Tort Triad: Slumbering Sentinels, Vicious Assailants, and Victims Variously Vigilant

William K. Jones
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I. INTRODUCTION

Tort litigation is often trilateral in character. Interposed between the injurer and the victim is a sentinel charged with protecting the victim. The sentinel is remiss and the inadequately protected victim is harmed by a wrongdoer, one whom the sentinel should have, but did not, repel. The victim may sue both the injurer and the sentinel, but often the injurer is either unknown or insolvent. So the key question is whether, and to what extent, the victim may recover from the delinquent sentinel.

In the last twenty years, the ability of an injured party to recover from a negligent sentinel has been profoundly affected, not by any reformulation of substantive principles applicable to trilateral relationships, but by procedural changes principally directed at other problems. Two cases—arising about a decade apart—illustrate the extent of the change.

In 1974, Connie Francis, a professional entertainer, was performing at the Westbury Music Fair in Westbury, New York.¹ She was staying at

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¹ Charles Evans Hughes Professor Emeritus of Law, Columbia University School of Law. My colleagues Alfred Hill and Victor Goldberg offered helpful suggestions on an earlier draft of this Article.

the local Howard Johnson’s Motor Lodge. In the early morning hours of November 8, she was attacked and raped. The unknown assailant gained access to the motel room through a sliding glass door that gave the appearance of being locked but could be opened with ease from the outside. A jury found that Howard Johnson’s had been negligent and awarded Ms. Francis $2.5 million in compensatory damages. A judgment was entered on the verdict, the court finding ample evidence of negligence on the part of Howard Johnson’s, no evidence of contributory negligence by Ms. Francis, and support in the record for the size of the jury’s award. No mention was made of the obviously culpable rapist.

Another trilateral case arose twelve years later in *Martin v. United States*. In 1986, nine young children were taken on an outing to Monterey Veterans’ Memorial Park. The children were under the supervision of Sal Maene, an employee of the United States. As a result of Maene’s negligence, Jennifer Martin, age six, became separated from the group. She was abducted and raped by an unknown assailant. On suit against the United States, premised on Maene’s negligence, the Government contended that the unknown assailant was the principal offender and that the bulk of damages claimed by Jennifer should be apportioned to him; accordingly, the United States should bear only a small percentage of any damages assessed. The United States Court of Appeals for the Ninth Circuit, applying California law, upheld the Government’s position. Any harm inflicted on Jennifer had to be apportioned between the United States and the unknown rapist; the United States would not be responsible for most of the damages awarded to Jennifer.

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2. See id.
3. See id.
4. See id.
5. See id. at 1211.
6. See id. at 1211, 1213-14.
7. See id. at 1211-14.
8. 984 F.2d 1033 (9th Cir. 1993).
9. See id. at 1034.
10. See id.
11. See id.
12. See id. at 1035 n.2.
13. See id. at 1038-40.
14. See id. at 1040.
15. See id. Under California law, the United States would be subject to joint and several liability for any economic damages, which presumably would be small in the case of a minor. It would not be liable for the rapist’s share of noneconomic damages. See infra notes 92-103 and accompanying text.
Connie Francis and Jennifer Martin were the victims of horrendous crimes; each was raped by an unknown assailant.16 Howard Johnson’s was compelled to accept full responsibility for the attack on Connie Francis.17 But the United States, no less negligent, was permitted to apportion a substantial part of Jennifer’s damages to an unknown assailant from whom no recovery could be expected.18 A major portion of any judgment recovered by Jennifer would be a worthless claim against a nameless rapist.

The outcome in Martin reflects the current state of the law, not only in California, but in New York (the scene of the Connie Francis rape).19 A growing number of other states take the same position as Martin.20 Why the dramatic change in perspective? The shift is traceable to the adoption of new laws governing comparative fault, contribution among joint tortfeasors, and joint and several liability. While valid in many of their applications, the cumulative impact of these changes produces results in trilateral cases that are both unjust to victims and contrary to the social policies properly applicable to the law of torts.

Part II of this Article examines the procedural reforms and their justifications. Part III considers the problems posed in seeking to invoke comparative fault in the context of intentional torts. In Part IV, we return to the problem of negligent sentinels and predatory attacks on innocent victims; in Part V, the problem is examined from the perspective of malefactors who inflect injury negligently as a consequence of inadequate protection by sentinels. This leads to closer scrutiny in Part VI of the various bases for imposing on sentinels a “duty to protect.” Part VII considers the impact of victim fault. Concluding observations are set forth in Part VIII, which proposes a more appropriate method for the apportionment of damages in trilateral tort cases.

18. See Martin, 984 F.2d at 1039.
20. See cases cited infra note 103.
II. PROCEDURAL REFORMS

A. Comparative Fault

The case for comparative fault can best be understood by looking to the facts of Gonzalez v. Garcia. Juan Gonzalez, Jack Longest and Francisco Garcia were coworkers who participated in a carpool to and from work. One morning, after leaving work at 6:00 a.m., the three of them went on a drinking spree. Garcia was driving. After several stops for alcohol, an altercation broke out and the police were summoned. An officer told Gonzalez, who appeared to be the least intoxicated, that he should drive. Gonzalez did so and dropped Longest at his home. Garcia then insisted on driving. Gonzalez attempted to call his wife to obtain an alternate ride, but he was unable to reach her. He then got into the car—with Garcia driving—and fell asleep. The car crashed, injuring Gonzalez. In Gonzalez's suit against Garcia, the jury found Gonzalez to be 20% at fault and Garcia 80% at fault, reducing the damage award to Gonzalez by 20%.

Garcia clearly was negligent in driving while drunk. Just as clearly, Gonzalez was guilty of contributory fault—whether characterized as contributory negligence or as assumption of risk—in getting into a car with an obviously intoxicated driver. Neither seems an attractive

21. 142 Cal. Rptr. 503 (Ct. App. 1977). For a discussion of the history and general scope of comparative fault, see VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE §§ 1-3 to 3-5(c)(6) (3d ed. 1994). In about three-quarters of all jurisdictions, comparative fault is unavailable if plaintiff's fault is either 50% or 51% of all fault. See, e.g., MARC E. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES 440 (7th ed. 2001). For ease of exposition, this limitation is ignored in this Article.

22. See Gonzalez, 142 Cal. Rptr. at 503.
23. See id. at 503-04.
24. See id. at 504.
25. See id.
26. See id.
27. See id.
28. See id.
29. See id.
30. See id.
31. See id.
32. Contributory negligence is "conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm." RESTATEMENT (SECOND) OF TORTS § 463 (1965).
Assumption of risk is implied whenever "a plaintiff who fully understands a risk of harm to himself . . . caused by the defendant's conduct . . . nevertheless chooses to enter or remain . . .
candidate for special consideration. From a social perspective, the optimal outcome would have been to confront Garcia with the full costs of his drunken driving by compelling him to bear 100% of the damages inflicted on Gonzalez. At the same time, Gonzalez should have been required to face the full costs of his risky behavior by bearing 100% of the costs of his injuries without recompense from Garcia. Either Gonzalez or Garcia could have avoided 100% of the harm by behaving properly: Garcia by not driving while drunk, and Gonzalez by not getting into a car with a drunken driver.

But the optimal outcome is not feasible under tort law as presently structured. Any attempt to impose 100% of the costs on Gonzalez allows Garcia off the hook; any attempt to impose 100% of the costs on Garcia lets Gonzalez off scot-free. The result is an odd kind of budgetary constraint: too much money. The damages payable by Garcia have to go somewhere; Gonzalez is the only plausible recipient under our present system. Thus, comparative fault can be viewed as a second-best option, a means of bringing home to both injurer and victim some substantial share of the costs of the harm done, leaving each of them poorer than they would have been had they behaved prudently. From this perspective, lawyers and related costly aspects of the legal system serve a useful role. They add to the costs of each party—absorbing at least part of the undeserved surplus that otherwise would be divided between the two parties at fault.

B. Contribution Among Joint Tortfeasors

The same reasoning applies to contribution among joint tortfeasors. Assume that Gonzalez had not fallen asleep with Garcia at the wheel, but had continued the altercation that had led to police intervention earlier. Garcia, impaired by alcohol and distracted by pushing and shoving from Gonzalez, runs down a pedestrian in a crosswalk. The pedestrian sues Garcia and Gonzalez and recovers a judgment against both of them. If Gonzalez can be compelled to pay without contribution from Garcia, or Garcia can be compelled to pay without contribution from Gonzalez, then one of the parties gets off without having to confront any of the costs of his negligent behavior. Ideally, each should pay 100% of the injuries to the pedestrian—assuming the pedestrian

\[\text{within the area of that risk, under circumstances that manifest his willingness to accept it \ldots.} \]

\[\text{Id. § 496C(1).} \]

33. The point is explained more fully in the Appendix to this Article. See infra notes 235-37 and accompanying text.
would have escaped unscathed absent misbehavior by both. But apart from punitive damages, the tort system does not countenance recovery by a tort victim of more than 100% of the damages incurred. As in the case of comparative fault, there is too much money—here 200% of the cost of plaintiff’s injuries. The solution is the same: each of the joint tortfeasors, through the mechanism of contribution, is compelled to pay for some substantial portion of the harm inflicted (possibly 50% each in this case), delivering a suboptimal message to the tortfeasors but one that at least brings home to each party some measure of accountability for the harm caused by his negligent behavior.

In cases of comparative fault and contribution among joint tortfeasors, the percentage of fault ascribed to each party is not only suboptimal. It is arbitrary. In both scenarios, Gonzalez and Garcia are each responsible for 100% of the social harm inflicted. If either had behaved properly, no harm would have occurred. Any reduction below 100% should be seen, not as a reward for less blameworthy behavior, but as an inevitable consequence of the budgetary constraint under which the tort system functions. When more than one person is jointly responsible for the infliction of harm, the totality of damages cannot exceed 100%—even though each party, from the perspective of causation, is responsible for 100% of the harm.

C. Curtailing Joint and Several Liability

Comparative negligence and contribution among joint tortfeasors can be seen as rooted in the budgetary constraint of the tort system. But the justification for eliminating joint and several liability is more difficult to fathom. To return to Gonzalez and Garcia and their collision with an innocent pedestrian, suppose that each is adjudged to be 50% at fault but that Garcia has no assets or insurance. Why not have Gonzalez


35. See id. at 80.

satisfy the entire judgment, as he would have to do under joint and several liability? The most he can be obliged to pay is 100% and that is exactly the amount he should pay absent the budget constraint previously discussed. There is no social loss, and an accidental social gain, in having Gonzalez answer for 100% of the damages inflicted if Garcia is without assets.

The objections to joint and several liability have their roots in a misperception concerning the type of harm typically inflicted by joint tortfeasors.

Consider, first, an atypical case: a toxic dump site. Ten firms have been dumping toxic wastes at the site over a number of years. Now the federal government has ordered that remedial steps be taken to clean up the site. In one sense (and generally under governing federal law), the ten firms are joint tortfeasors: they have each contributed to a social harm that in practical terms may be indivisible. But the magnitude of the harm clearly varies with the nature and quantity of the wastes deposited at the site. No one firm is responsible for 100% of the harm. In this case, it may be plausible to say that each firm should pay no more than its proportionate share of the cleanup costs since, in a causal sense, that is a rough approximation of the damage each has done. If one of the ten firms had behaved properly and had refrained from depositing wastes at the site, the evil would not have been averted. A toxic dump site still would have had to be cleaned up. But presumably the cost of the cleanup would have been less because the volume of toxic waste would have been less. In short, some rational basis for divisibility may be feasible in this kind of case—if only in terms of rough approximation. Here several liability, rather than joint and several liability, may be the more equitable solution and one consistent with the tort objectives of deterrence and compensation.

But this reasoning is unavailable in cases involving rapes, assaults and murders. In these instances, there is but one harm, not divisible by any method grounded in reason or policy. The substitution of several liability for joint and several liability disserves the ends of the tort system: compensation is inappropriately circumscribed, and deterrence of culpable behavior is blunted. This is particularly true if one of the

37. See, e.g., Hager, supra note 34, at 80.
tortfeasors—the assailant in the Connie Francis or Jennifer Martin case—is unknown or insolvent and predictably so.

D. Combinations and Permutations

Issues of comparative fault and contribution may arise in the same case. To return to the misadventures of Gonzalez and García, assume, as before, that García is driving under the influence of alcohol; that Gonzalez is fighting with García and impeding him in his effort to control the car; and that the car collides with a pedestrian. But in this instance assume that the pedestrian is not in the crosswalk; further, he is not watching where he is going and he does not see the approaching automobile until it is too late to avoid being hit. In short, the pedestrian is negligent.

On these facts, a jury might assess the fault of the pedestrian at 20% and the fault of Gonzalez and García at 40% each. If the pedestrian incurs injuries of $100,000, Gonzalez and García would each be liable for $40,000 and the pedestrian would have to bear the remaining $20,000. This combination poses no new or distinctive problems.

But the addition of joint and several liability to the mix creates an additional complication. Suppose, as before, that García has no assets or insurance. What adjustments are necessary? Under joint and several liability, García simply drops out of the picture and the pedestrian and Gonzalez share the costs of the accident in proportion to their fault. Since the fault of Gonzalez (40%) is twice the fault of the pedestrian (20%), the pedestrian would recover two-thirds of the cost of the accident from Gonzalez ($66,667) while bearing the remainder of his damages without recompense ($33,333).

If liability is several, rather than joint and several, the pedestrian’s recovery is limited to the original share of Gonzalez (40% or $40,000) and he has to bear the bulk of the damages himself (60% or $60,000). In sum, the consequences of García’s insolvency are borne entirely by the plaintiff, without regard to the relative fault of the plaintiff and the remaining solvent defendant (Gonzalez). Although the impact here is less severe than in the case in which the plaintiff is free from fault, the use of several liability significantly distorts the outcome: most of the costs are now borne by a plaintiff whose fault is less than the fault of any of the other parties to the accident. As before, several liability is inferior


41. See, e.g., Hager, supra note 34, at 80.
to joint and several liability in terms of both compensation and deterrence.

E. The Relevance of Fairness

As a matter of historical fact, the tort reforms under discussion—comparative fault, contribution among joint tortfeasors, and curtailment of joint and several liability—were motivated more by considerations of fairness than by concerns about the efficacy of tort law in achieving its objectives of compensation and deterrence. In the case of comparative fault, it seemed unfair that plaintiffs, only partly at fault, should be barred from recovery from wayward defendants possibly much more culpable. As regards contribution, it seemed capricious to saddle one tortfeasor with the totality of tort liability by barring contribution from joint tortfeasors just as culpable, allowing the latter to escape unscathed. Finally, with respect to joint and several liability, objections were made that tortfeasors only partly at fault were being compelled to bear more than their “fair share” of the damages arising from the wrongful behavior of multiple parties in cases in which other tortfeasors, jointly responsible, turned out to be insolvent or otherwise unavailable.

On the first two issues—comparative fault and contribution—there is no conflict between the efficient solutions discussed in Parts II.A and II.B and solutions that might be characterized as fair. In each case, culpable parties pay in proportion to their fault—or, in the case of plaintiffs, forego compensation. No innocent party is compelled to forego compensation under either comparative fault or contribution among joint tortfeasors. Nor does any party pay (or absorb) more than its proportionate share of fault. It is hard to imagine a norm based on fairness that would call for a different result.

On the third issue—curtailing joint and several liability—there is a tension between efficiency and fairness. Solvent tortfeasors argue that it is unfair to compel them to pay more than their share of the aggregate fault of all tortfeasors in order to compensate a plaintiff adequately in cases in which some joint tortfeasors are insolvent, unidentifiable or otherwise unavailable. The argument made in Part II.C—looking to an efficient solution—is that as long as the accident would not have occurred but for the negligence of the solvent tortfeasor, that tortfeasor

42. See id. at 78.
may properly be called upon to pay up to 100% of the loss. An example may be helpful in illuminating the underlying logic of this position.

Apex Sprinkler Service installs sprinkler systems in commercial, residential and government buildings. Their purpose is to extinguish fires before they can do significant damage. One such installation is defective and the building burns to the ground with significant personal injuries, including loss of life. Apex is sued by the owner of the building and by other injured parties—all free from fault—and they establish fault on the part of Apex in designing, installing, and/or maintaining the system. Does it make any difference how the fire started? It could have originated with natural causes, such as lightning. It could have been started by carelessness on the part of an occupant—e.g., discarding a lit cigarette in a wastebasket. It could have been the work of an arsonist. Or the cause could be unknown—no natural phenomenon or act of carelessness or arson can be shown. Obviously, if a joint tortfeasor can be identified, Apex is entitled to contribution in proportion to fault. But no such identification is possible if the cause of the fire was a natural phenomenon or is simply undiscoverable. In the case of arson or carelessness, identification also may be infeasible and, even if made, may prove to be unhelpful to Apex under joint and several liability if the arsonist or negligent malefactor is without assets.

The key points are that the fault of Apex is the same in all of these cases and the damages resulting from that fault are also the same. Apex cannot name a natural phenomenon or an unknowable cause as a joint tortfeasor, reducing its liability to some severable part of the total. Its position is no worse if the existence of a joint tortfeasor is indicated—an arsonist or careless smoker—but that tortfeasor is either unidentifiable or insolvent. It is difficult to identify the normative basis for holding Apex liable for the totality of damages in some of these cases, but not in others.

In sum, the conflict between fairness and efficiency is more apparent than real. As argued earlier, the case for several liability rests on a misunderstanding—i.e., that somehow Apex is responsible for less than 100% of the damages in some but not all of the cases described above.

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44. See, e.g., id. at 458.
III. COMPARATIVE FAULT AND INTENTIONAL TORTS

At common law, contributory negligence was not a defense to an intentional tort. In implementing comparative fault regimes, many modern courts have taken an analogous position: a plaintiff's comparative fault may not be interposed to reduce a recovery against an intentional tortfeasor. But a minority of courts at common law, and a growing minority under comparative fault statutes, have allowed a plaintiff's comparative fault to be compared with a defendant's intentional wrongdoing—thereby reducing the defendant's liability—in at least some circumstances. The critical question is under what circumstances is it appropriate to compare a plaintiff's negligent behavior with a defendant's intentional malfeasance?

The heart of the problem is that the line between intentionality and negligence is not the appropriate dividing line for purposes of comparative fault. The category of intentional torts is overinclusive. A narrower focus is required.

The relevant distinction is not between intentional and negligent behavior, but between predatory and nonpredatory behavior. For this purpose, I define "predatory" to encompass two classes of cases: (1) instances in which the actor is seeking to appropriate for his own use one or another interest to which the victim is entitled; and (2) cases in which the actor derives no discernible benefit, but seeks simply to inflict harm on the owner of the entitlement. The first class of cases encompasses theft in all its forms (fraud, robbery, burglary, etc.), murder for hire or gain, and rape and other forms of sexual assault. The second category includes vandalism, murder motivated by hatred or anger, and unprovoked assaults on the person. The two categories have these features in common: Neither type of conduct has any redeeming social value; society would be better off if all such behavior simply ceased.

Second, the threat posed by these practices compels persons to incur costs, financial and personal, to avoid being victimized; to install locks

45. See, e.g., Gail D. Hollister, Using Comparative Fault to Replace the All-or-Nothing Lottery Imposed in Intentional Tort Suits in Which Both Plaintiff and Defendant Are at Fault, 46 VAND. L. REV. 121, 123 (1993).


47. For discussions, see SCHWARTZ, supra note 21, §§ 5-1 to 5-2; Jake Dear & Steven E. Zipperstein, Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations, 24 SANTA CLARA L. REV. 1, 26 (1984); Hollister, supra note 45, at 121; William J. McNichols, Should Comparative Responsibility Ever Apply to Intentional Torts?, 37 OKLA. L. REV. 641, 644 (1984); Allan L. Schwartz, J.D., Annotation, Applicability of Comparative Negligence Principles to Intentional Torts, 18 A.L.R. 5th 525, 538-40 (1994 & Supp. 2000).
and bolts, to be wary about admitting strangers onto the premises, to limit one's freedom of action so as to avoid dangerous areas at dangerous times, and so forth.\(^4\)

In effect, the predator imposes on other members of society costs that are socially wasteful and would be wholly unnecessary in the absence of predation. In many places in the past, including the East Bronx neighborhood in which I grew up, precautions against predation were rarely taken. Doors and windows were not locked; cars were left open and bicycles were not chained; persons of all ages felt free to move about at all times of the day or night without fear of being assaulted, raped or robbed. To allow a predator to raise a defense of comparative fault—that a door was unlocked or a bike was unchained or a woman was out walking alone at night—is to accept as proper the unilateral imposition of costs on society by predators as a class.

To state the issue in the most graphic terms, the predator should not be able to say, "Your money or your life," and then, if the victim refuses to yield, shoot him and later defend on the ground that a prudent crime victim would have surrendered his purse when confronted with a threat to his life.

**A. Non-Predatory Intentional Torts**

Most tortious behavior is not predatory. In the typical negligence case, the alleged tortfeasor is engaged in a socially approved activity—such as driving to work, constructing a building, or performing a medical procedure. The only question in such cases is whether adequate precautions have been taken. Injuries, when they occur, are the product of friction between multiple parties in an interactive society, each pursuing some socially acceptable objective. This friction can be

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One aberrational opinion allowed a rapist to reduce the rape victim's recovery because she had been guilty of comparative fault. *See Morris v. Yogi Bear's Jellystone Park Camp Resort*, 539 So. 2d 70, 77-78 (La. Ct. App. 1989). The state's leading case on comparative fault, subsequently decided, described the *Morris* opinion as "[e]xcept . . . erroneous." *Veazey v. Elmwood Plantation Assocs.*, 650 So. 2d 712, 717 (La. 1994) (alteration in original). The *Morris* decision also was repudiated in a subsequent statutory amendment. *See LA. CIV. CODE ANN. art. 2323 (West 1997).*

*See also Barker v. Kallash*, 459 N.Y.S.2d 296, 300 (App. Div. 1983) (refusing to allow an injured bomb maker to claim negligence on the part of the supplier of explosive materials; the comparative negligence statute does not permit "any wrongdoer, be he a murderer, rapist or bomb maker, to recover, at least in part, once he establishes some fault on behalf of one or more of his partners in wrongdoing"), aff'd, 468 N.E.2d 39 (N.Y. 1984). *Barker* is unsound. Partial recovery should have been allowed under the reasoning associated with *Gonzalez v. Garcia*, 142 Cal. Rptr. 503 (Ct. App. 1977).
reduced, and concomitant injuries avoided, if all parties take care—the pedestrian as well as the motorist, the onlooker as well as the construction crew, the patient as well as the doctor. In this context, comparative fault can play a useful role in providing incentives for all actors to adopt appropriate precautions.

But some cases alleging intentional misconduct also involve instances of friction rather than predation. They, too, call for a comparison of the fault of injurer and victim. Consider these examples:

In *Sindle v. New York City Transit Authority*, Mr. Mooney was driving a New York City school bus transporting 65 to 70 boisterous students. They were heading home after the last day of the term. Some of the students’ high spirits were expressed in acts of vandalism: the “breaking [of] dome lights, windows, ceiling panels and advertising poster frames.” The students ignored Mooney’s warnings to behave, and, after the damage had become severe, Mooney decided not to discharge any more passengers and advised the students that he was taking them to a nearby police station. Several students successfully exited the bus by jumping through a window whenever the bus slowed to turn. James Sindle, age 14, attempted a similar escape but had the misfortune to fall under the bus and sustain severe injuries. His father sued Mooney and the bus company for false imprisonment, seeking damages for James’s injuries. The court ruled that defendants had a plausible claim of justification—Mooney’s effort to protect school property. But even if that defense proved unavailing, Sindle’s conduct had to be considered: “[I]f the trier of fact finds that plaintiff was falsely imprisoned but that he acted unreasonably for his own safety ... [in jumping or falling from the bus], recovery for the bodily injuries subsequently sustained would be barred.”

*Sindle* antedates comparative fault, but the principle it articulates is sound. Mooney was not a predator; he was simply trying to do his job. If he misjudged, and if his conduct is subsequently found to be unjustified, his fault should be compared with the fault of Sindle. On this

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50. See id. at 247.
51. See id.
52. Id.
53. See id.
54. See id.
55. See id.
56. See id.
57. See id. at 247-48.
58. Id. at 248.
assumption, the unreasonable actions of both contributed to the bodily injury. But comparative fault obviously would not apply if Mooney had been a kidnapper or a terrorist, intent on extracting ransom or holding the children as hostages, and one or more of them had been injured in seeking to escape.

In a similar case, Comer v. Gregory, Sherman Chesnutt maintained a private fishing pond on his property. James Comer and Ricky Griggs were trespassers, fishing in the Chesnutt pond at night without permission. Chesnutt confronted them with a twelve-gauge shotgun, and, after neither would give his name or tell where he was from, Chesnutt informed them that he was "taking them to the law." As they were leaving the property, Comer made a sudden movement and Chesnutt, believing that Comer was going for a gun, shot and injured him. On Comer's suit for assault and battery, the jury awarded him damages of $125, despite proof of medical expenses and lost income exceeding $9400. The court affirmed. A Mississippi statute provided that in actions for battery and other intentional torts, the defendant, in addition to justification, "may give in evidence any mitigating circumstances to reduce the damages." The court found sufficient mitigating circumstances in Comer's trespass and in Comer's uncooperative and potentially threatening behavior.

Again, Chesnutt was not a predator. He was seeking simply to protect his property and to obtain the assistance of law enforcement authorities. He may have been guilty of misjudging the seriousness of Comer's threat. But the injury to Comer could have been avoided either by better judgment on the part of Chesnutt or by a more law abiding and cooperative attitude on the part of Comer. The jury evidently found both to be at fault and apportioned the bulk of the blame to Comer. But the Mississippi ruling should not be read as conferring a license on armed vigilantes to patrol the countryside and shoot down those against whom they have some sort of grievance.

59. 365 So. 2d 1212 (Miss. 1978).
60. See id. at 1213.
61. See id.
62. Id.
63. See id.
64. See id.
65. See id. at 1215.
66. Id. at 1214 (emphasis omitted) (quoting MISS. CODE ANN. § 11-7-61 (1972)).
67. See id.; accord Hall v. Coplon, 355 S.E.2d 195, 197-98 (N.C. Ct. App. 1987) (holding that provocation may be considered as a mitigating circumstance where the plaintiff was an intruder into a home and was shot by the defendant homeowner).
In both *Sindle* and *Comer*, the defendants' actions may have been unjustified under the law of intentional torts, but they were similar to negligence in that each defendant sought to achieve a legitimate objective, although a jury could have found that each had crossed the boundary of reasonableness.

### B. Intentional Antisocial Behavior by Multiple Parties

*Bonpua v. Fagan* is illustrative of a very different configuration. Salvatore Fagan was talking to his girlfriend in the parking lot behind Cammarano’s Bar in Long Branch, New Jersey. He testified that Robert Bonpua “ridiculed him” and called him a “faggot”—Fagan then walked over to Bonpua’s car, at which point Bonpua got out of his car and began hitting Fagan. Fagan struck back with sufficient severity that he subsequently was convicted of aggravated assault and sentenced to seven years in prison. In this civil suit by Bonpua, the New Jersey court ruled that Fagan was entitled to invoke comparative fault. If Fagan’s version were accepted by the jury, it could find that Bonpua had committed an assault on Fagan or had failed to exercise due care for his own safety.

In a number of similar cases, comparative fault has been invoked to deal with multiparty rowdiness leading to brawls and injuries in bars, restaurants, school buses, and places of employment.

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68. In one case, however, the defendant’s response was so extreme that defendant’s reliance on comparative fault was disallowed on grounds of public policy. In *Hattori v. Peairs*, 662 So. 2d 509 (La. Ct. App. 1995), Hattori, a Japanese exchange student, approached the Peairs household in search of a Halloween party. See *id.* at 511. The homeowner, frightened by the costumed student, shot and killed him. See *id.* at 512. The court refused to apportion any fault to Hattori, who may or may not have been at fault. See *id.* at 516. Peairs was not a predator although he was seriously at fault. A better outcome would have been to allow comparative fault in this case with the expectation that any fault attributed to Hattori would be minor in comparison to the fault of Peairs.

70. See *id.* at 288.
71. See *id.* at 289.
72. See *id.* at 288.
73. See *id.*
74. See *id.* at 289-90.
graphic is *Jones v. Thomas*. Willie Jones and John Thomas were employees of the Audubon Park Commission in New Orleans. At the time of the incident, Thomas was acting supervisor of a work crew. When he announced a break at 10:30 a.m., the crew, with the exception of Jones, stopped work and took their break. Jones began yelling and cursing at Thomas and continued to do so after James Logan, the regular supervisor, had returned to take charge and Thomas had walked away. The tirade lasted for about ten minutes. Among other things, Jones called Thomas a "black motherfucker" and threatened to kick his "black ass" and to kill his mother and burn down his house. When threats were made against his mother and family, Thomas lost control. He punched Jones in the face and broke his jaw. On suit by Jones, the trial court assessed Jones's damages at $10,000, found Thomas culpable for assaulting Jones, but found Jones at fault for provoking the assault. Thomas was assigned 10% of the fault and Jones's damages were reduced by 90% to $1000.

The appellate court agreed that the evidence justified a finding of fault on the part of Jones, but it ruled that the trial court had abused its discretion in finding Jones to be 90% at fault. Because "the provocation, although serious, offensive and demeaning, was verbal only" and because "Jones made no overt acts or threatening gestures towards Thomas," the more appropriate apportionment of damages was 50% to each party.

*Bonpua* and *Jones* are similar to *Gonzalez v. Garcia*, previously discussed. In *Bonpua*, plaintiff committed the initial assault and defendant responded with excessive force. In *Jones*, plaintiff initiated

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77. *See id.* at 1016.
78. *See id.*
79. *See id.*
80. *See id.* at 1016-17.
81. *See id.* at 1018.
82. *See id.* at 1017 n.2.
83. *See id.* at 1017.
84. *See id.*
85. *See id.* at 1016.
86. *See id.*
87. *See id.*
the incident with a verbal assault (one that might well have been actionable as intentional infliction of emotional distress), and defendant responded by striking the first (and only) blow. In cases of this character, neither party should get off scot-free. Apportionment of damages among the several blameworthy parties to an antisocial brawl serves the purpose of condemning the behavior of both and deterring similar behavior in the future.

C. Summary

In the context of intentional torts, therefore, comparative fault is appropriate in two kinds of cases:

1. Where the defendant may have acted inappropriately, as in Sindle and Comer, but was not engaged in a predatory course of conduct. The misjudgments in such cases are no more culpable than ordinary negligence.

2. Where both the plaintiff and the defendant have behaved in an antisocial manner, as in Bonpua and Jones, and the most appropriate social response is to condemn both by apportioning damages between the two of them.

These classes of cases have only a limited bearing on the principal problem addressed in this Article: the responsibility of a sentinel to protect a prospective victim against attacks by predatory tortfeasors. But in resolving such cases, courts frequently cite the special status of intentional torts under a regime of comparative fault, an approach sometimes required by the governing state statute. As discussed above, and as further developed in Part VII, the critical distinction is not between intentional and negligent acts but between predatory and nonpredatory behavior.


91. See, e.g., Comer v. Gregory, 365 So. 2d 1212, 1214 (Miss. 1978).
IV. PREDATORY ATTACKS ON INNOCENT VICTIMS

The federal court in Martin applied California law without any analysis of that law. The leading California case is Weidenfeller v. Star & Garter.92 Allen Weidenfeller was the victim of an “unprovoked armed assault in the parking lot of the Star [&] Garter.”93 He sued the bar for negligent failure to provide adequate lighting and other security measures in the parking lot.94 The jury found for Weidenfeller and assessed economic damages at $122,500 and noneconomic damages at $250,000.95 It apportioned fault 75% to the assailant, 20% to Star & Garter and 5% to Weidenfeller (the basis for the latter finding was not stated and it played only a marginal role in the court’s decision).96 California by statute provided that responsibility for economic damages was joint and several while responsibility for noneconomic damages was several only.97 Accordingly, the trial court entered a judgment against Star & Garter for economic damages of $116,375 (95% of $122,500) and for noneconomic damages of $50,000 (20% of $250,000).98 On appeal by Weidenfeller, the judgment was affirmed.99

Weidenfeller contended that the statute was inapplicable in a case such as this, where the conduct of one of the defendants—the assailant—was intentional.100 The court disagreed, saying that Weidenfeller’s argument would result in an “absurdity”:

[A] negligent tortfeasor’s obligation to pay only its proportionate share of the noneconomic loss, here 20 percent, would become disproportionate increasing to 95 percent solely because the only other responsible tortfeasor acted intentionally. To penalize the negligent tortfeasor in such circumstances not only frustrates the purpose of the statute but violates the commonsense notion that a more culpable party should bear the financial burden caused by its intentional act.101

The court also was unpersuaded by Weidenfeller’s arguments that its conclusion would leave tort plaintiffs undercompensated and fail to

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92. 2 Cal. Rptr. 2d 14 (Ct. App. 1991).
93. Id. at 15.
94. See id.
95. See id.
96. See id.
97. See id. at 15 n.3.
98. See id. at 15.
99. See id. at 18.
100. See id. at 15.
101. Id. at 16.
deter negligent tortfeasors. On the latter, the court observed: "Negligent actors remain liable for all economic damages and for noneconomic damages in proportion to their fault. Moreover, a legitimate purpose of the [statute] is to deter the more culpable defendant." The court did not consider whether there were means by which both the negligent tortfeasor and the intentional tortfeasor could be held accountable. More on this later.

The opposing point of view was set forth in a recent Florida case, Merrill Crossings Associates v. McDonald. Lawrence McDonald was shot and injured by an unknown assailant in a Wal-Mart parking lot. He sued Wal-Mart for failure to maintain reasonable security measures. He recovered a judgment that allocated 100% of the damages to Wal-Mart and a related real estate company and nothing to the unknown assailant. A Florida statute had abolished joint and several liability in most negligence actions, and Wal-Mart appealed on the ground that some substantial share of the fault should have been assessed against the unknown assailant. In rejecting Wal-Mart's position, the Florida court reasoned that:

[N]egligent tortfeasors . . . should not be permitted to reduce their liability by shifting it to another tortfeasor whose intentional criminal conduct was a foreseeable result of their negligence. . . . [I]t would be irrational to allow a party who negligently fails to provide reasonable security measures to reduce its liability because there is an intervening

102. See id. at 17.
104. 705 So. 2d 560 (Fla. 1997).
105. See id. at 561.
106. See id.
107. See id.
108. See id.
intentional tort, where the intervening intentional tort is exactly what
the security measures are supposed to protect against.\textsuperscript{109}

Nothing was said about how the intentional tortfeasor, excluded
from liability in this action, might be held accountable if apprehended.

One point deserves emphasis. While the California and Florida
courts were interpreting different statutes, the language of the respective
statutes did not compel different results. Each court could have reached
the opposite result on the basis of the statute before it. The decisions
were driven by the courts' differing policy perspectives.\textsuperscript{110}

The most comprehensive consideration of all of the dimensions of
the problem appears in several opinions rendered in a Louisiana case,
\textit{Veazey v. Elmwood Plantation Associates}.\textsuperscript{111} Christi Veazey was a tenant
in an apartment complex managed by Southmark.\textsuperscript{112} While in her
apartment, Ms. Veazey was attacked and raped by an unknown assailant.\textsuperscript{113} She sued Southmark alleging numerous deficiencies in
security—such as inadequate locks and inadequate lighting of exterior

\textsuperscript{109} Id. at 562-63 (citations omitted). Other cases following the Florida approach include:
Whitehead v. Food Max of Miss., Inc., 163 F.3d 265 (5th Cir. 1998) (applying Mississippi law);
(applying Washington law); Wyke v. Polk County Sch. Bd., 137 F.3d 1292 (11th Cir. 1998)
(applying Florida law), \textit{withdrawing question certified to state court in 129 F.3d 560 (11th Cir.
1986); M. Bruenger & Co. v. Dodge City Truck Stop, Inc., 675 P.2d 864 (Kan. 1984); McLain v.
Training & Dev. Corp., 572 A.2d 494 (Me. 1990); Flood v. Southland Corp., 616 N.E.2d 1068
(Mass. 1993); Brandon v. County of Richardson, 624 N.W.2d 604 (Neb. 2001); Lewis v. Nat'l R.R.
Passenger Corp., 675 N.Y.S.2d 504 (Civ. Ct. 1998) (applying Federal Employers' Liability Act);
(THIRD) OF TORTS: APPORTIONMENT OF LIABILITY} § 14 (2000) adopts the position taken by Florida
and allied jurisdictions.

\textsuperscript{110} The California statute at issue in \textit{Weidenfeller} applied to all actions "based upon
provided no guidance on how to respond to the action before the court because it never identified
which actions were "based upon principles of comparative fault." The Florida statute at issue in
\textit{Merrill Crossings} applied to all "negligence cases" but not to any action "based upon an intentional
tort." \textit{FLA. STAT. ANN.} § 768.81(4) (West 1997), \textit{quoted in Merrill Crossings Assocs. v. McDonald,
705 So. 2d 560, 561 (Fla. 1997). This statute would have supported a conclusion contrary to the one
reached by the court since the action, while charging a third party with an intentional tort, was
promised on defendant's alleged negligence.

\textsuperscript{111} 650 So. 2d 712 (La. 1994).

\textsuperscript{112} \textit{See id. at 713.}

\textsuperscript{113} \textit{See id.}
The first paragraph simply restates the conclusion reached in the Florida case of Merrill Crossings Associates v. McDonald. The second makes a more important point: any allocation of fault to the predator reduces the incentive of the sentinel to properly discharge its responsibilities. But the court’s prediction about the “lion’s share” of the fault being apportioned to the intentional tortfeasor has not been entirely accurate. In some cases, courts and juries have indeed allocated 90% or more of the fault to the predator. But in others, the negligent sentinel has been assessed a major share of responsibility—though substantially less than 100%.

The third reason given by the Veazey court is not persuasive. To be sure, the rapist is 100% responsible for his actions. But the assignment of 100% of the fault to the sentinel is not precluded because the two are different in kind. The double assessment of 100% of the fault is precluded by the budgetary constraint on tort recoveries, not the cited difference in kind.

In any case, on facts closely paralleling those of the Connie Francis decision, Veazey comes to a conclusion wholly consonant with the earlier view. A concurring opinion in Veazey makes explicit what should have been apparent all along. The assailants in all of these cases are in suit by minor’s family against negligent companions of deceased minor. The disarray in the Louisiana cases is attributable in part to Veazey’s adoption of a case-by-case approach and in part to different interpretations of a 1996 amendment to the governing Louisiana statute.

Another distinctive approach was adopted in Field v. Boyer Co., 952 P.2d 1078 (Utah 1998), which held that apportioning fault to an intentional assailant was appropriate, but only if that assailant was identified and named as a party. See id. at 1082; accord Bencivenga v. J.J.A.M.M., Inc., 609 A.2d 1299, 1303 (N.J. Super. Ct. App. Div. 1992) (refusing to apportion fault to unknown assailant).

119. Compare Veazey, 650 So. 2d at 719, with Merrill Crossings Assocs. v. McDonald, 705 So. 2d 560, 562 (Fla. 1997).

120. See Veazey, 650 So. 2d at 719.

121. See Ozaki v. Ass’n of Apartment Owners, 954 P.2d 644, 646 (Haw. 1998) (allocating 92% of fault to murderer, 5% to victim and 3% to negligent condominium complex). Allocations of major fault to a negligent sentinel were reversed as insupportable in Pamela B. v. Hayden, 31 Cal. Rptr. 2d 147, 159 (Ct. App. 1994), vacated by 889 P.2d 539 (Cal. 1995), which had allocated 5% of fault to a rapist and 95% of fault to a negligent landlord, and in Scott v. County of Los Angeles, 32 Cal. Rptr. 2d 643, 654-55 (Ct. App. 1994), which had allocated 1% of fault to an assailant and 99% to negligent government officers.

122. See Ortiz v. N.Y. City Hous. Auth., 22 F. Supp. 2d 15, 19, 34 (E.D.N.Y. 1998) (allocating 60% of fault to negligent landlord and 40% to rapist), aff’d, 198 F.3d 234 (2d Cir. 1999); Hutcherson v. City of Phoenix, 961 P.2d 449, 453-54 (Ariz. 1998) (en banc) (allocating 75% of fault to negligent police and 25% to murderous assailant); Rosh v. Cave Imaging Sys., Inc., 32 Cal. Rptr. 2d 136, 140 (Ct. App. 1994) (allocating 75% of fault to negligent security firm and 25% to assailant); Weiss v. Hodge, 516 N.W.2d 468, 474-75 (Mich. Ct. App. 1997) (allocating 80% of fault to negligent tavern and 20% to assailant); cf. Reichert v. Atler, 875 P.2d 379, 382 (N.M. 1994) (approving a charge favorable to apportionment of major fault to the negligent sentinel).
spaces—as well as misrepresentations by Southmark about prior crimes and about the adequacy of the building’s security measures. A jury found for Veazey on her negligence claim and the issue was whether some portion of Veazey’s damages should have been apportioned to the unknown rapist. The trial court declined to do so and a divided appellate court affirmed. All of the opinions agreed that, under Louisiana’s comparative fault statute, intentional and negligent conduct could be compared. But a majority of the state supreme court declined to do so in this case:

First, . . . the scope of Southmark’s duty to the plaintiff in this case clearly encompassed the exact risk of the occurrence which caused damage to plaintiff. . . . [N]egligent tortfeasors should not be allowed to reduce their fault by the intentional fault of another that they had a duty to prevent.

Second, Southmark, who by definition acted unreasonably under the circumstances[,] . . . should not be allowed to benefit at the innocent plaintiff’s expense by an allocation of fault to the intentional tortfeasor . . . . [Since] any rational juror will apportion the lion’s share of the fault to the intentional tortfeasor[,] . . . application of comparative fault principles in the circumstances . . . [of this] case would operate to reduce the incentive of the lessor to protect against the same type of situation occurring again in the future.

Third, . . . intentional torts are of a fundamentally different nature than negligent torts, . . . [and] a true comparison of fault . . . is, in many circumstances, not possible. . . . “[I]n such a comparison, how can a rapist . . . not be 100% liable for his actions?” The common sense answer [is] that intentional wrongdoing “differs from negligence not only in degree but in kind . . . .”

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114. See id.
115. See id. at 714.
116. See id. at 713-14.
117. See id. at 718, 721 (Hall, J., dissenting).
100% responsible for their predatory conduct. But that responsibility should be given effect, not by whittling down the victim’s recovery against the negligent sentinel, but by giving the sentinel a right of indemnity against the predator. The appropriate outcome in all of these cases, assuming an absence of fault by the injured plaintiff, is to have the plaintiff recover 100% of his or her losses from the negligent sentinel, who in turn has a right to recover 100% of its losses from the guilty assailant. No culpable party escapes unscathed. In the unlikely event that the assailant is both identifiable and solvent, the negligent sentinel is held harmless; but that remote contingency is an inevitable byproduct of the budgetary constraint previously described (the plaintiff cannot recover twice) and is wholly consistent with the tort objectives of providing compensation for innocent victims and deterring unreasonable behavior by wayward defendants. The negligent sentinel cannot anticipate an identifiable and solvent predator. Its precautions will be premised on the opposite assumption; no case has been found in which the predator in a trilateral case has been both identifiable and solvent.

V. SLUMBERING SENTINELS AND NEGLIGENT MALEFACTORS

Occasionally, the negligent lapse by a sentinel may lead to an injury to the victim that is caused, not by a predatory assailant, but by a negligent malefactor. Does this require a different approach? Several cases suggest that it does. But the issue is not free from doubt.

Denny Gibbs was an inmate serving a five-year sentence with the Louisiana Department of Corrections. He was assigned by Sheriff Goss to a municipal work program in the Town of Iota. While under the supervision of Joel Cart, a municipal employee, Gibbs stole a municipal work vehicle and fled. (The keys had been left in the ignition and Gibbs had been out of Cart’s sight.) In making his escape, Gibbs sideswiped several vehicles, then ran a red light and collided with

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123. See Veazey, 650 So. 2d at 721 (Watson, J., concurring).
124. See id. at 730, 736-37 (Calogero, C.J., concurring in denial of rehearing). The RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (2000) would limit the negligent sentinel to a right of contribution, based on comparative fault, rather than a right of indemnity. See id. §§ 14 cmt. b, 22 cmt. e. The Restatement’s position affords undeserved protection to predators. See discussion supra Part III.
126. See id.
127. See id. at 1191.
128. See id.
a car in which Keith Marceaux was a passenger. Marceaux was injured and sued Gibbs, Sheriff Goss, the Town of Iota, and the town’s Chief of Police. The trial court allocated fault to Gibbs (30%), Sheriff Goss (5%) and the town (65%). An intermediate appellate court held that the sheriff was immune from suit under a special statute, and it apportioned 100% of the fault to the Town of Iota.

Custodians of prisoners have a duty to manage the affairs of the prison so as not to create an unreasonable risk of harm to the public...

Because plaintiff’s injuries were sustained while defendant Gibbs was still in the process of fleeing.... [and] plaintiff was not at fault... the liability of the [custodial] tortfeasor should be 100%, with the answerable custodian ... able to seek whatever remedies the law permits against Gibbs.

On appeal, the Louisiana Supreme Court reversed, finding its decision in Veazey to be inapplicable to the facts of this case because Gibbs was a negligent malefactor, not an intentional tortfeasor. Further, the trial court’s allocation of fault was revised to apportion 70% to Gibbs and 30% to the town.

The decision is puzzling. If Gibbs had shot a civilian in the course of his escape, Veazey clearly would have supported the intermediate appellate court’s assessment of 100% of the fault to the town. If a fleeing felon runs down a civilian rather than shooting him, what possible difference can it make to any factor pertinent to resolving the issue of liability? The town’s negligence is the same in either case; the likelihood of harm to innocent persons is the same; and the injury to the plaintiff may be as great in one case as in the other. The fleeing felon is just as dangerous in the driving case as in the shooting case (perhaps more so);...
custodial authorities should be held accountable in both cases in order to provide appropriate incentives to take all proper precautions.

Another disturbing opinion is McKillip v. Smitty's Super Valu, Inc. Betty McKillip was shopping in Smitty's grocery store when she slipped on a piece of waxed tissue paper on the floor. Smitty's employees used the paper to select bakery items for customers, including the cookies Smitty's gave to children visiting the store. "How the paper reached the floor, whether a person dropped the paper, and how long the paper rested on the floor" were not known. McKillip sued Smitty's on the theory that it conducted a negligent "mode of operation," claiming that Smitty's neglected to adopt or follow operational procedures that would have prevented or expeditiously detected tissue paper on the floor, whatever the source. The court accepted the validity of McKillip's theory of liability; the jury found that Smitty's had been negligent. But the court allowed Smitty's to apportion part of the fault to the unknown paper-dropper. The jury returned a verdict in favor of McKillip for $136,000, but found Smitty's to be only 35% at fault and the paper-dropper 65% at fault. Accordingly, McKillip's judgment was reduced to $47,600. To recover the balance, she would have to track down the elusive paper-dropper and hope to find him financially responsible.

McKillip argued on appeal that the whole point of the "mode of operation" theory of liability was to relieve the plaintiff of the burden of proving that "a business had notice of a hazard if '(1) the store adopted a method of operation which the store could reasonably have anticipated would regularly produce dangerous conditions; and (2) the store failed to exercise due care to prevent harm under these circumstances.'" The court was not persuaded. It rejected McKillip's argument as incompatible with the legislative determination "'that each tortfeasor be responsible for the prevention of all foreseeable accidents that could be prevented by methods of operation that would be adopted in the exercise of due care.'"
responsible for only his or her percentage of fault and no more." 647 The
court seemed impervious to the fact that its approach to apportionment
of fault removed much of the incentive otherwise applicable to stores
like Smitty's to protect their patrons against preventable hazards.

Marceaux and McKillip are beyond the central thesis of this Article
since in each case the perpetrator of harm was someone other than a
predatory assailant. 648 But they do suggest that the issue under scrutiny is
but part of a larger problem: the dilution of the "duty to protect" through
the apportionment of fault away from the negligent sentinel to someone
else (either a predatory assailant or a negligent malefactor).

Perhaps the source of the difficulty can be found in flaws in the
duty to protect.

VI. THE DUTY TO PROTECT

The duty to protect encompasses three types of cases (some of
which overlap): control of dangerous instrumentalities and dangerous
substances; control of dangerous persons (or of information about such
persons); and possession of some distinctive advantage in guarding
vulnerable persons against harm. 649 Some are more controversial than
others.

A. Dangerous Instrumentalities and Dangerous Substances

One well-recognized basis of tort liability is negligent
entrustment. 650 Owners of automobiles, firearms and other dangerous
instrumentalities are expected to keep these instrumentalities out of the
hands of immature, untrained or irresponsible

individuals. 651 Reasonable
precautions are appropriate, and no basis is apparent why the law should
not be demanding. The cost of properly securing a firearm or automobile
is part of the cost of owning that instrumentality, and no social loss
occurs if owners are compelled to internalize that cost as part of the total

147. Id. at 376 (emphasis omitted) (quoting Natseway v. City of Tempe, 909 P.2d 441, 443
(Ariz. Ct. App. 1995)).

148. The Restatement (Third) of Torts: Apportionment of Liability (2000) follows the
approach of Marceaux and McKillip in denying contribution when the malefactor is a negligent
tortfeasor rather than an intentional tortfeasor. See id. § 14 cmt. b. The Restatement's position
dilutes incentives properly applicable to negligent sentinels.

149. See generally Keeton et al., supra note 46, at 197-203 (discussing the need to anticipate
the conduct of others and, more particularly, negligent entrustment).

150. See generally id. (describing tort liability of negligent entrustment).

151. See Epstein, supra note 39, at 115-16, 153-54; Keeton et al., supra note 46,
at 200, 203.
The cost of ownership. There is no difference in principle between operating a motor vehicle carefully and taking appropriate care to prevent that vehicle from falling into the hands of juveniles, drunks, joyriders, and the like.

In cases of accidental harm, the most dangerous of substances is alcohol. Under the laws of many states, duties are imposed on those engaged in the commercial distribution of alcoholic beverages not to sell to minors or to obviously intoxicated persons. Again, it is difficult to find a principled basis for opposition. Alcohol consumption imposes severe social costs—especially when made available to minors or to the obviously intoxicated—and those costs should be internalized by the business of alcohol distribution. No distortion occurs if the price of alcoholic beverages includes the cost of policing necessary to keep alcohol away from those who have been deemed inappropriate recipients.

While some may debate particular aspects of this duty of care, the principle seems sound and excessive extensions seem unlikely. In most cases, courts and legislatures have been surprisingly tolerant of those who fail to exercise reasonable care with respect to dangerous instrumentalities and dangerous substances.

B. Dangerous Persons

Dangerous persons include criminals, insane persons, and children—obviously some but not all in each category. States apply varying standards in defining the responsibility of custodians in each case. Jailors are supposed to prevent dangerous criminals from escaping; the same holds true for custodians of the dangerously insane; and parents


153. See EPSTEIN, supra note 39, at 154-55; KEETON ET AL., supra note 46, at 199.


On liability for affording minors and intoxicated persons access to alcohol, thereby facilitating automobile accidents and other injuries, see Rabin, supra, at 438-40; Conaway, supra note 152, at 419-34.


155. See EPSTEIN, supra note 39, at 303-04; KEETON ET AL., supra note 46, at 202-03.
who have knowledge of the dangerous propensities of particular children are expected to maintain appropriate control.\textsuperscript{156} In each case, no more than due care is required.\textsuperscript{157} That standard may be high or low, affecting the cost of maintaining jails, insane asylums, and certain households. But this matter of degree reflects differences in social judgments—differences that thus far have not imposed, or threatened to impose, excessive burdens on custodians. Again, courts and legislatures seem surprisingly reticent in imposing liability, especially in the case of children who run amok and inflict harm on strangers.\textsuperscript{158}

More difficult problems are presented when the focus shifts to providing information about dangerous persons: the psychiatrist who gains knowledge that a patient has homicidal designs on a third party;\textsuperscript{159} or law enforcement authorities who have knowledge that a dangerous offender is to be released into the community.\textsuperscript{160} Here there are obvious opposing social values: the importance of confidentiality in psychiatrist-patient relationships, and the impediment to rehabilitation resulting from widespread publicity of a person’s prior criminality. These conflicts have received extensive public attention.\textsuperscript{161} As regards tort liability, the law does not appear to be imposing excessive burdens of care.

Oddly enough, the custodial category that is most often at issue in tort litigation is also the least controversial. Employers are held accountable for the actions of their employees within the scope of their employment without regard to the care, or lack of care, of the


\textsuperscript{157} See id. at 99-102.

\textsuperscript{158} See Mari Matsuda, \textit{On Causation}, 100 Colum. L. Rev. 2195, 2207-09 (2000); Skaare, supra note 156, at 101-02.

\textsuperscript{159} The leading case in this highly controversial area is \textit{Tarasoff v. Regents of the University of California}, 551 P.2d 334 (Cal. 1976) (in bank), which imposed a duty to warn on the psychiatrist. See id. at 340. For brief discussions, see Epstein, supra note 39, at 305-06; Keeton et al., supra note 46, at 203; see also Daniel J. Givelber et al., Tarasoff, \textit{Myth and Reality: An Empirical Study of Private Law in Action}, 1984 Wis. L. Rev. 443, 443-57; D.L. Rosenhan et al., \textit{Warning Third Parties: The Ripple Effects of Tarasoff}, 24 Pac. L.J. 1165, 1169-85 (1993).


The employer's responsibility is not subject to dilution by contemporary doctrines of apportionment of fault. The parallel to other cases under this heading occurs when the employee acts beyond the scope of his employment and the employer is charged with negligent hiring, training or supervision. The considerations in these cases are similar to those applicable to other custodial situations in which the plaintiff alleges negligent failure to control a dangerous person.

C. Protecting Vulnerable Persons

Controversies surrounding dangerous instrumentalities, substances, and persons are minimal or are of marginal concern for purposes of this Article. Of greater significance are cases discussed under the present heading which turn on the defendant's relationship with the victim, rather than with the injurer. And most of these are instances of premises liability, in which the injured party argues that the owner of the premises—the landlord, motel operator, store, restaurant, bar, or parking lot—failed adequately to protect its patrons from harms inflicted by predatory intruders (or, possibly, by negligent malefactors). A smaller group of cases involves parties assuming responsibility for passengers, children or other vulnerable individuals—e.g., common carriers, day care centers, nursing homes—where the alleged neglect may be wholly unrelated to the condition of any premises.

What these cases have in common is a contractual relation, direct or indirect, between the victims seeking protection and the allegedly delinquent sentinels who failed to provide the protection sought. And the unyielding reality about these cases is that victims, as a class, can obtain only those protections for which they are prepared to pay. For example, residents in an apartment house might prefer the security of controlled access—e.g., a doorman to screen persons seeking entry to the building. But someone has to pay for the doorman, and that someone will be the tenant. A central unspoken issue in all of these cases is whether the plaintiff-victim is being shortchanged. Has she obtained all of the security for which she has paid, or is she now demanding security

164. See, e.g., RESTATEMENT (SECOND) OF AGENCY § 213 (1958).
165. For a good discussion of premises liability, see EPSTEIN, supra note 39, at 295-300. Most of the cases discussed in this Article entail premises liability.
166. That was the duty at issue in Martin v. United States, 984 F.2d 1033 (9th Cir. 1993), discussed supra notes 8-20 and accompanying text.
beyond the bounds of the price she was paying prior to the harmful encounter?

Similarly, the patron of a store or restaurant may complain, after the event, that an injury could have been avoided had specified security measures been in effect at the time. But presumably those measures are not costless, and their adoption would entail expenditures that would have to be included in the prices charged for goods or meals. The same analysis holds true for common carriers, day care centers, nursing homes and the like.

Nor is an elevation in price the only danger. If courts are overzealous in imposing stringent duties to protect, the supply of stores and other accommodations may be adversely affected. The need for security is greatest in high-crime areas. Is it in the interest of anyone to so heighten security requirements as to make it economically infeasible to operate an apartment building, store, restaurant, or other establishment in a high-crime area?

This is not to say that imposing a duty to protect is never warranted. Three kinds of cases seem relatively easy.

First, communities adopt minimum standards intended to protect the safety of tenants, patrons and other users of facilities. These standards reflect a public judgment that gains in safety outweigh the adverse effects on price and availability. A court should have no hesitation in giving effect to that judgment. If, for example, a building code specifies that all entrance ways shall have locks of a designated character, failure to install and maintain locks of that character is a violation of the duty to protect.\(^\text{167}\)

Second, owners may make representations, express or implied, about the safety of the premises. For example, municipal codes do not normally require doormen. But if a landlord attracts tenants by advertising a "secure" building, with 24-hour control of access, any failure to live up to that representation violates the duty to protect. Similarly, a door that appears to have a lock should have a lock that works.\(^\text{168}\)

Third, some practices may be so universally observed or so low in cost in relation to the expected harm that any owner of residential or business premises should observe them. For example, cries for help

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167. This is a fairly straightforward application of the doctrine of negligence per se. See Epstein, supra note 39, at 146-53; Keeton et al., supra note 46, at 220-31.

should not go unheeded. The cost of calling for police assistance, at the
behest of a tenant or patron, is so small that the expected gain clearly
outweighs the cost. And in these cases the requisite "special relation"
exists so the proprietor cannot plausibly argue that the responsibility for
summoning assistance should be assumed by someone else. 169

Obviously, this is not an exhaustive discussion of the topic.
Improved lighting of exterior premises may be another good candidate
for inclusion if appropriate objective standards can be devised. But this
discussion makes clear that a duty to protect is not an unmixed blessing
and that, in some cases at least, courts are justified in being circumspect
in imposing such a duty. How do these considerations bear on the
problem addressed in this Article?

First, at least on some occasions, courts seem reluctant to apportion
major fault to the premises-owner because of doubts about the propriety
of imposing a duty on the owner in the first place. Apportioning a major
share of fault to the intruder, thereby reducing the liability of the
negligent owner, is a roundabout—and thoroughly unprincipled—means
of ameliorating the impact of a duty about which some courts are
dubious. 170

Second, in one class of cases, the nature and extent of the
defendant’s duty cannot be avoided. When the victim is alleged to be at
fault, the court must compare the victim’s alleged fault with violations
of duty on the part of the premises owner.

VII. VICTIM FAULT

As previously indicated, the victim's comparative fault is irrelevant
to any claim she might have against a predator—a rapist, robber or other
assailant. The basis for disallowing the defense is developed in Part III.

But when the victim sues the sentinel for failure to protect, her suit
is grounded in negligence and comparative fault comes into play. To
provide a simple illustration, one common ground of complaint against

169. See Epstein, supra note 39, at 295-96; Keeton et al., supra note 46, at 201-03.
170. For a notable example, see the opinion in Pamela B. v. Hayden, 31 Cal. Rptr. 2d 147,
158-59 (Ct. App. 1994), vacated by 889 P.2d 539 (Cal. 1995). The “duty to protect” also has been
circumvented by imposing on the victim the almost insurmountable burden of proving that
admittedly inadequate security measures would have prevented the attack at issue. See Saelzler v.
Advanced Group 400, 23 P.3d 1143, 1149-53 (Cal. 2001). In Saelzler, the plaintiff was raped while
making a delivery on the premises. The landlord conceded, arguendo, that its security measures for
excluding outsiders were inadequate; but the court ruled that the plaintiff was unable to show that
adequate security measures would have excluded the rapists (e.g., they could have been visitors of
other tenants or otherwise on the premises for reasons that would not have justified their exclusion).
See id. at 1145, 1147.
the owners of premises is failure to provide secure locks on doors and windows.\textsuperscript{171} If, as a consequence of a faulty lock, a predator gains entry into the victim's room, the premises-owner almost certainly will be held to be negligent. This was the basis for liability in the Connie Francis case discussed at the outset.\textsuperscript{172} But suppose that the locks are adequate and the occupant of the room or apartment simply fails to use them. This, too, is viewed as negligent behavior and constitutes comparative fault on which the premises-owner can rely if the victim points to other breaches of security on the part of the owner.\textsuperscript{173}

From the vantage point of both the victim and the premises-owner, the predator is an alien force against which both parties have to take precautions. To be sure, the predator unilaterally imposes costs upon both, and limits the freedom of action of both. That is the basis for disallowing comparative fault in a victim's suit against the predator and for granting the sentinel indemnity against the predator if the sentinel is held liable to the victim on grounds of negligence.\textsuperscript{174} To argue, as some have, that a woman should have no duty to take reasonable measures to avoid a rape is the same as arguing that an occupant of a motel room has no duty to take care to avoid a fire.\textsuperscript{175} A woman who smokes in bed, starting a fire made worse by the motel's inadequate fire protection, is guilty of comparative fault. So is a woman who leaves her motel door unlocked or otherwise unreasonably fails to exclude potential rapists and robbers.

Although some of the cases are more complex than unlocked doors and windows, the most controversial are not far removed.

Consider, for example, \textit{Malone v. Courtyard by Marriott L.P.}\textsuperscript{176} Lolita Malone and Karen Meador traveled to Blue Ash, Ohio, to attend the Kool Jazz Festival.\textsuperscript{177} They arrived at 11:30 p.m. and proceeded to

\begin{itemize}
\item \textsuperscript{171} See Garzilli, 419 F. Supp. at 1212.
\item \textsuperscript{172} See supra notes 1-7 and accompanying text.
\item \textsuperscript{175} See Ellen M. Bublick, \textit{Citizen No-Duty Rules: Rape Victims and Comparative Fault}, \textit{99 COLUM. L. REV.} 1413, 1416 (1999). For a contrary position, see Minson, supra note 174, at 628.
\item \textsuperscript{176} 659 N.E.2d 1242 (Ohio 1996).
\item \textsuperscript{177} See id. at 1243.
\end{itemize}
their room at the Marriott. In the elevator, they met Vincent Gatewood for the first time. They invited him to their room for drinks. At 12:30 a.m., a Marriott security guard knocked at their door to inform them of noise complaints, and shortly thereafter Gatewood left. At 1:30 a.m., Gatewood reappeared and for the next two hours he and the two women made a tour of local bars. Returning to the hotel at 3:30 a.m., Gatewood once again joined the women in their room for drinks. Shortly thereafter, in a confusing sequence of events, Malone and Meador found themselves in an altercation with Gatewood that began in their room, continued in the hallway, and ended in Gatewood’s room.

On one occasion, Ms. Meador found herself alone in her room free to take whatever action she chose; she chose to assist Malone who was being dragged into Gatewood’s room. Despite screaming by the two women and other noise emanating from the altercation—reported to the hotel staff by other guests—no one came to the aid of the two women. Gatewood raped both of them.

In their suit against the Marriott for failure to respond to their calls for assistance and the calls of others who had heard the noise, the jury ruled that Malone could not recover because she was more than 51% at fault (which bars recovery under Ohio law), but that Meador, although also at fault, could recover because her fault was not the cause of her injuries. The Ohio Supreme Court affirmed the judgment adverse to Malone and ordered a new trial to rectify the jury’s contradictory verdict in favor of Meador, a verdict said by the court to be manifestly against the weight of the evidence:

[B]oth Malone and Meador “invited . . . Gatewood to their room, had drinks with him, went out to several bars, and upon return again allowed him in their room. . . . [T]here were several opportunities for [Meador] to have called either hotel security or other law enforcement for assistance.”

See id. at 1243-44.
See id. at 1244.
See id. at 1244-45.
See id. at 1244.
See id. at 1245-46.
See id. at 1245.
See id. at 1246.
See id. at 1249 (alterations in original) (quoting the trial judge).
Despite the censorious tone of these comments, no one is telling Malone and Meador how to conduct their lives. None of their actions excused the conduct of Gatewood, who was criminally prosecuted and who would be liable in tort if sued by Malone and Meador. He could not raise a defense of comparative fault. But when the women seek to recover from a nonpredatory party, the hotel, then comparative fault comes into play. Malone and Meador cannot challenge the reasonableness of the hotel’s actions without placing in issue the reasonableness of their own conduct. The jury could have found, and evidently did find, that either party—the women or the hotel—could have prevented the rapes by exercising greater care.

Another controversial ruling is *Wassell v. Adams.*90 Susan Wassell was visiting her fiancé, Michael, who was stationed at the Great Lakes Training Station near Chicago.91 She stayed at the Ron-Ric motel, a small and inexpensive motel that catered to the families of sailors at the Training Station.92 Michael had to return to the base on Sunday, and Susan spent the night alone in the motel room.93 At 1:00 a.m. she was awakened by a knock at the door.94 She went to the door and looked through the peephole but saw no one.95 Next to the door was a pane of clear glass; Susan did not look through it.96 The door had two locks and a chain. Susan unlocked the door and opened it all the way, expecting that Michael had come from the base.97 But it was not Michael.98 A stranger was at the door. He asked for “Cindy.”99 When told that Cindy was not there, he asked for a glass of water.100 While Susan was fetching the water, the stranger entered the room. (The room had a screen door as well as a solid door, but the screen door had not been locked.)101 In the sequence that ensued, Susan had several opportunities to escape but did not take advantage of them.102 Too late, she fled from the room but the

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90. 865 F.2d 849 (7th Cir. 1989).
91. See id. at 850.
92. See id. at 850-51.
93. See id. at 851.
94. See id.
95. See id.
96. See id.
97. See id.
98. See id.
99. See id.
100. See id.
101. See id.
102. See id.
man grabbed her and dragged her back. She screamed but no one responded. She was raped.

Susan sued the Adamses, owners of the motel, for negligent failure to protect her. The precautions omitted by the Adamses were said to be these: (1) failure to warn Susan of the proximity of the motel to a high-crime area; (2) failure to employ a security guard; and (3) failure to have either alarms or telephones in the room. The jury assessed the motel’s negligence at 3% and Susan’s negligence at 97% and returned a verdict for 3% of the damages claimed by Susan. The Court of Appeals for the Seventh Circuit upheld the verdict. There was little doubt that Susan had been negligent in opening her door to a stranger in the middle of the night—not necessarily a major lapse in view of Susan’s being awakened from a sound sleep with the expectation that Michael was at the door. But the case against the Adamses was not particularly strong. Under the facts as stated by Susan, it is unlikely that any warning by the Adamses would have sufficed—she was proceeding on the assumption that it was Michael at the door. Economy motels often lack telephones, and personal alarm systems are uncommon even in expensive motels. As for the security guard, the cost was placed at $50 a night. That cost had to be spread over 14 motel rooms renting for a maximum of $36 per night. Assuming a 50% occupancy rate, the security guard would add $7 per night per room—an increase of almost 20%—an outcome incompatible with the character of the motel as an inexpensive lodging for the families of servicemen.

Comparing Malone and Wassell, the first featured substantial evidence of negligence by the hotel offset by substantial evidence of negligence by the two women. In the second case, Susan’s negligence seems slight; but evidence of negligence by the motel also was pretty slender. In both cases, either party could have avoided the totality of the harm by prudent conduct (or so the respective juries found). That being the case, any allocation of fault of less than 100% is arbitrary. And for

203. See id.
204. See id.
205. See id.
206. See id. at 852.
207. See id. at 831, 856.
208. See id. at 852.
209. See id. at 856.
210. See id. at 854-55.
211. See id. at 855-56.
212. I have never encountered one in extensive travels throughout the United States.
213. See id. at 855.
214. See id. at 851.
reasons previously indicated, it is not possible to hold both a plaintiff
and a defendant accountable for 100% of the loss.

One further point deserves attention. Malone and Meador, and
Susan as well, had called for help.215 Suppose that some Good Samaritan
had responded and that, in the course of his efforts to assist, he had been
injured by the rapist in question. Could he recover from the victim who
sought his aid? There are no decisions directly on point, but other cases
suggest that a person who unreasonably places himself in peril is liable
for injuries to a Good Samaritan seeking to rescue the endangered
individual.216

In one respect, however, the opinions in Malone and Wassell are
deficient. They fail to distinguish between carelessness prior to the
attack and possible shortcomings after the attack has begun. Ordinary
standards of prudence are appropriate in evaluating such lapses as
failures to lock doors and windows, invitations to strangers to enter hotel
rooms at night, and association with persons who by word or conduct
indicate a heightened potential for danger. But greater latitude should be
afforded to rape victims—and to all victims of unprovoked attacks—to
respond to the emergency engendered by the attack as best they can. It
may not be possible to determine, in the moment of desperation, whether
the best approach is to run or scream or fight back or adopt some
combination of these measures. Judges and jurors are qualified to pass
on whether or not appropriate precautionary measures were taken prior
to the attack. They should be hesitant to substitute their judgment for
that of a victim compelled to make split-second decisions in the midst of
an attack.

216. See, e.g., Sears v. Morrison, 90 Cal. Rptr. 2d 528, 529, 533 (Ct. App. 1999); Foster v.
LaPlante, 244 A.2d 803, 804-05 (Me. 1968); Provenzo v. Sam, 244 N.E.2d 26, 28 (N.Y. 1968);

Comparative fault has been invoked in a number of other rape cases involving allegedly
negligent sentinels. See, e.g., McGill v. Duckworth, 944 F.2d 344, 353 (7th Cir. 1991) (prisoner
held to have assumed the risk of a jailhouse rape; his suit against prison authorities was rejected);
Zerangue v. Delta Towers, Ltd., 820 F.2d 130, 132-33 (5th Cir. 1987) (30% of fault attributed to
victim in her suit against hotel); Kukla v. Syfus Leasing Corp., 928 F. Supp. 1328, 1330 (S.D.N.Y.
1996) (40% of fault attributed to victim in her suit against hotel); Cook v. Greyhound Lines, Inc.,
847 F. Supp. 725, 734-35 (D. Minn. 1994) (comparative fault was a jury question in a bus
passenger’s suit against the bus company for rape on the bus); Harrison v. Hous. Res. Mgmt. Inc.,
588 So. 2d 64, 66 (Fla. Dist. Ct. App. 1991) (25% of fault attributed to victim in her suit against
landlord); Ledbetter v. Concord Gen. Corp., 665 So. 2d 1166, 1168-69 (La. 1996) (35% of fault
attributed to victim in her suit against motel).
Victim fault also has been invoked in mitigation in numerous cases not involving rape:

Nicholas DiVincenzo was working late. He left his office unlocked while he went across the hall to a bathroom. On his return, he was attacked and seriously injured. On DiVincenzo’s suit against his landlord for inadequate security measures, he was found to be 25% at fault for having left his office unlocked and unattended.

At 8:00 p.m. on a March evening, Daniel Hardee decided to wash his car at a self-service car-wash unattended at the time. He was stabbed, beaten and robbed. On his suit against the car-wash for inadequate security, Hardee was held to be 68% at fault for using an unattended car-wash at night in an area known to have criminal activity.

Brian Flanagan, a cadet at the Riverside Military Academy ("RMA"), got high on Scotchgard. Thereafter he was beaten by three other cadets, who were exercising disciplinary authority delegated to them by RMA. Flanagan died as a consequence of the combined effects of the Scotchgard and the beating. Comparative fault was held to be no defense in the parents’ suit against RMA and the three cadets, because they had been responsible for a deliberate beating. But as regards two faculty members, who had observed but had failed to stop the beating, Flanagan’s inhalation of Scotchgard was relevant as comparative fault in a suit against them premised on negligence.

Blazovic and his friends got into a fight with Andrich and his friends in the parking lot of the Plantation Restaurant & Lounge. Blazovic sued for injuries sustained. A jury found that Andrich and his
cohorts were guilty of assault, that Blazovic and his companions had been negligent in provoking the assault, and that the Plantation had been negligent in failing to provide adequate security in the parking lot and for selling excessive quantities of alcohol to the Andrich contingent. The court ruled that all of the parties involved should be included in an assessment of comparative fault.

In sum, no one is compelled to endure a predatory attack. And the predator cannot defend on the ground that the victim was careless. But when a charge of negligence is levied against a delinquent sentinel, the victim's own prudence can be called into question in assessing comparative fault.

VIII. CONCLUSION

A plausible plan for apportionment of damages in trilateral cases—one giving weight to the incentive and compensatory objectives of tort law—would have these features:

1. Predators recover from no one and are responsible for the full extent of the victim's damages. If any portion of those damages are paid by a sentinel found to be negligent, the sentinel has a claim in indemnity against the predator.

2. Innocent victims recover from predators and/or negligent sentinels, on the basis of joint and several liability, for the full extent of their injuries. (As noted, sentinels have a claim in indemnity against predators.)

3. Negligent victims recover from predators for the full extent of their injuries. But their suits against negligent sentinels are subject to a defense of comparative fault. In other respects, they are not limited; the fault of the predator is not relevant in this context.

The key to a just resolution of these cases is a repudiation of the limitations on joint and several liability. Those limitations are based on a faulty premise in assuming that each of the multiple tortfeasors should be accountable for no more than its "fair share" of the plaintiff's harm. But if that harm is indivisible, and if it could have been avoided had care

231. See Blazovic, 590 A.2d at 224.
232. See id. at 231-32.
233. See SCHWARTZ, supra note 21, § 5-2.
been taken by any one of the multiple defendants, then the fair share of each is 100%. If in some cases, multiple tortfeasors escape with a lesser share by pursuing opportunities for contribution, the reduction is not a product of justice or sound economic policy. It is a fortuitous byproduct of the budget constraint applicable to all tort litigation. To elevate this accidental dividend to an icon of justice and fairness is to turn the entire tort system on its head.
APPENDIX

OPTIMALITY AND THE PROBABILISTIC NATURE OF NEGLIGENCE LIABILITY

A. Traditional "Hand Formula" Analysis

To understand why comparative fault and related contribution doctrines lead to suboptimal outcomes, it is necessary to examine the economic basis of negligence. Under the "Hand formula," an actor is negligent if $P \times L$ exceeds $B$ where:

- $P$ is the probability of an accident absent care;
- $L$ is the magnitude of expected loss; and
- $B$ is the burden or cost of precaution.\(^{235}\)

For example, an actor is negligent if an accident is expected 10% of the time, the ensuing loss is expected to be $1500, and the actor fails to take precautions costing less than $150. In such event, $P \times L$ (10% x $1500) exceeds $B$ (less than $150). Since a rational actor can escape liability by taking appropriate precautions, it has an incentive to do so. But the actor has no incentive to spend more than $150 on precautions. It gains full protection at the $150 boundary; it need do no more.

From an economic perspective, this outcome is optimal. Expending more than $150 wastes social resources since the expected value of the averted harm is $150. To spend less than $150 also is wasteful because it invites a social harm that could have been averted at a cost less than the expected value of the harm ($150).

But $P \times L$ is almost never the product of a simple multiplication of one $P$ by one $L$. In practice, $P \times L$ is a weighted average of a multiplicity of different possible outcomes. Suppose that a motorist fails to repair a faulty braking system. The cost of doing so is $140; the saving from not doing so is $140. Is the economy a wise one? The faulty brake system has these consequences:

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\(^{235}\) See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).
Ninety percent of the time no accident ensues. Most of the rest of the time, losses are modest. If the actor were to ignore the final contingency—that in one-tenth of one percent of the accidents (.001) losses would be $100,000—the expected $P \times L$ would be $50, far less than the cost of precaution of $140. But that myopic view of $P \times L$ would be shattered when the big accident did occur. Motorists and their insurance companies would have to take notice and either accurately assess $P \times L$ or pay for losses that could have been avoided by precautions fully justified by the probability and magnitude of the risks at issue.

With comparative fault in effect, a motorist might reason that the true $P \times L$ is overstated because, in at least some cases, the injured party also will be at fault and the adverse judgment will be reduced accordingly. Suppose, for example, that the motorist assumes that 30% of the time the injured party will be at fault and that, on those occasions, comparative fault will be assessed at 50% each. If the expected loss is $1500 and if the true $P \times L$ is $150, the actor’s appraisal would look like this:

<table>
<thead>
<tr>
<th>$P$</th>
<th>$L$</th>
<th>$P \times L$</th>
</tr>
</thead>
<tbody>
<tr>
<td>90%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>0.7</td>
<td>1500</td>
<td>105</td>
</tr>
<tr>
<td>0.3</td>
<td>750 (50% of 1500)</td>
<td>22.5</td>
</tr>
<tr>
<td>100%</td>
<td></td>
<td>127.5</td>
</tr>
</tbody>
</table>

Given the prevalence of negligent behavior in our society, and the random nature of such faulty behavior, the motorist’s appraisal cannot be said to be unrealistic. The motorist now has no incentive to spend $140 or even $130 to correct its brake system even though such an expenditure would avert a social harm expected to be $150. But in this
instance, the law does not correct the motorist's misperception. It ratifies that misperception by applying comparative fault, making it more attractive for the motorist to behave negligently rather than non-negligently.

The same analysis holds in the case of contribution among joint tortfeasors. Suppose the motorist assumes that 30% of the time another tortfeasor (possibly the car manufacturer) will be found to be at fault and that, on these occasions, the comparative fault of each will be assessed at 50%. If the expected loss is $1500 and if the true $P \times L$ is $150$, the actor's appraisal would be the same as above:

<table>
<thead>
<tr>
<th>$P$</th>
<th>$L$</th>
<th>$P \times L$</th>
</tr>
</thead>
<tbody>
<tr>
<td>90%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>7</td>
<td>1500</td>
<td>105</td>
</tr>
<tr>
<td>3</td>
<td>750 (50% of 1500)</td>
<td>22.5</td>
</tr>
<tr>
<td>100%</td>
<td></td>
<td>127.5</td>
</tr>
</tbody>
</table>

If the motorist assumes some probability of victim fault and some probability of joint tortfeasor liability, the estimated appraisal of $P \times L$ will be depressed even more. In sum, anything that leads a motorist to perceive that it probably will not confront the full social costs of his actions will lead to a perception of $P \times L$ that is less than the true $P \times L$. The misperception will provide a suboptimal incentive for the motorist to take precautions.

The problem is even more acute in the trilateral cases that are the subject of this Article. In these instances, the liability of the sentinel is contingent upon the misconduct of another (the assailant). In every case, therefore, a joint tortfeasor will be present, and one to whom a major part of the fault will be attributed (say 60%). If liability is several, rather than joint and several, the perception of the sentinel when the expected loss is $1500 and the true $P \times L$ is $150$ will look like this:

<table>
<thead>
<tr>
<th>$P$</th>
<th>$L$</th>
<th>$P \times L$</th>
</tr>
</thead>
<tbody>
<tr>
<td>90%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>10</td>
<td>600 (40% of 1500)</td>
<td>60</td>
</tr>
<tr>
<td>100%</td>
<td></td>
<td>60</td>
</tr>
</tbody>
</table>

In the case of comparative fault and contribution among joint tortfeasors, the perceived $P \times L$ is less than the true $P \times L$ but not by an inordinate amount. Under the assumptions made above, which appear to be within the realm of plausibility, the reduction is from $150$ to $127.50
or a diminution of 15%. But under equally plausible assumptions, the reduction in the trilateral case (absent joint and several liability) is 60% (from $150 to $60). The 15% reduction might not have a major impact on incentives. A 60% reduction is almost certain to have an adverse effect.

B. Critique of the Analysis Normally Employed in Explaining the Efficiency Aspects of Multiparty Fault

The foregoing analysis differs from that normally employed in explaining the efficiency aspects of multiparty fault. Consider the following example offered by Steven Shavell.\(^\text{236}\) There are two tortfeasors, A and B, and the magnitude of the accident in the event of fault by either or both of them is $1000:

<table>
<thead>
<tr>
<th>Levels of Care by Injurers</th>
<th>Costs of Care by Injurers</th>
<th>Accident Probability</th>
<th>Expected Accident Losses</th>
<th>Total Accident Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>A None</td>
<td>B None</td>
<td>8%</td>
<td>80</td>
<td>80</td>
</tr>
<tr>
<td>Care</td>
<td>None</td>
<td>7%</td>
<td>70</td>
<td>76</td>
</tr>
<tr>
<td>None</td>
<td>Care</td>
<td>7%</td>
<td>70</td>
<td>78</td>
</tr>
<tr>
<td>Care</td>
<td>Care</td>
<td>6%</td>
<td>60</td>
<td>74</td>
</tr>
</tbody>
</table>

The efficient solution is for both parties to take care, reducing total accident costs to 74. Under joint and several liability (or under several liability), each party will be motivated to take care. A knows that B can avoid all liability by taking care and thus B will do so; if this happens, A will have expected accident losses of 70 compared with a cost of care of 6. Similarly, B knows that A can avoid all liability by taking care and thus A will do so; if this happens, B will have expected accident losses of 70 compared to a cost of care of 8. Thus, each will take care because each expects the other to do so. (The same reasoning applies to comparative fault. Instead of multiple injurers, A and B are plaintiff and defendant.)

\(^{236}\) See STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 164-67 (1987); see also id. at 14-17. But Shavell recognizes that the suggested outcome may be altered by a number of contingencies. See id. at 167.

Shavell’s analysis is typical of law and economics scholars. See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 186-89, 204-07 (5th ed. 1998).
The problem with this approach is that it abandons the probabilistic nature of negligence liability. It assumes that each party knows to a certainty what the other will do. Reality is otherwise: negligence abounds. The approach taken in this Article reflects that reality and rejects the hypothetical world of those who assume that, with everyone behaving rationally, negligence simply ceases to exist.