International Journal of Business, Human and Social Sciences
ISSN: 2517-9411
Vol:15, No:7, 2021

# The Role of the Injured Party's Fault in the Apportionment of Damages in Tort Law: A Comparative-Historical Study between Common Law and Islamic Law

Alireza Tavakolinia

***Abstract*****—**In order to understand the role of the injured party's fault in dividing liability, we studied its historical background. In common law, the traditional contributory negligence rule was a complete defense. Then the legislature and judicial procedure modified that rule to one of apportionment. In Islamic law, too, the Action rule was at first used when the injured party was the sole cause, but jurists expanded the scope of this rule, so this rule was used in cases where both the injured party's fault and that of the other party are involved. There are some popular approaches for apportionment of damages. Some common law countries like Britain had chosen 'the causal potency approach' and 'fixed apportionment'. Islamic countries like Iran have chosen both 'the relative blameworthiness' and 'equal apportionment' approaches. The article concludes that both common law and Islamic law believe in the division of responsibility between a wrongdoer claimant and the defendant. In contrast, in the apportionment of responsibility, Islamic law mostly believes in equal apportionment that is way easier and saves time and money, but common law legal systems have chosen the causal potency approach which is more complicated than the rival approach but is fairer.

***Keywords*****—**Contributory negligence, common law, Islamic Law, Tort Law.

## I. Introduction

HISTORICAL study of common law legal systems makes it clear that the fault or negligence of the injured party was an obstacle to claiming damages and this is also clearly seen in Roman law which had an influence on the common law [1], [2]. In Roman law, if the injured party was at fault and another person caused damage, the injured party could not demand compensation from the other one and, in fact, his fault caused the loss of liability of the injurious and the injured party should suffer the loss without the right to compensation. Judicial procedure in the laws of most common law countries, including the United Kingdom and United States of America, began to modify the rules, and in some jurisdictions, the legislature has concluded that the fault of the injured party should not be a barrier to the responsibility of the defendant and he must compensate for the damage caused by his harmful actions.

There are also provisions of the rule of the injured party's fault in Islamic law and it is called 'Action' [3]. This rule means that if someone does an act against his or her own property or body, he or she cannot blame other person for the resulting injury; but it does not mean that in Islamic jurisprudence, a self-damaging action will always deprive the plaintiff of his or her claim for damages from the other participant in damage. According to 'Action rule', damages will be reduced as a result of the plaintiff's fault but it is still possible to claim compensation from the defendant. The main question is, how liability should be apportioned if the act or fault of both the injured party and the other party's fault are considered? This article reviews the historical background of each system, in order to see how liability would be divided if the act or fault of the injured party and another's fault are considered. In the last part of this article, we will see the ways in which legal systems apportioning the damages.

Alireza Tavakolinia is graduate student in LLM at Faculty of Law of the University of Tehran, Tehran, Iran (phone: +989120379726; e-mail: a.tavakkolinia.ut@gmail.com).

## II. Contributory Negligence in Common Law

### *A. Contributory Negligence in Britain*

At common law, the principle of the injured party's fault, referred to as the rule of contributory negligence, has a history of about two centuries. This rule was first introduced in Roman law and became known as 'the Roman all or nothing approach' rule; because the Romans believed that either the fault is entirely attributable to the Defendant and he must compensate for all the damages inflicted or the fault is not attributable to the defendant at all and he is completely free from paying damages and there is no other assumption to discuss. In fact, the Romans were only interested in answering the question of whether the damage was merely due to an error of the claimant or the defendant. Therefore, they believed that the claimant and the defendant could not have a joint role in the occurrence of the damage [4]. This continued to be a problem in common law until various jurisdictions passed apportionment legislation in the early 20th century.

According to the traditional form of the rule, an injured person whose fault has contributed to the claimed loss did not have the right to compensation because there was no causal relationship between the cause - i.e., the defendant's act - and damage, and the injured person's act breaks the causal relationship [36]. Therefore, since the alleged loss was attributable to the injured and his act has been directly involved in the occurrence of the loss, the contributory

negligence will be regarded as the main cause of the loss [5].

The emergence of the contributory negligence rule is also disputed in the Common Law. Some writers attribute the emergence of this rule to 1809 in the *Butterfield v. Forrester* [37], and in the United States, to 1824 in *Smith v. Smith* [38]. And, according to some other's opinion, contributory negligence rule was first used in *Brown v. Kendall* case in 1850 [6].

In *Butterfield v. Forrester*, the defendant put timber in an alley to repair his home, but the timber did not block the entire alley and the road was open enough. At around 8 am when it was dark and the residents had to light their lights, the claimant came out of a nearby bar and, while riding a horse past the alley, he collided with timber in the middle of the alley, causing him to fall off his horse and suffer an injury. There was no evidence of the plaintiff's drunkenness, and furthermore, according to a witness, the timber was visible from a distance of 100 meters; but because of his high speed, the plaintiff did not see the timber. The court held that the plaintiff was not entitled to recover damages because he had not behaved as a prudent and reasonable horse rider in the circumstances. Thus, by this sentence which seems unfair to us, because the fault of the defendant was not considered, the contributory negligence theory or rule was announced as a disclaimer of liability, that the defendant would be fully exempt from compensation, as a result, all damages would be on the injured party, without considering the fault of defendant in the damages. In fact, if the injured party's fault was negligible and his fault had a small portion in the damage, the defendant would still be considered exempt [7].

This very rough and unfair rule was slightly adjusted and the judicial procedure in the Common Law was able to limit its scope. The first step the courts took to reduce the roughness and modify the contributory negligence rule was to invent the Last Clear Chance rule [8]. According to this rule, the person who has had the last opportunity to avoid danger and the incident but has lost that opportunity due to his fault will be liable for compensation. This rule was first introduced in *Davies v. Mann* [39] in 1842: The claimant tied up illegally his donkey for grazing by a road about 8 meters wide and left the place. The defendant's carriage collided with the donkey and killed it as it quickly came down the highway, according to witnesses. Following a lawsuit by the owner of the donkey for compensation, the court sentenced the defendant to pay damages; because, according to the court, although the defendant had the last opportunity to avoid harm before the accident happening, he did not use it. Therefore, despite the plaintiff's negligence, the defendant was liable because he was the proximate cause of the incident. In fact, in this trial, the causal relationship was focused on and if the claimant's action had a direct effect on the occurrence of the damage and eliminated the effect of defendant's action, the claimant was not entitled to compensation [9]. As a rule, the claimant or the injured party is always entitled to receive damages from the wrongdoer unless proven to have a direct role in the occurrence of the damage [8].

This rule, although a way to modify the previous rule, was still problematic. This rule was unreasonable because it considered the claimant's or defendant's fault, whichever is the last, and ignored the other one. Hence, in British law, the legislature began to enact laws to modify the harshness of this rule, and at first enacted the "Maritime Convention Act" in 1911, which deals with the accident of ships at sea. And finally, in 1945, with the passage of the Law Reform (Contributory Negligence) Act 1945, the solution in the Maritime Convention Act came to UK law that the damages are divided on the basis of the measure of the effect of each of those who caused the loss.

According to Section 1 (1): 'Where any person suffers damage partly as the result of his own fault, and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the liability for the damage…'. Today, therefore, contributory negligence is not a complete defense, and British courts have held that the injured party's fault does not necessarily exempt the defendant from conventional caution and care. For example, in *Reeves v. Commissioner of Police of the Metropolis* [40] the defendant held liable because of not preventing the plaintiff of doing suicide in cell, but under the Law Reform (Contributory Negligence) Act 1945 the damages reduced by 50%. Thus, by enacting this new kind of contributory negligence rule, the apportionment of damages was accepted.

### *B. Contributory Negligence in Australia*

In Australia, as a common law country, most jurisdictions have enacted legislation that divides damages and does not put the burden only on the defendant or the plaintiff which is known as comparative negligence. In New South Wales, based on the percentage of plaintiff's involvement in causing the damage, the court reduces the amount of compensation [41]. For example, if the plaintiff is 40% negligent in causing his or her own accident and is entitled to receive $100,000 for damages, a court will award only $60,000. The court is also permitted to not award anything to a plaintiff who is 100% blameworthy in the damages. [41]. In *Jackson v McDonald's Australia Ltd* [42] the plaintiff claimed that he wanted to leave the restaurant that at the moment he slipped and fell down because they washed the floor and it was slippery. After considering all the facts and statements of the parties, the Court found the plaintiff 70% contributory negligent when he slipped after walking through a clearly signposted wet floor and did not hold any handrails. McDonald's bore 30% of the liability for its failure to mop up the spill immediately.

Contributory negligence has not been a complete defense in Victoria since the enactment of apportionment legislation in 1951 [43]. In cases where a contributory negligence is established, the court shall reduce the amount of damages to the extent that it deems it fair and equitable. [44]. In Victoria, the jury is instructed to determine the extent and percentage of the plaintiff's involvement in the damage if he or she is found

to be at fault [10].

Queensland went the same way as the two other states. According to Section 10 of the *Law Reform Act 1995* (Qld) the courts are allowed to reduce damages by an amount it considers fair and equitable having granted the extent of the plaintiff's share of responsibility for the harm. Based on sections 24 of the Civil Liability Act and 305G of the Workers' Compensation Rehabilitation Act 2003, the court has this authority to reduce the compensation to 0% according to plaintiff's contribution in damages.

Western Australia jurisdiction, by enacting the Western Australia Law Reform (Contributory negligence and tortfeasors' contribution) Act 1947, accepted the apportionment of damages and put aside the last opportunity rule. According to section 4(1) of this Act: "...then notwithstanding that the plaintiff had the last opportunity of avoiding or could by the exercise of reasonable care, have avoided the consequences of the defendant's act or might otherwise be held guilty of contributory negligence, the defendant shall not for that reason be entitled to judgment...". So, by these provisions the Western Australia joined to apportionment of damages approach.

### *C. Contributory Negligence in USA*

In the United States, the contributory negligence rule quickly modified at the end of the 1960s and the beginning of the 1970s. Finally, in 1974, this theory was replaced by the Comparative Negligence theory in many states, and these states have ended the life of the traditional Contributory Negligence rule either by enacting new laws or by their judicial procedure [11]. When the comparative negligence defense is arisen, the jury must investigate the degree to which the plaintiff's negligence and the other causes which contributed in damages and determine the measure of each one [13], [14]. It is a modification of the doctrine of early contributory negligence that disallowed any suing by a plaintiff who contributed even slightly in the damages; although some states still follow the traditional type of contributory negligence rule [12].

Comparative negligence has three types that each state followed one of them. The first type is known as "pure comparative negligence". This doctrine, followed in states such as Alaska, California and Mississippi, allows the plaintiff to seek compensation regardless of how much fault he had in the accident. However, the plaintiff recovery will be reduced based on his degree of fault in the accident. For example, if he were 80% responsible for the accident, he is only legally able to recover compensation for the 20% fault of the other party.

The second two types of comparative negligence are both "modified comparative negligence". In some states that follow modified comparative negligence, such as Colorado and Maine, the plaintiff will be doomed to failure if the jury determines him or her liable equally or more than the defendant for damages. In other modified comparative negligence states, such as Hawaii and Iowa, the plaintiff cannot ask for compensation if he or she is more blameworthy (51% and more) than the defendant [15]. South Dakota is the only state that follows the "slight/gross" negligence rule. In this system, the plaintiff is only entitled for damages when his or her contribution in damages is slight and the defendant's fault is gross. The plaintiff may be able to recover damages only if their fault was slight and the other party's fault was gross. At last should be noted, today, some jurisdictions still use the traditional type of contributory negligence. This means if a driver is just 1% negligent, he or she is disqualified from pursuing any compensation from the other party. States which follow this rule are Alabama, Maryland, North Carolina and Virginia [15].

## III. Injured Party's Fault in Islamic Law

In Islamic law, the injured party's fault rule has not been raised as an independent subject in jurisprudence, but it does not mean that the jurisprudents have not investigated it. This rule has a history of about more than a thousand years in Islamic jurisprudence.

The 'Action rule' in jurisprudence has historically been similar to contributory negligence in the common law, because in Islamic jurisprudence the rule of Action is one of the factors for lack of liability. For example, if the buyer knowingly deals with the non-owner, he does not have the right to claim damages or if a person leaves their property to a child or a madman and they waste the goods, the owner has no right to pursue the damages from the child or madman, because the owner has acted against himself. Therefore, the Action rule in jurisprudence is still considered as a complete defense [3]. Of course, the rule's scope is not limited to contract law and there are so many situations, in tort or criminal cases, in which this rule is applicable. For example, if someone seizes the property of someone else illegally or without any contractual permission, then he or she cannot demand the cost of keeping and protection of that property from the owner, because he or she had no rights to that property and the costs should be on his shoulder [16].

In the case that the injured act and other's fault operate together, the rule of Action would not be considered. Some law scholars nowadays believe that the scope of Action rule should not be limited to what the jurists have done [17]. In the opinion of these scholars, it is true that the Action rule exists where the injured act is considered to be the sole cause of the damage, but its scope must be expanded to where injured party's fault and the other's both operate. Such an interpretation of the Action rule would extend its scope and, in each case, a separate verdict should be given: where the injured person is the sole cause of damage, he or she is not entitled to compensation from anyone, but where the injured party's fault, along with the other's fault causes the damage, he or she has the right to refer to another. Based on this interpretation of the Action rule, the division of liability in jurisprudence is justified [18].

A glance at the views of the jurisprudents reveals that they have investigated and reviewed the injured party's fault and some scholars believe that the concept of contributory negligence and the distribution of damages among the causes, already existed from Imam Ali's era – i.e. about thirteen

centuries ago - and the jurisprudents have long been familiar with it [19]. The following are some examples of Sunni and Shia opinions in jurisprudence. We will set out the examples and then discuss how they have been interpreted.

*A. Sunni Jurisprudence*

The following are examples from the point of view of Sunni scholars, and some scholars who are familiar with modern and common law. The Islamic scholars studied early era of rise of Islam and found various topics and examples about the role of injured party's fault in dividing of liability.

1. The Story of Qamese

Three girls in a game were riding on each other in turns. When one of them was riding on the back of the other, the third girl tickled the girl who was below. As a result, the girl moved and the other one fell down on the ground and her neck was broken and died. Imam Ali decreed that each of the three daughters is liable for one-third of the blood money and so the deceased's parents can claim two-thirds of the blood money and they are also deprived of a third of the blood money; because the damage was caused by the action of all three of them and the deceased also participated [20].

2. Arming the Catapult

If three people together help to arm the catapult and then the thrown stone comes back and hits one of them and kills him, those two survivors must each pay a third of the deceased's blood money and one-third of the blood money is on shoulders of the deceased whose heirs cannot claim it; because the damage was caused by the action of all three and attributed to all of them. Therefore, no other partner can be a guarantor because of the victim's actions. In other words, the injunction to compensate for the total loss of injured or his survivors means ignoring the effect of injured act on the loss [21].

3. Collaborating on Demolishing the Wall

If three people help crumble a wall and the wall falls on one of them and kills him, all three are liable, as is the case if the wall falls on a pedestrian and kills him. In fact, in both cases, because the fault is attributable to their act, all three are known as guarantors and liable [20].

4. Damage Caused by Children's Play

If two children collide with each other while playing and one of them hits the ground and his bone is broken and is not treated and his bones does not heal as they used to, the father of the sinful child must pay five hundred dinars to the injured child; because blood money and damages are considered to be 1000 dinars, and its 500 dinars are deducted for the role of the injured person in the damage. Therefore, the wrongdoer must pay half of the blood money [19].

*B. Shia Jurisprudence*

The examples of injured party's fault that are in Shia jurisprudence are the same as Sunni jurisprudence. Therefore, we only refer to different views and cases of disagreement.

1. The Catapult Case

If ten people put a stone at a catapult together and after the release and shoot, the stone returns and hits one of them or a stranger and kills him, everyone is liable and should compensate for the damages. So that if a stranger is killed by the rock, everyone in the group is liable and damages should be compensated. In other words, each person in the group must pay a tenth of the blood money. In fact, everyone has been involved in damages and preferring one to the other is not right and that means ignoring his liability and putting the burden of guilt on another.

Now if one person in the group dies as a result of rock collision, each person in the group is liable for one-tenth. And the deceased heiress for nine-tenths of blood money can refer to the nine survivors of the accident because the deceased also contributed to the damage. In fact, in this case, it is difficult to recognize the real liable person for the damage and attribute the damage to him, for example, we suppose that the person who placed the stone in the catapult is the only liable. And, in fact, this assumption should not be confused with the assumption that one puts an arrow in the bow and another kills someone with that [22].

2. Collaborating on Demolishing the Wall

If three people cooperate in the destruction of a wall and the wall falls on one of them and he or she dies, disagreements arise among jurists about the extent of the liability of the perpetrators:

1. Liability of Two Surviving Partners: Some jurists only hold two surviving partners liable for paying compensation to deceased survivors, because they believe the damage was caused by the actions of the two surviving partners and they are liable for their actions and each one should pay half of the blood money to the deceased heir and there is also a narration in this regard that has caused controversy. Imam Ali says: “If three people are involved in destroying a wall and the wall collapses and one of them dies, survivors are liable for the blood-money of the deceased, because each survivor is a guarantor against his comrade” [23]. According to this narrative, the surviving partners are liable for paying the full blood money, and each one should pay half of the blood money to the heirs. Although it seems the narrative gives such meaning but does not have such clarity to that impression [24].
2. Liability of all three: Some jurists also believe that the two surviving partners should each pay one-third of the blood money to the deceased's heir and the deceased is also liable for one third; because the deceased has been participated in wasting his life with others and has cooperated in this regard. Therefore, he or she cannot seek compensation for his or her harmful act. In other words, a judgment of total compensation for damages means that the partner is liable for the harmful actions of his partner they argue that such an interpretation contradicts this verse “on the shoulder of the sinner, no other's sin” [25]. In addition, they argue that the narration of Imam Ali is

weak due to the presence of Ali Ibn Abi Hamza Waqifi among the narrators, because he was not trustworthy, and therefore it cannot be useful at inferring the religious law [26]. On the other hand, the narrative only emphasizes the liability of the two surviving partners against the deceased, and the narrative does not indicate that the two surviving partners should pay full blood money to the heirs. So, it should be assumed that each partner is liable for one-third of the blood money and damages.

According to the legal principles, the damage caused by the actions of all three partners has occurred and according to the available evidence, each partner is liable for one-third of the blood money, so the liability of one or two of them means ignoring the injured party's fault [27].

3. Reviewing the Story of Qamese in Shia Jurisprudence

This story was retold in Yemen to Imam Ali and he sentenced the two girls to compensate. However, there is no consensus on the interpretation of the narration among the jurists:

1. Some jurists believe that two living daughters are liable for half of the blood money and they should each pay half of the damage to the heir. Because in the narration quoted by Abu Jamila, Imam Ali said about the death of a girl who had another girl on her shoulder and a third girl tickled her, causing the girl who was riding to fall and die, that the rider and the tickler should each pay half of the deceased's blood money [28]. This view is not very popular in Shia jurisprudence because its basis is weak and in the narrators' dynasty, there is Abu Jamila who is not a valid narrator. Some have argued that this narrative is well-known among jurists to make up for this weakness, but some jurists believe that this weakness will not be offset despite the fame of the narrative because, in their view, this narrative is incompatible with law principles [27].
2. Some other jurists believe that each girl is liable for one-third of the blood money and should pay one-third of the blood money to the deceased's heir. And the deceased's heirs are deprived of taking one-third of their blood money and cannot claim it, because the damage is attributable to them all, so the preference of one or two of them over the other makes no sense. In addition, Imam Ali in Yemen held each girl liable for one-third of the blood money and when the news reached the Prophet, he confirmed it. Therefore, some scholars have found this view consistent with the principles; however, some believe that the basis of this view is not strong and cannot be cited [23], [24].
3. Fakhr Al-Mohaqeqin, son of Allameh Helli, claims that only the third daughter – i.e., the tickler - is liable for all damages and she has to pay the blood-money of the deceased; because the damage is only attributable to her actions and not the other. Tabatabai also considered this view as strong and correct, provided it does not disagree with the popular view of the jurists. He goes on to point out the disagreement among the jurists, who have each justified their own interpretation and interpreted the narrations [27]-[29].

## IV. Apportionment of Damages across the Legal Systems

In the cases in which there are multiple-causes of the harm, for which they are all held responsible, there are some popular ways of portioning and dividing of responsibility. Regarding the difference between Islamic law and common law, in this section we can see more. We should mention that we are just going to introduce the criteria which are accepted in these legal systems and we do not try to invent any new criterion [35], because this article is just about comparison of these legal systems in terms of contributory negligence. The most popular ways of apportioning damages are as follows:

### *A. Discretion Apportionment*

Case by case, there are so many aspects to consider for a fair and just judgment. Sometimes a Claimant's negligence is so minor and it is hard to deprive him or her more than 5% and, in another situation, his or her failure to take care of him/ herself is massive and damages should be reduced more than 50%. Legislature sometimes gives a broad authority to judges to make a better decision that is based on facts and circumstance of each case. In this article, we break this type of apportionment in two parts. In some countries (mostly Islamic) the discretion apportionment is based on degree of blame and in common law countries, mostly it is based on measure of effect of parties.

1. The Degree of Blame Criterion

Sometimes, one party is guiltier than the other. For example, in an accident, two cars are driving illegally so fast but one of two cars light is off in dark night. So, he made the situation worse and his fault is more even though the causal potency of two cars would be equal. In these cases, judge regards whose fault is more, so that one has to bear more responsibility. This solution is accepted in many legal systems and has a popularity. For example, in article 165 of the Maritime Code of Iran (1964) it can be seen [45]. This criterion is also considered in the Egyptian Civil Code (1948). In articles 169 and 216 the legislature states that the responsibility is based on the measure of fault and blameworthiness, otherwise if it cannot be detectable, all liable parties are responsibly equal. The judicial procedure in Egypt also follows it.

Judicial procedure of Iran has a conflict in choosing a way of apportionment of damages. As we will see later, in Islamic countries, especially Iran, the basic principle is equal apportionment. But after looking into court decisions of Iran about cars collision cases, we can see that judges divide the damages according to the degree of faults of litigants, and when they fail to do so, they choose the equal apportionment [30]. This solution also was mentioned in England. According to Law Reform (Contributory Negligence) 1945, the legislature gave an authority to judges for determining damages with just and equitable manner. Judicial procedure

and doctrine of the time about the interpretation of this section were numerous but in short, the opinions were divided into two categories: some believed that courts should decide by measuring of fault and others believed it should be on basis of causal potency [31]. Some scholars criticized to first solution because sometimes a responsibility of tort is not based on a fault and there is no fault at all and it is a strict liability. On the other hand, causal potency of litigants sometimes is useless and that's because the causal relationship is hard to find. But overall, they preferred the measuring of effect theory and put away the other one [31].

2. Causal Potency Criterion

As it came, in English law with the passage of Law Reform (Contributory Negligence) Act 1945, the courts had the authority to diminishing the compensation according to what is just and fair in relation to the plaintiff's role in the occurrence of damage.

What should be considered is that most of the cases are about driving accidents. For example, if the plaintiff is not wearing a helmet or not using a seatbelt, it will reduce the amount of compensation. One of these cases is *Froom v. Butcher* [46]. In this case, Mr. Froom was driving with his family in car while none of them were wearing seatbelts. He was on the right side of the road when Butcher pulled out to pass then collision occurred. The daughter was not injured, and Mrs. Froom's injuries would have happened whether she wore a belt or not. Mr. Froom's head and chest were injured although, they would not have been as badly injured if he had his seatbelt on. His finger also was broken and still would have done so with the seatbelt on. Seatbelts were not legally required at the time. The plaintiffs received full compensation at trial and Butcher appealed. After accepting the appeal, Lord Denning suggested a reduction of 25% in cases that the damages would not have occurred at all if a seatbelt had been used and 15% when the damages would have been reduced by a seatbelt. Lord Denning stated his guidance to apportionment of damages in such cases:

> "Whenever there is an accident, the negligent driver must bear by far the greater share of responsibility. It was his negligence which caused the accident. It also was a prime cause of the whole of the damage. But in so far as the damage might have been avoided or lessened by wearing a seat belt, the injured person must bear some share. But how much should this be? ... In Davies v. Swan Motor Co. (Swansea) Ltd. the court said that consideration should be given not only to the causative potency of a particular factor, but also its blameworthiness. But we live in a practical world. In most of these cases the liability of the driver is admitted, the failure to wear a seat belt is admitted, the only question is: what damages should be payable? This question should not be prolonged by an expensive inquiry into the degree of blameworthiness on either side, which would be hotly disputed. Suffice it to assess a share of responsibility which will be just and equitable in the great majority of cases [48]."

Regarding the apportionment of damages, Denning LJ referred to both blameworthiness and causal potency and used such a same statement and notion before in Davies v. Swan Motor Co. (Swansea) Ld. [47] But he did not give any good justification of why finally he chose causal potency criterion rather than blameworthiness and, why the last criterion is more expensive than the other. Many common law jurisdictions, such as Britain and Australia, have accepted the causal potency for apportionment of damages in contributory negligence cases without giving a convincing explanation of what is causal potency exactly and why they chose it as a better solution than measure of blameworthiness of litigants [8]. This criterion also was considered in other (Islamic) countries. In part two of Article 14 of the Civil Liability Code of Iran 1960, this way of dividing is accepted: 'about the article 12 when some people make damage, all of them are liable and in this situation, each one is responsible according to the measure of his intervene by a court decision'. It seems this article is originated from other legal systems and has no Islamic background. The basic principle in apportionment of damages in Islamic law, as we will see later, is equal apportionment, and other solutions are Secondary principle [32]. That is, the equal apportionment is the primary solution in most cases and an alternative solution where the court reaches a dead end in determining the extent of the parties' blameworthy or causal potency.

*B. Fixed Apportionment*

The second type of apportioning the damages between claimant and defendant is the fixed apportionment provisions. This term is somehow the opposite of discretionary apportionment. Based on the discretionary apportionment, judges enjoy essentially absolute freedom to decide the discount. They can take account of whatever facts of a given case that they feel are important (and ignore facts that they think are unimportant) [35]. Because of this freedom, judges can easily consider any circumstances and causes which are effective in the case and clarify the measure of responsibility of each person according to fault or effect of him or her. Fixed apportionment is not as flexible as the discretionary apportionment, but has its own advantages.

There are four types of fixed apportionment: (1) fixed reduction rules. This rule provides that damages must be reduced for contributory negligence by, say, exactly 25%; (2) minimum reduction rules that state that damages must be diminished by at least 25%, so you cannot consider less than that; (3) maximum reduction rules. A rule that stipulates that the greatest reduction in damages that a court can make for contributory negligence is 25% would be a maximum reduction rule. And finally (4) rules that limit the permissible discount to a certain range. This rule limits the permissible discount to a certain range would include a rule that requires the courts to confine themselves to discounts falling between a 25% reduction and a 50% reduction [35]. And finally (5) equal apportionment rules in which damages are divided equally among the causes of damage.

1. Fixed Reduction

The fixed apportionment is popular especially in Islamic law but also in common law countries, it is considered as a good way of apportionment of damages and liabilities. The fixed reduction in common law came from Froom vs. Butcher [46]. In this case the defendant claimed that the claimant is responsible because he did not use seat belt. Lord Denning MR had an opinion in this case that became a rule:

> "Sometimes the evidence will show that the failure [to wear a seat belt] made no difference. The damage would have been the same, even if a seat belt had been worn. In such case the damages should not be reduced at all. At other times the evidence will show that the failure made all the difference. The damage would have been prevented altogether if a seat belt had been worn. In such cases I would suggest that the damages should be reduced by 25 per cent. But often enough the evidence will only show that the failure made a considerable difference. Some injuries to the head, for instance, would have been a good deal less severe if a seat belt had been worn, but there would still have been some injury to the head. In such case I would suggest that the damages attributable to the failure to wear a seat belt should be reduced by 15 per cent [48]."

After that, this rule became popular especially in car accident cases like where someone failing to wear a seat belt or accepting a lift from an intoxicated driver [49]. This rule is not referred to frequently in Australia or Canada courts but has an influence on such cases [50].

2. Minimum and Maximum Reduction

As we mentioned before, the legislature may state that in contributory negligence cases, the courts cannot reduce damages less than 25% but can reduce it more than that up to 100% [51]. In some jurisdictions, courts cannot hold the claimant responsible more than 25%. Legislatures in several jurisdictions in the USA have created maximum reduction rules in seat belt cases. For example, in Michigan the maximum discount in such cases is 5%. There is a third type that is something between the last two. For example, a provision may state a discount for contributory negligence could be something between 25% and 50%. This kind of rule has been seen in Canada [52]. In these three types of fixed apportionment, judges have some discretion.

3. Equal Apportionment

This criterion of dividing is popular in Iran and has roots in the Islamic law system [33]. Article 365 of the Islamic Penal Code (1991) is stated: 'When some people together causing injury or damage, they are equally responsible'. The Supreme Court of Iran to create unity of procedure stated that attribution of damage to the wrongdoers is enough and the amount of fault is not necessary although Courts of First Instance believe that this solution is for the cases that we cannot detect the percentage of each fault. So, the Supreme Court as a procedural unity decision stated: 'According to article 337 of the Islamic Penal Code (1991) when two or more vehicles collide to each other and cause the death of passengers, the responsibility of each driver if committed fault, without considering the amount of the faults, is equal' [53].

And finally, according to article 528 of the Islamic Penal Code 2013: 'when the collision of two ground or air or sea vehicle causes death or injury of drivers or passengers, each driver is responsible for damages to the other driver and all passengers, and if vehicles were three, each driver is responsible for one-third of the blood-money of two other drivers and all passengers, And the same way for more vehicles. If one party has done fault and the collision is attributed to him, only him is responsible'. As you can see, the legislature of Iran prefers equal responsibility unless the difference between the faults of wrongdoers figure out.

*C. Comparison of Criterions*

As we saw in the sections that came before, there are two types of apportionment of damages that each one divided into several types. The first type, i.e., discretion apportionment, has advantages and disadvantages against the second type, i.e., fixed apportionment. Also, each subset, i.e., fixed reduction and equal apportionment and etc., has its own advantages.

The obvious difference between discretion and fixed approaches is that with discretion provisions, judges have absolute authority to determine the amount of discount. On the other hand, fixed apportionment provisions do not give enough authority to judges to determine litigants share of damages [35]. In contrast, the fixed apportionment takes advantage of speed. The court just needs to understand whether the plaintiff is negligent or not; if the answer is yes, the court is free of determining the measure of each party share of damage [34]. This also means that the cost of trial is much less than when the court needed to consult with experts or when the court repeats the hearings for better inquiry and investigation to determine the plaintiff's share of responsibility.

Regarding the examination of the sub-branches of each of the two categories mentioned above, first we talk about causal potency and blameworthiness criterions. In a contributory negligence case, each party's fault and negligence may not be equal, e.g., the plaintiff may be found more negligent, in contrast the effect and potent of each cause or party may be opposite of the measure of their fault. The causal potency could be the fairest way of the dividing of responsibility because a fault can be minor but play an important role in causing damage, but it is not without any problem. The main problem of causal potency criterion is that it is hard to find the causal relationship, so when you cannot find it, it is impossible to talk about the potency of causes and assume it [31].

The degree of blame or fault is about to see how much a defendant or plaintiff act like a rational man. If such a person does what he should not or omission an act that he should do, then he is blameworthy. It is fair to sentence a more negligent and blameworthy defendant or plaintiff, more liable for damages. Blameworthiness or fault is a term in criminal law and that is why it is inappropriate in tort law, because we do

not want to punish anybody in tort law and the main goal is to compensate the damages. Another problem is that sometimes one of the causes is based on strict liability, so there is no blame to consider.

The fixed apportionment solutions are a little different in some ways. Minimum and maximum reduction are close to discretion approach and judges enjoy of having enough authority to determine the plaintiff's share in damages. The fixed reduction and equal apportionment approaches look alike too each other, but in our view, there is a difference between them. The fixed reduction approach mostly takes the side of injured person and the reduction is less than 50%, maybe with this assumption that he needs more legal protection, but on the other hand the equal apportionment does not prefer each party to other one and condemns them equally.

## V. Conclusion

Both common law and Islamic law have a history of attempt of scholars and jurists to bring a fair and just rule about contributory negligence cases. Islamic Law mostly accepted the equal apportionment solution, looks like it is because of hardness of finding out the measure of fault and causal potency of litigants in a thousand years ago. But today, it is more difficult to choose a method that suits every case and situation. That is why each country chose multiple of those solutions that we mentioned in this article and we can see both systems are getting closer in this section of tort law.

## References

[1] Emanuel van Dongen and Henriette Verdam, 'The Development of the Concept of Contributory Negligence in Civil and Common Law a Comparison' (2016) 57 *Hungarian Journal of Legal Studies* 326.
[2] Francis Wharton, a Treatise on the Law of Negligence (Kay and Brother, 1874) 265.
[3] MAF al-Maraqi, al-Anavin (al-Nashr al-Islami, 2004) vol 2, pp. 488-92.
[4] Reinhard Zimmermann, the Law of Obligations: Roman Foundation of the Civil Tradition (Oxford University Press, 1996) 1010.
[5] James Jr Fleming, Contributory negligence (1952) 62 *Yale Law Journal*, pp. 693-6.
[6] M.G. Golobardes and F.G. Pomar, 'Contributory and Comparative Negligence in the Law and Economics Literature', cited in Micheal Faure (ed), Tort Law and Economics (Edward Elgar Publishing, 2009) 46, 49.
[7] PN Swisher, 'Virginia should abolish the Archaic Tort Defense of Contributory Negligence and adopt a Comparative Negligence Defense in its Place' (2011) 46 *University of Richmond Law Review* 359.
[8] James Goudkamp and Lewis Klar, 'Apportionment of damages for contributory negligence: The causal potency criterion' (2016) 53 (4) *Alberta Law Review*, pp. 849-858.
[9] William Schofield, 'Davies v. Mann: Theory of Contributory Negligence' (1890) *Harvard Law Review* 267.
[10] Judicial College of Victoria Civil Juries Charge Book at 2.1.8.1.
[11] Christopher J. Robinette and Paul G. Sherland, 'Contributory or comparative: which is the optimal negligence rule?' (2003) 24 *Northern Illinois University Law Review* 41, 43.
[12] Aaron Larson, 'Negligence and tort law', Expert Law (Web Page, May 8, 2018) <https://www.expertlaw.com/library/personal_injury/negligence.html>.
[13] Julia Kagan, 'Comparative Negligence', Investopedia (Web Page, March 11, 2020) <investopedia.com/terms/c/comparative-negligence.asp>.
[14] Victor E Schwartz, 'Strict Liability and Comparative Negligence' (1974) 42 *Tennessee Law Review* 171).
[15] 'Comparative & Contributory Negligence', Justia (Web Page, *April 2018) <https://www.justia.com/injury/negligence -theory/comparative-contributory-negligence/>*.
[16] E. Shoaryan and Y. Molaei, 'Motale'e Tatbiqi Mabani Qaede Taqlil Khesarat' (2011) 2 *Feqh and Hoquq Eslami*, pp. 131-55.
[17] Naser Katoozian, Civil Law, extra contractual obligations (Moasese Enstesharat and Chap University of Tehran, 2006) vol 1, pp. 502-3.
[18] Mahmood Hekmat Nia, Civil responsibility in Imamieh jurisprudence (Institute of Islamic Sciences and Culture, 2008) pp. 216-7.
[19] MA Seraj, Zeman al-Odvan fi al-Feqh al-Islami (Daar al-Seqafa, 1990) 225.
[20] SD al-Sarakhsi, al-Mabsut (Daar al-Marefa, 1993) vol 27, pp. 14-6.
[21] Ibn Qodamah al-Moqadasi, al-Sharh al-Kabir (Daar al-Ketab al-Arabi, 1283) vol 9, pp. 493-4.
[22] Sheykh Toosi, al-Mabsoot fi al-Fiqh al-Imamiyya (Aniat b-Nashreh al-Maktaba al-Mortazaviah, 1984) vol 7, pp. 165-6.
[23] MBH al-Horr al-Ameli, Vasael al-Shia (Maktabat al-Islamiyah, 1989) vol 19, pp. 175-179.
[24] S.A. Tabatabaei, Riaz al-Masael (Dar al-Haadi, 1992) vol 10, pp. 411-5.
[25] Quran, Surah Fatir, Verse 18.
[26] HTY Fazel Aabi, Kashf al-Romuz (Moasese al-Nashr al-Islami, 1996) vol 2, 642.
[27] SQ al-Mousavi al-Khouyi, Mabaani Takmalat al-Menhaj (Moasese Ehya Asaar al-Emam al-Khouyi, 2001) vol 2, pp. 290-301.
[28] Sheykh Sadooq, Man La Yahzaraho al-Faqih (Manshurat Jama'at al-Modaresin, 1984) vol 4, pp. 169-70.
[29] Z.D. Shahid Saani, al-Roza al-Bahia (Moasese al-A'lami al-Matbuat, 2012) vol 10, pp. 132-7.
[30] SA Qodsi and S. Noroozi, 'Measuring drivers liability based on their degree of fault' (2017) 13 *Hoquq Keyfari*, pp. 49–51.
[31] CD Baker, Tort [Concise Course Texts] (Sweet & Maxwell, 5th ed, 1991) pp. 187-8.
[32] S.H. Safaei and H. Badini, 'criterion for division of responsibility assuming the multiplicity of causes' (2018) 84 *Faslname Didgahaye Hoquq Qazaei* 161.
[33] IB al-Torabelsi, al-Mohazab (cited in Selselah al-Yanaby al-Feqhiya, 1991) vol 24, 156.
[34] Mahmood Kazemi, The Impact of injured party's fault on Civil Liability (2006) 28 *Imam Sadegh University* 109, 136.
[35] James Goudkamps, 'Apportionment of damages for contributory negligence: a fixed or discretionary approach? ' (2015) 35 Legal Studies, pp. 621-643.
[36] *Smith v. Pelah* (1746) 93 E.R. 1170/1171.
[37] *Butterfield V Forrester* (1809) 103 E.R. 926.
[38] *Smith v. Smith*, 19 Mass. (2 Pick.) 621 (1824).
[39] *Davis v. Mann* (1842) 10 M & W 546.
[40] *Reeves v Commissioner of Police of the Metropolis* (2000) 1 AC 360.
[41] *Civil Liability Act* 2002 (NSW)
[42] *Jackson v McDonald's Australia* (2014) NSWCA 162.
[43] *Wrongs (Contributory Negligence) Act* 1951 (Vic).
[44] *Wrongs Act* 1958 (Vic).
[45] *Maritime Code of Iran* 1964 (IRN).
[46] *Froom v Butcher* [1976] 1 QB 286.
[47] *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291.
[48] (1976) QB 286 (CA) 296.
[49] *Sloan v Triplett* (1985) SLT 294
[50] *Hallowell v The Nominal Defendant* (Queensland) [1983] 2 Qd R 266 – 268.
[51] The *Motor Accidents (Liabilities and Compensation) Act* 1973 (Tas)
[52] *Galaske v O'Donnell* [1994] 1 SCR 670 (SCC) 682.
[53] Decision 717 (26/04/2011).

**Alireza Tavakolinia** born in Iran in 1991 and received his LLB and LLM degree from University of Tehran, Faculty of Law, Tehran, in 2014 and 2019. He passed bar exam successfully in 2018. He was eager about tort law and other legal systems and decided to study them as a comparative article.