

According to the fundamental attribution error, an observer is likely to be dispositionally focused and will likely underestimate the effect of situational influences on a defendant's behavior. For example, when observing another individual driving over the speed limit the observer will make an internal inference about that person's character. This observer is more likely to assume the speeding driver is reckless or ascribe some other negative trait to that individual. This emphasis on internal attributions could lead to an increased sense of agency over outcomes of actions, including outcomes that lead to harm to others.

This over emphasis on dispositional explanations of behavior was once thought to be universal. However, more recent research suggests that attributional tendencies actually vary between cultures and individuals. For example, holistic cultures, such as East Asia, tend to perceive the situation as having a stronger influence on an individual's actions compared to analytic cultures, such as the United States.[78] Stated another way, individuals from holistic cultures tend to make more situational attributions—they are more likely to see the situation as a cause of someone's behavior.[79] For example, if someone from a holistic culture sees another person driving over the speed limit, she is likely to consider the possible situational factors that could influence that behavior rather than automatically make an assumption about that person's character or disposition. A holistic individual might consider that the speeding driver is late for work or may be trying to get to the hospital because of a medical emergency.

Michael W. Morris and Kaiping Peng demonstrated that the holistic culture's tendency to make situational attributions even extended to attributions for murders.[80] Their study had Chinese and American participants weigh the importance of potential causes for two different murders that had occurred.[81] Overall, the findings indicated that compared to Americans the Chinese participants gave more weight to sit-

78. Michael W. Morris & Kaiping Peng, *Culture and Cause: American and Chinese Attributions for Social and Physical Events*, 67 J. PERSONALITY & SOC. PSYCHOL. 949, 949 (1994).

79. *Id.*

80. *Id.* at 962.

81. *Id.* at 963. The materials described two mass murders. *Id.* at 958. The first was committed by Gang Lu who was a Chinese physics student who had lost an award which he unsuccessfully appealed. *Id.* He ended up going to the University of Iowa Physics Department and "shot his advisor, the person who handled his appeal, several fellow students and bystanders, and then himself." *Id.* The second mass murder was committed by Thomas McIlvane, who was an "Irish-American postal worker who had recently lost his job." *Id.* He had appealed the decision but was unsuccessful. *Id.* He ended up going to the Post Office where he had previously worked, "shot his supervisor, the person who handled his appeal, several fellow workers and bystanders, and then himself." *Id.*

uational factors that influenced the murder, such as corruption by others who were bad examples and life disruptions experienced by each of the murderers.[82] If Chinese participants attribute more causal influence to the situation then this could imply that they ascribe less responsibility to "bad actors" compared to American participants.

Although differences in attributional tendencies were initially studied in cross-cultural settings, additional research has observed that socioeconomic status also influences attributional tendencies. For example, researchers found that lower social class participants in both the United States and Russia are more situational and less dispositional in their attributional tendencies.[83] Igor Grossmann and Michael E.W. Varnum examined the influence of socioeconomic status in addition to nationality differences between Americans and Russians.[84] Participants were asked to read vignettes which described a protagonist who performed either a desirable or undesirable action, and then they rated the extent to which they thought internal and external factors influenced the protagonist's actions.[85] As predicted, they found that, overall, Russians made less dispositional attributions than Americans.[86] However, they also found that above and beyond the effect of nationality, lower social class participants made less dispositional and more situational attributions than those from higher social classes.[87] These findings indicate that groups with different socioeconomic statuses also show cultural differences in attributional tendencies.[88] My previous research has also demonstrated differences in attributional tendencies as a measurable individual difference within United States.[89]

V. Current Study: Dividing Responsibility

The purpose of the current study is to examine how jurors approach complex negligent tort cases in which responsibility can potentially be attributed to multiple factors including the negligent behavior of the person injured. More specifically, the driving questions include: "How

82. *Id.* at 964.

83. *See generally* Igor Grossmann & Michael E.W. Varnum, *Social Class, Culture, and Cognition*, 2 Soc. Psychol. & Personality Sci. 81 (2011).

84. *Id.* at 81.

85. *Id.* at 83.

86. *Id.*

87. *Id.*

88. *Id.* at 86.

89. *See generally* Ashley M. Votruba, Partition Responsibility: The Influence of Cultural Differences in Social Attributions on Jurors' Division of Responsibility in a Negligent Tort Context (May 2017) (unpublished Ph.D. dissertation, Arizona State University), https://repository.asu.edu/items/44295.

does the trier-of-fact perceive and make judgments regarding apportionments of responsibility when there are multiple causal influences?"; and "Are decision-makers uniform in how they judge the same case?" Based on the social psychological literature surrounding attributional tendencies, I predict that jurors will vary in their assessments of the apportionment of responsibility. Further, I predict that this variable will be driven, in part, by individual differences in attributional tendencies. Individuals who are more disposition-focused and less situation-focused will apportion more responsibility to the identified defendant resulting in less responsibility being attributed to other factors. The paradigm used to examine these questions consists of a short vignette involving a car accident with multiple contributing factors, including negligence on the part of the plaintiff and the defendant.

A. Participants

Two hundred ten participants from Amazon's Mechanical Turk[90] completed the study, and they were compensated $0.50 for their time. Participants were required to be an adult within the United States. No other requirements were specified; the goal was to sample broadly from the United States population. The average age of the participants was 38.61 years old, with a range from 19 to 84 years old (SD = 13.13 years). The sample consisted of slightly more female than male participants: 52.4% self-designated as female and 42.9% self-designated as male (the remainder opted to not disclose their gender). With regards to the ethnic breakdown, this sample primarily identified as "White/Caucasian" (75.7%), with 10.0% of the sample identifying as "Black/African-American" and 3.3% identifying as "Hispanic/Latino". Additional demographic information is reported in Table 6.

90. Amazon Mechanical Turk is a crowdsourcing marketplace for individuals and businesses. AMAZON MECHANICAL TURK, https://www.mturk.com/ (last visited Nov. 10, 2019).

TABLE 6. Participants' Demographic Information & Study Design Distribution

Variable/ Response Option	# of Participants	Percent (%) of Participants
Gender		
Female	110	52.4
Male	90	42.9
Did not report gender	10	4.8
Ethnicity		
White/Caucasian/European	159	75.7
Black/African-American	21	10.0
Hispanic/Latino/Chicano	7	3.3
East Asian/Southeast Asian/Asian-American	2	2.9
European or Australian	1	0.5
Other	4	1.9
Did not report ethnicity	10	4.8
Political Affiliation		
Democrat	86	41.0
Republican	50	23.8
Libertarian	4	1.9
Independent	60	28.6
Did not report political affiliation	10	4.8
Self-reported Social Class		
Working class	35	16.7
lower-middle class	55	26.2
Middle class	91	43.3
Upper-middle class	17	8.1
Upper class	1	0.5
Did not report social class	11	5.2

B. Methods

The study was administered online through Amazon's Mechanical Turk using Qualtrics survey software.[91] After consenting to participate in the study, the participants were directed to read a short scenario and were then provided the following car accident vignette:

> It is early in the morning and Rick is speeding on a mostly empty two-lane road. The road is wet, and a dense fog has settled upon it. Up the road, a city bus has run out of gas and the bus driver has attempted to pull over to the shoulder. The bus, however, is still slightly blocking the roadway. Rick's car hits the bus.

After reading the vignette, participants were asked, "To what extent do you believe each of the following factors should be considered re-

91. Qualtrics is a survey tool built for multiple uses including market research. QUALTRICS XM, https://www.qualtrics.com/ (last visited Nov. 10, 2019).

sponsible for the accident? Please provide the percentage (%) of responsibility for each factor, totaling to 100%." Then they assigned a percentage (totaling 100%) to each of the following factors: (1) Rick's driving; (2) the road and weather conditions; (3) the bus partially blocking the roadway; (4) luck; and (5) other. Pilot testing and informal focus groups regarding the study materials suggested that these were the factors that lay perceivers tended to attribute responsibility for the harm. Participants had the option to designate a factor as "0" percent responsible if they felt it was not an influential factor.

Following the apportionment of responsibility, participants were instructed on negligence: "Negligence is the failure to use reasonable care. Negligence may consist of action or inaction. Negligence is the failure to act as a reasonably careful person would act under the circumstances." They were then asked whether Rick was negligent (responding "yes" or "no"). Finally, the last question about the case explained several liability and described the damages from the accident as being worth about $100,000. The prompt stated:

> According to some state's negligent tort laws, a person is only legally responsible for the amount of damages that their proportion of the harm caused. This means that they only have to pay for the proportion of the damages that they are responsible for causing. Assume this is the law and that the damages in this case were $100,000. How much of the $100,000 in damages should Rick have to pay?

Following this prompt, participants responded to the question: "How much of the $100,000 in damages should Rick have to pay?" By instructing participants on several liability and providing the total amount of damages it is possible to compare apportionment of responsibility with lay perceptions of damage awards.

After completing the questions regarding the car accident, participants were given the Attributional Tendency Scale. This scale consists of six statements that participants were asked to rate their agreement with on a scale of 1 ("strongly disagree") to 7 ("strongly agree"). Items included: "How people behave is mostly determined by their personality" and "People in similar situations will behave similarly regardless of their personalities" (see Table 8 for the full list of items). Finally, participants answered several demographic questions, were debriefed on the study's purpose, and were provided an individualized survey code that allowed them to receive payment through Amazon's Mechanical Turk for completing the study.

C. Results

1. Perceptions of Negligence

As written, the vignette suggests negligence on the part of our defendant, Rick, because he was speeding.[92] However, although instructed on the general concept of negligence, not all of the participants believed Rick was actually negligent. Of the participants who responded, 82.5% believed the defendant was negligent, while 17.5% did not believe Rick's actions were negligent. If the participant did not believe that the defendant's actions were negligent, then there is no reason to assess how they apportion responsibility for the harm. Therefore, the results regarding apportionment of responsibility are reported for 82.5% of the participants who believed the defendant was negligent.

2. Apportionment of Responsibility

The following results describe how 82.5% of the participants—those who believed the defendant was negligent—apportioned responsibility between the five options of: (1) Rick's driving; (2) the road and weather conditions; (3) the bus partially blocking the roadway; (4) luck; and (5) other. Table 7 below provides the mean, standard deviation, minimum value, and maximum value for each of the options.

TABLE 7. Descriptive Statistics for Apportionments of Responsibility

	Rick's Driving	Road and Weather	Bus Blocking Road	Luck	Other
Mean	63.33	14.93	16.99	2.63	1.53
Standard Deviation	26.66	14.51	16.80	6.24	5.63
Minimum Value	0	0	0	0	0
Maximum Value	100	70	80	40	40

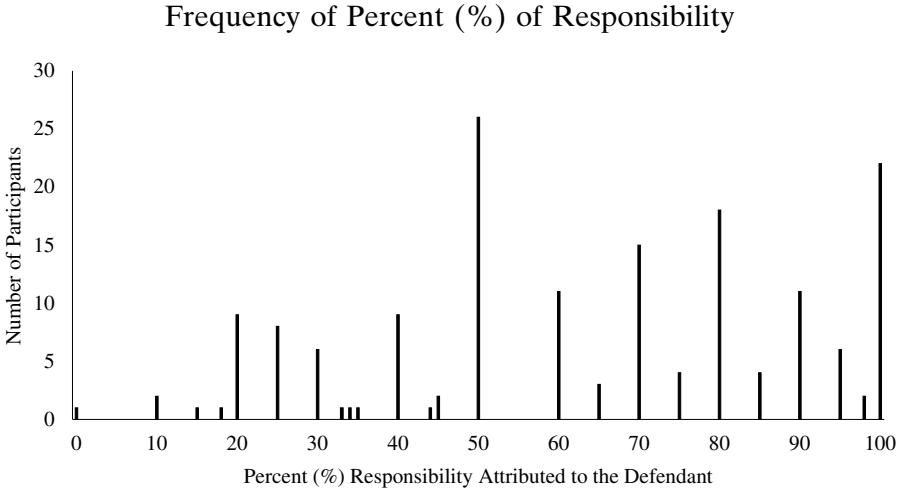
On average, the participants apportioned 63.33% of the responsibility to the defendant. The majority of the remaining apportionment of responsibility was spread almost evenly between "the road and weather conditions" (14.93%) and "the bus partially blocking the roadway" (16.99%; this represents the contributory negligence of the

92. In most jurisdictions, speeding is considered negligence per se. In this hypothetical set up for research purposes, that is not the case. Participants were not instructed that by "speeding" the defendant had broken a statute establishing a duty of care indicating that this is negligence per se. Instead, the participants were instructed to treat this as a standard negligence claim.

bus driver). Very little responsibility was apportioned to "luck" (2.63%) or other factors (1.53%).

An examination of the frequency distribution of this data (see Figure 1) highlights a couple of key findings. First, although all of these participants believed the defendant was negligent, the amount of responsibility they apportioned to the defendant varied widely. This is evident by the distribution of 26.1% of the participants apportioning less than 50% to the defendant, 15.8% apportioning exactly 50%, and 58.1% apportioning over 50%. This high level of variability is also highlighted by the large standard deviation for apportionments of the defendant's responsibility (standard deviation = 26.66%). Although there is considerable variability, the majority of participants (73.9%) believed that the defendant was at least 50% to blame for the harm.

FIGURE 1. Frequency Distribution of the Proportion of Responsibility Assigned to the Defendant



There is one other feature of the frequency distribution that is worth noting given the distinction between the forty-nine percent and fifty percent rules of comparative negligence. Of the 165 participants in this analysis, the overwhelming majority apportioned responsibility to the defendant on a value that is a multiple of 10 (e.g., 10, 20, 30, etc.). Only 35 participants (21.2%) chose a value that was not a multiple of 10. And of those, the majority (29) chose values that were a multiple of 5.

3. *The Influence of Attributional Tendencies on the Apportionment of Responsibility*

As previously discussed, an individual's attributional tendencies influence perceptions of causal influences. Thus, I predict that an individual's predisposition to be dispositionally or situationally focused influenced their apportionment of responsibility to the defendant. Participants who are more dispositionally focused should see stronger causal connections between the defendant's actions and the harm. Thus, they will apportion a larger percent of the responsibility for the harm to the defendant. In contrast, participants who are more situationally focused should see a stronger influence of external, situational factors. Thus, they will apportion a smaller percent of the responsibility for the harm to the defendant.

To examine the effect of individual differences in attributional tendencies, I have developed and validated the Attributional Tendencies Scale.[93] To test the factor structure of the items of the Attributional Tendency Scale in this sample, I conducted an exploratory factor analysis (EFA) on the six items using Principal Axis Factoring to determine whether the scale is unidimensional as predicted. A Direct Oblimin rotation was used, allowing the factors to correlate. The analysis extracted two initial factors with an eigenvalue greater than 1: The first factor explained 39.17% of the variance (*eigenvalue* = 2.35) and the second explained 27.28% of the variance (*eigenvalue* = 1.64). Table 8 displays the factor loadings from the Pattern Matrix of each item on the two extracted factors. The first factor contained the three situationally focused items loading positively, with all loadings over 0.75. None of the dispositionally focused items loaded with a value of greater than +/- 0.20. The second factor consisted of all three dispositionally focused items loading positively, all with loadings over 0.75.

93. Ashley M. Votruba, Attributional tendencies: An examination of the relationship between dispositional and situational tendencies using a self-report scale (Dec. 4, 2019) (unpublished manuscript) (on file with author).

TABLE 8. Exploratory Factor Analysis factor loadings for the Attributional Tendency Scale

Subscale/Item	Factor 1	Factor 2
Dispositional Tendency Subscale		
1) How people behave is mostly determined by their personality.	-.034	**.786**
2) An individual's personality predisposes them to act in specific ways.	-.066	**.832**
3) An individual's future behavior is predictable if you know his or her personality.	.120	**.776**
Situational Tendency Subscale		
4) Behavior can best be predicted by looking at situational factors.	**.789**	.184
5) Behavior is primarily determined by the situations people find themselves in.	**.827**	-.020
6) Situational influences often have a large influence on someone's behavior.	**.829**	-.116

Note. Factor loadings > +/- .30 are in boldface. The exploratory factor analysis was done using Principal Axis Factoring with a Direct Oblimin rotation allowing the factors to correlate.

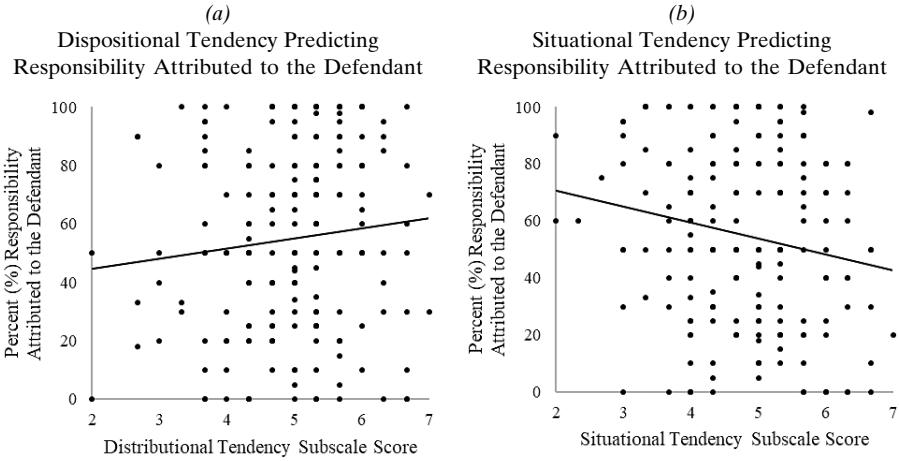
In addition to the exploratory analyses, I conducted a two-factor Confirmatory Factor Analysis (CFA) on the data, using maximum likelihood as the estimation procedure. To test the fit of the data, I examined the Chi-Square Test of Model Fit, for which values closer to zero indicate a better fit. I also examined two other model fit indices that are not influenced by sample size and have different measurement properties: the comparative fit index (CFI) and the root-mean-square error of approximation (RMSEA).[94] The CFI compares the fit of the estimated model to the fit of the independence model (where all variables are unrelated) using a noncentral χ^2 distribution; possible values range from 0–1, with larger numbers indicating better model fit. A CFI of .90 or greater is generally thought to indicate good fit of the model to the data, with values greater than .95 indicating excellent fit. I also examined the RMSEA which compares the estimated model to a perfect (i.e., saturated) model. Smaller RMSEA values represent better fitting models and values between .06 and .10 are generally thought to indicate a reasonable degree of fit, with values less than .06 indicating very close fit to the data.

94. *See generally* Li-tze Hu & Peter M. Bentler, *Cutoff criteria for fit indexes in covariance structure analysis: Conventional criteria versus new alternatives*, 6 STRUCTURAL EQUATION MODELING: A MULTIDISCIPLINARY J. 1 (1999).

The two-factor CFA consisted of six items loading on two factors as previously described (and shown in Table 8). Three of the items loaded on the dispositionally focused factor and the other three loaded on the situationally focused factor. This model indicated $\chi^2(8) = 25.06$, $p < .01$, and the fit indices for this model showed a CFI of .94 and an RMSEA value of .10. Both the CFI and the RMSEA for this model indicate that the model is a good fit for the data. Thus, I computed the Attributional Tendency Scale (with two subscales), which was created using those six items. The Dispositional Tendency Subscale score was computed by averaging the three dispositionally focused items (Chronbach's alpha = .72; $M = 4.96$; $SD = .96$). Similarly, the Situational Tendency Subscale score was computed by averaging the three situationally focused items (Chronbach's alpha = .75; $M = 4.78$; $SD = 1.01$). These subscales were significantly correlated, $r\ (199) = .19$, $p = .01$.

To test the predicted relationship between attributional tendencies and apportionments of responsibility, I ran a regression analysis with two predictors: (1) scores on the Dispositional Tendency Subscale and (2) scores on the Situational Tendency Subscale. First, with the two-predictor regression model, I determined that there was not a significant interaction between the Dispositional Tendency and Situational Tendency Subscales, $\beta = -.06$, $p = .39$. Having ruled out an interaction effect, as predicted, both subscales were significant predictors for apportionments of responsibility attributed to the defendant's driving (Dispositional Tendency Subscale: $\beta = .15$, $p = .04$; Situational Tendency Subscale: $\beta = -.20$; $p = .01$; R^2 (overall model) = .06, $p = .01$; see Figure 2).

FIGURE 2. Relationship between Dispositional Tendency Subscale (a), Situational Tendency Subscale (b), and the Percent Responsibility Attributed to the Defendant.



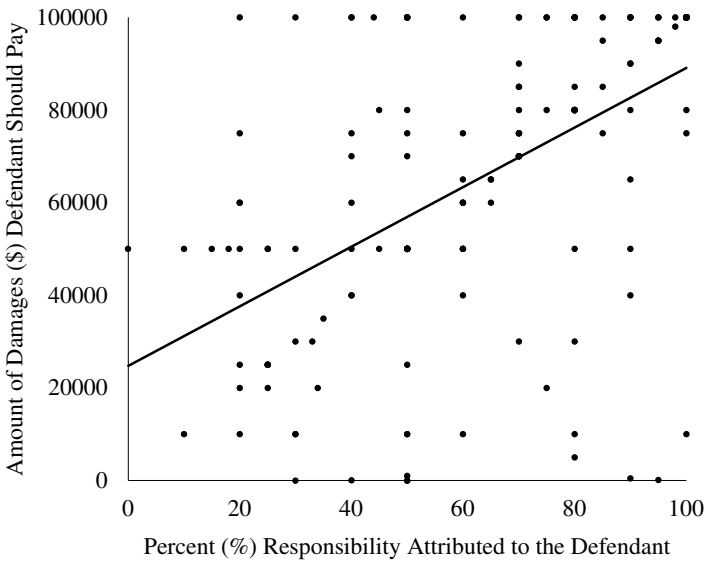
This data supports the conclusion that individual differences in Attributional Tendencies predicted some of the variability in how participants apportioned responsibility to the defendant. In general, participants who showed more dispositional tendencies and less situational tendencies apportioned more responsibility to the defendant for the harm. Thus, apportionments of responsibility vary—at least in part—based on the individual differences of the decision-maker.

4. The Relationship between Apportionment of Responsibility and Damage Awards

In addition to examining how participants apportion responsibility for harm, this study also examined the implications for awarding several liability. One question instructed participants on the doctrine of several liability and described the damages from the accident as being worth about $100,000. It then asked participants to determine how much in damages the defendant should pay. If participants are appropriately applying the doctrine of several liability, then the damage award should reflect the apportionment of responsibility assigned to the defendant. In this specific example, if participants are dividing damages based purely on how they apportion responsibility, then for every one percent of responsibility attributed to the defendant, he should be responsible for an additional $1,000 in damages.

The mean values suggest that there are proportional values. The average percent of responsibility attributed to the defendant is 63.33% and the average damage award was $65,513.03. Additionally, a linear regression analysis estimates the change in damage award for each additional percent of responsibility attributed to the defendant. Using the apportionment of responsibility of the defendant as a predictor, for every one percent increase in attribution of responsibility, there is a corresponding $643.37 increase in damages ($\beta = .54$; $p < .001$; R^2 (overall model) = .29, $p < .001$; see Figure 3). This finding suggests that increases in damage awards follow with increases in apportionments of responsibility, but lag behind what would be expected ($1,000) if the values were lockstep.

FIGURE 3. Relationship between the Percent Responsibility Attributed to the Defendant and Amount of Damages the Defendant Should Pay.



CONCLUSIONS

The United States has a rich legal history addressing how to apportion responsibility between multiple negligent actors. Much of this doctrine governs the implications of specific apportionments between the plaintiff and defendant (or multiple defendants). However, these doctrines leave to the jury how best to go about actually doing the apportionment. There is no instruction manual. Nor are courts wanting to interfere with these jury determinations. Thus, it is useful to

consider how the jury might be going about apportioning responsibility. The current study sought to provide some insight into how triers-of-fact apportion responsibility.

There are a number of noteworthy findings. First, although all participants read the same, relatively simple vignette, the apportionments of responsibility varied widely. This highlights the vast differences in perception that can exist in triers-of-fact even though they are exposed to the same information. It also suggests the potential difficulties a trier-of-fact might have in apportioning responsibility for harm. Although, it is possible some of these differences might converge in the jury deliberation process on some "middle ground." However, the high levels of variability in apportionments may be cause for some concern regarding the equitable administration of justice.

Another noteworthy finding focuses on the influence of attributional tendencies. Participants who showed more dispositional tendencies and less situational tendencies apportioned more responsibility for the harm to the defendant. This suggests that apportionments of responsibility vary—at least in part—based on the individual differences of the decision-maker.

Third, the study also examined the relationship between apportionments of responsibility and apportionments of damages. According to this analysis, for every one percent increase in apportionment of responsibility, the damage award followed the trend, but lagged behind the expected increases.

The final noteworthy finding highlighted the influence of human cognition on the apportionment of responsibility, specifically the tendency to prefer values that are multiples of ten when provided a zero to one hundred percent scale. These findings could have profound implications for the distinction between the forty-nine percent and fifty percent rules associated with modified comparative negligence. This is in line with an observation by Schwartz, "[A]ttorneys who have practiced with some frequency under comparative negligence suggest that jurors are inclined to return fifty/fifty verdicts which would, of course, bar recovery under the forty-nine percent rule."[95] As written, the forty-nine percent and fifty percent rules differ only slightly. But given these findings, there might be significant differences in plaintiff's ability to recover from the defendant for her harm. Plaintiffs in forty-nine percent rule jurisdictions may be far more often precluded from recovering compared to the fifty percent rule.

95. SCHWARTZ, *supra* note 4, § 2.01(b)(3), at 34.

As with any empirical study, there are limitations worth discussing. This research is based on a single vignette study with an online sample. Additional replications using other case facts and with diverse samples (online and in-person) would allow for greater generalizability of the findings. Further, this was not a mock jury study. As such, it is difficult to know how the deliberation process might affect the outcome. Future studies could use mock jury procedures with more realistic materials mimicking a trial to increase ecological validity. Keeping these limitations in mind, this study offers initial empirical evidence suggesting that jurors might be struggling to uniformly apportion responsibility. These results suggest that our understanding of the application of comparative negligence would benefit from further research examining the decision-making processes that influence the apportionment of responsibility.

APPENDIX

TABLE 1. Contributory Negligence States

Jurisdiction	Rule	Authority
Alabama	Contributory Negligence	*Rowden v. Tomlinson*, 538 So.2d 15, 18 (Ala. 1988) (stating, "The law in Alabama is quite clear that while it is not a defense to a claim based on wanton misconduct on the part of the defendant, contributory negligence is a complete defense to an action based on negligence. *Creel v. Brown*, 508 So.2d 684 (Ala. 1987).").
Maryland	Contributory Negligence	*Board of Cty. Comm'r of Garrett Cty. v. Bell Atlantic*, 695 A.2d 171, 180 (Md. 1997) (stating, "[u]nder Maryland law, contributory negligence of a plaintiff will ordinarily bar his, her, or its recovery. Contributory negligence is that degree of reasonable and ordinary care that a plaintiff fails to undertake in the face of an appreciable risk which cooperates with the defendant's negligence in bringing about the plaintiff's harm. *Wegad v. Howard Street Jewelers*, 326 Md. 409, 418, 605 A.2d 123, 128 (1992); *Menish v. Polinger Co.*, 277 Md. 553, 559, 356 A.2d 233, 236 (1976).").
North Carolina	Contributory Negligence	*Clark v. Roberts*, 139 S.E.2d 593, 597 (1965) (stating, "[e]very person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so, and if he fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of defendant contributes to the injury complained of, he is guilty of contributory negligence.").
Virginia	Contributory Negligence	*Rose v. Jaques*, 597 S.E.2d 64, 71 (2004) (stating, "[c]ontributory negligence involves an objective test, 'i.e., whether a plaintiff failed to act as a reasonable person would have acted for his own safety under the circumstances.' *Artrip v. E.E. Berry Equip. Co.*, 240 Va. 354, 358, 397 S.E.2d 821, 823–24 (1990).").
District of Columbia	Contributory Negligence	*Bell v. Elite Builders*, 634 Fed.Appx. 802, 803 (2015) (stating, "[c]ontributory negligence is a complete bar to liability for negligence under District of Columbia law. *Juvenalis v. District of Columbia*, 955 A.2d 187, 193 (D.C. 2008). To succeed, the defendants must establish 'that the plaintiff failed to exercise reasonable care' and 'that this failure was a substantial factor in causing the alleged damage or injury.' *Massengale v. Pitts*, 737 A.2d 1029, 1031 (D.C.1999).").

TABLE 2. Pure Comparative Negligence States

Jurisdiction	Rule	Authority
Alaska	Pure Comparative Negligence	ALASKA STAT. ANN. § 09.17.060 (West 2018) ("In an action based on fault seeking to recover damages for injury or death to a person or harm to property, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for the injury attributable to the claimant's contributory fault, but does not bar recovery.").
Arizona	Pure Comparative Negligence	ARIZ. REV. STAT. ANN. § 12-2505(A) (West 2019) ("The defense of contributory negligence or of assumption of risk is in all cases a question of fact and shall at all times be left to the jury. If the jury applies either defense, the claimant's action is not barred, but the full damages shall be reduced in proportion to the relative degree of the claimant's fault which is a proximate cause of the injury or death, if any.").
California	Pure Comparative Negligence	*Li v. Yellow Cab Co*. 13 Cal.3d 804, 829, 523 P.2d 1226, 1246 (Cal. 1975) (stating "[I]n all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured in person or property shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering.").
Florida	Pure Comparative Negligence	FLA. STAT. ANN. § 768.81(2) (West 2018) ("In a negligence action, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.").
Kentucky	Pure Comparative Negligence	KY. REV. STAT. ANN. § 411.182(1)(b) (West 2019) ("The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under subsection (4) of this section.").
Louisiana	Pure Comparative Negligence	LA. CIV. CODE ANN. art. 2323(A) (West 2018) ("If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.").

Mississippi	Pure Comparative Negligence	MISS. CODE ANN. § 11-7-15 (West 2018) ("In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.").
Missouri	Pure Comparative Negligence	*Gustafson v. Benda*, 661 S.W.2d 11, 15–16 (Mo. 1983) ("Insofar as possible this and future cases shall apply the doctrine of pure comparative fault in accordance with the Uniform Comparative Fault Act §§ 1–6, 12 U.L.A. Supp. 35–45 (1983)."). UNIFORM COMPARATIVE FAULT ACT § 1 [Effect of Contributory Fault] states, "(a) In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery."
New Mexico	Pure Comparative Negligence	*Scott v. Rizzo*, 634 P.2d 1234, 1241 (N.M. 1981) (stating "[T]he plaintiff's percentage of contributing fault will reduce his recovery of total damages suffered in an amount equal to his degree of fault, at the same time exposing him to liability to and recovery by defendant for injuries incurred by defendant as a result of plaintiff's proportionate negligence.").
New York	Pure Comparative Negligence	N.Y. C.P.L.R. § 1411 (McKinney 2019) ("In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.").

Rhode Island	Pure Comparative Negligence	9 R.I. GEN. LAWS ANN. § 9-20-4 (West 2019) ("In all actions hereafter brought for personal injuries, or where personal injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property or person having control over the property, may not have been in the exercise of due care . . . shall not bar a recovery, but damages shall be diminished by the finder of fact in proportion to the amount of negligence attributable to the person injured, or the owner of the property or the person having control over the property.").
Washington	Pure Comparative Negligence	WASH. REV. CODE ANN. § 4.22.005 (West 2019) ("In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.").

TABLE 3. Forty-Nine Percent Rule Comparative Negligence States

Jurisdiction	**Rule**	**Authority**
Arkansas	Forty-Nine Percent Rule	ARK. CODE ANN. § 16-64-122(b)(1)-(2) (West 2018) ("(1) If the fault chargeable to a party claiming damages is of a lesser degree than the fault chargeable to the party or parties from whom the claiming party seeks to recover damages, then the claiming party is entitled to recover the amount of his or her damages after they have been diminished in proportion to the degree of his or her own fault. (2) If the fault chargeable to a party claiming damages is equal to or greater in degree than any fault chargeable to the party or parties from whom the claiming party seeks to recover damages, then the claiming party is not entitled to recover such damages.").
Colorado	Forty-Nine Percent Rule	COLO. REV. STAT. ANN. § 13-21-111(1) (West 2019) ("Contributory negligence shall not bar recovery in any action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made.").
Georgia	Forty-Nine Percent Rule	GA. CODE ANN. § 51-12-33(g) (West 2019) ("[T]he plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed.").

Idaho	Forty-Nine Percent Rule	IDAHO CODE ANN. § 6-801 (West 2019) ("Contributory negligence or comparative responsibility shall not bar recovery in an action by any person or his legal representative to recover damages for negligence, gross negligence or comparative responsibility resulting in death or in injury to person or property, if such negligence or comparative responsibility was not as great as the negligence, gross negligence or comparative responsibility of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence or comparative responsibility attributable to the person recovering.").
Kansas	Forty-Nine Percent Rule	KAN. STAT. ANN. § 60-258a(a) (West 2017) ("The contributory negligence of a party in a civil action does not bar that party or its legal representative from recovering damages for negligence resulting in death, personal injury, property damage or economic loss, if that party's negligence was less than the causal negligence of the party or parties against whom a claim is made, but the award of damages to that party must be reduced in proportion to the amount of negligence attributed to that party.").
Maine	Forty-Nine Percent Rule	ME. REV. STAT. ANN. tit. 14, § 156 (West 2019) ("When any person suffers death or damage as a result partly of that person's own fault and partly of the fault of any other person or persons, a claim in respect of that death or damage may not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof must be reduced to such extent as the jury thinks just and equitable having regard to the claimant's share in the responsibility for the damage. . . . If such claimant is found by the jury to be equally at fault, the claimant may not recover.").
Nebraska	Forty-Nine Percent Rule	NEB. REV. STAT. ANN. § 25-21, 185.09 (Reissue 2016) ("Any contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery.").
North Dakota	Forty-Nine Percent Rule	N.D. CENT. CODE ANN. § 32-03.2-02 (West 2019) ("Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property unless the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering.").

Tennessee	Forty-Nine Percent Rule	*McIntyre v. Balentine*, 833 S.W.2d 52, 57 (Tenn. 1992) (stating "[S]o long as a plaintiff's negligence remains less than the defendant's negligence the plaintiff may recover; in such a case, plaintiff's damages are to be reduced in proportion to the percentage of the total negligence attributable to the plaintiff.").
Utah	Forty-Nine Percent Rule	UTAH CODE ANN. § 78B-5-818(2) (West 2008) ("A person seeking recovery may recover from any defendant or group of defendants whose fault, combined with the fault of persons immune from suit and nonparties to whom fault is allocated, exceeds the fault of the person seeking recovery prior to any reallocation of fault made under Subsection 78B-5-819(2).").

TABLE 4. Fifty Percent Rule Comparative Negligence States

Jurisdiction	**Rule**	**Authority**
Connecticut	Fifty Percent Rule	CONN. GEN. STAT. ANN. § 52-572h(b) (West 2019) ("In causes of action based on negligence, contributory negligence shall not bar recovery in an action by any person or the person's legal representative to recover damages resulting from personal injury, wrongful death or damage to property if the negligence was not greater than the combined negligence of the person or persons against whom recovery is sought including settled or released persons under subsection (n) of this section. The economic or noneconomic damages allowed shall be diminished in the proportion of the percentage of negligence attributable to the person recovering which percentage shall be determined pursuant to subsection (f) of this section.").
Delaware	Fifty Percent Rule	DEL. CODE ANN. tit. 10, § 8132 (West 2019) ("In all actions brought to recover damages for negligence which results in death or injury to person or property, the fact that the plaintiff may have been contributorily negligent shall not bar a recovery by the plaintiff or the plaintiff's legal representative where such negligence was not greater than the negligence of the defendant or the combined negligence of all defendants against whom recovery is sought, but any damages awarded shall be diminished in proportion to the amount of negligence attributed to the plaintiff.").

Hawaii	Fifty Percent Rule	HAW. REV. STAT. ANN. § 663-31(a) (West 2018) ("Contributory negligence shall not bar recovery in any action by any person or the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the person or in the case of more than one person, the aggregate negligence of such persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made.").
Illinois	Fifty Percent Rule	735 ILL. COMP. STAT. ANN. 5/2-1116(c) (West 2019) ("The plaintiff shall be barred from recovering damages if the trier of fact finds that the contributory fault on the part of the plaintiff is more than 50% of the proximate cause of the injury or damage for which recovery is sought. The plaintiff shall not be barred from recovering damages if the trier of fact finds that the contributory fault on the part of the plaintiff is not more than 50% of the proximate cause of the injury or damage for which recovery is sought, but any economic or non-economic damages allowed shall be diminished in the proportion to the amount of fault attributable to the plaintiff.").
Indiana	Fifty Percent Rule	IND. CODE ANN. § 34-51-2-6(a) (West 2018) ("In an action based on fault that is brought against: (1) one (1) defendant; or (2) two (2) or more defendants who may be treated as a single party; the claimant is barred from recovery if the claimant's contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages.").
Iowa	Fifty Percent Rule	IOWA CODE ANN. § 668.3(1)(a) (West 2019) ("Contributory fault shall not bar recovery in an action by a claimant to recover damages for fault resulting in death or in injury to person or property unless the claimant bears a greater percentage of fault than the combined percentage of fault attributed to the defendants, third-party defendants and persons who have been released pursuant to section 668.7, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the claimant.").

Massachusetts	Fifty Percent Rule	MASS. GEN. LAWS ANN. ch. 231, § 85 (West 2019) ("Contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the total amount of negligence attributable to the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made.").
Michigan	Fifty Percent Rule	MICH. COMP. LAWS ANN. § 600.2959 (West 2017) ("In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306 or 6306a,1 as applicable. If that person's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306 or 6306a, as applicable, and noneconomic damages shall not be awarded.").
Minnesota	Fifty Percent Rule	MINN. STAT. ANN. § 604.01(Subdivision 1) (West 2018) ("Contributory fault does not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, in injury to person or property, or in economic loss, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed must be diminished in proportion to the amount of fault attributable to the person recovering.").
Montana	Fifty Percent Rule	MONT. CODE ANN. § 27-1-702 (West 2017) ("Contributory negligence does not bar recovery in an action by a person or the person's legal representative to recover tort damages for negligence resulting in death or injury to a person or property if the contributory negligence was not greater than the negligence of the person or the combined negligence of all persons . . . but any damages allowed must be diminished in the proportion to the percentage of negligence attributable to the person recovering.").

Nevada	Fifty Percent Rule	NEV. REV. STAT. ANN. § 41.141(1) (West 2017) ("In any action to recover damages for death or injury to persons or for injury to property in which comparative negligence is asserted as a defense, the comparative negligence of the plaintiff or the plaintiff's decedent does not bar a recovery if that negligence was not greater than the negligence or gross negligence of the parties to the action against whom recovery is sought.").
New Hampshire	Fifty Percent Rule	N.H. REV. STAT. ANN. § 507:7-d (West 2019) ("Contributory fault shall not bar recovery in an action by any plaintiff or plaintiff's legal representative, to recover damages in tort for death, personal injury or property damage, if such fault was not greater than the fault of the defendant, or the defendants in the aggregate if recovery is allowed against more than one defendant, but the damages awarded shall be diminished in proportion to the amount of fault attributed to the plaintiff by general verdict.").
New Jersey	Fifty Percent Rule	N.J. STAT. ANN. § 2A:15-5.1 (West 2019) ("Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought or was not greater than the combined negligence of the persons against whom recovery is sought. Any damages sustained shall be diminished by the percentage sustained of negligence attributable to the person recovering.").
Ohio	Fifty Percent Rule	OHIO REV. CODE ANN. § 2315.33 (West 2019) ("The contributory fault of a person does not bar the person as plaintiff from recovering damages that have directly and proximately resulted from the tortious conduct of one or more other persons, if the contributory fault of the plaintiff was not greater than the combined tortious conduct of all other persons from whom the plaintiff seeks recovery in this action and of all other persons from whom the plaintiff does not seek recovery in this action. The court shall diminish any compensatory damages recoverable by the plaintiff by an amount that is proportionately equal to the percentage of tortious conduct of the plaintiff as determined pursuant to section 2315.34 of the Revised Code.").

Oklahoma	Fifty Percent Rule	OKLA. STAT. ANN. tit. 23, § 13 (West 2018) ("In all actions hereafter brought, whether arising before or after the effective date of this act, for negligence resulting in personal injuries or wrongful death, or injury to property, contributory negligence shall not bar a recovery, unless any negligence of the person so injured, damaged or killed, is of greater degree than any negligence of the person, firm or corporation causing such damage, or unless any negligence of the person so injured, damaged or killed, is of greater degree than the combined negligence of any persons, firms or corporations causing such damage.").
Oregon	Fifty Percent Rule	OR. REV. STAT. ANN. § 31.600(1) (West 2017) ("Contributory negligence shall not bar recovery in an action by any person or the legal representative of the person to recover damages for death or injury to person or property if the fault attributable to the claimant was not greater than the combined fault of all persons specified in subsection (2) of this section, but any damages allowed shall be diminished in the proportion to the percentage of fault attributable to the claimant.").
Pennsylvania	Fifty Percent Rule	42 PA. STAT. AND CONS. STAT. ANN. § 7102(a) (West 2019) ("In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.").
South Carolina	Fifty Percent Rule	*Nelson v. Concrete Supply Co*., 399 S.E.2d 783, 784 (S.C. 1991) (stating "For all causes of action arising on or after July 1, 1991, a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant. The amount of the plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence.").
Texas	Fifty Percent Rule	TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (West 2017) ("In an action to which this chapter applies, a claimant may not recover damages if his percentage of responsibility is greater than 50 percent.").

Vermont	Fifty Percent Rule	VT. STAT. ANN. tit. 12, § 1036 (West 2019) ("Contributory negligence shall not bar recovery in an action by any plaintiff, or his or her legal representative, to recover damages for negligence resulting in death, personal injury, or property damage, if the negligence was not greater than the causal total negligence of the defendant or defendants, but the damage shall be diminished by general verdict in proportion to the amount of negligence attributed to the plaintiff.").
West Virginia	Fifty Percent Rule	W. VA. CODE § 55-7-13a(b) (West 2019) ("In any action based on tort or any other legal theory seeking damages for personal injury, property damage, or wrongful death, recovery shall be predicated upon principles of comparative fault and the liability of each person, including plaintiffs, defendants and nonparties who proximately caused the damages, shall be allocated to each applicable person in direct proportion to that person's percentage of fault.").
Wisconsin	Fifty Percent Rule	WIS. STAT. ANN. § 895.045(1) (West 2019) ("Contributory negligence does not bar recovery in an action by any person or the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if that negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering.").
Wyoming	Fifty Percent Rule	WYO. STAT. ANN. § 1-1-109(b) (West 2019) ("Contributory fault shall not bar a recovery in an action by any claimant or the claimant's legal representative to recover damages for wrongful death or injury to person or property, if the contributory fault of the claimant is not more than fifty percent (50%) of the total fault of all actors. Any damages allowed shall be diminished in proportion to the amount of fault attributed to the claimant.").

TABLE 5. Slight/Gross Comparative Negligence States

Jurisdiction	**Rule**	**Authority**
South Dakota	Slight/Gross Comparative Negligence	S.D. CODIFIED LAWS § 20-9-2 (West 2019) ("In all actions brought to recover damages for injuries to a person or to that person's property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence does not bar a recovery when the contributory negligence of the plaintiff was slight in comparison with the negligence of the defendant, but in such case, the damages shall be reduced in proportion to the amount of plaintiff's contributory negligence.").