

NOTES

COMPARATIVE FAULT AS A TOOL TO NULLIFY THE DUTY TO PROTECT: APPORTIONING LIABILITY TO A NON-PARTY INTENTIONAL TORTFEASOR IN *STELLAS v. ALAMO RENT-A- CAR, INC.*

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Under Florida's comparative fault statute, should the jury verdict form include an intentional tortfeasor for purposes of apportioning fault in causes of action based on negligent failure to protect from criminal attack?

I. INTRODUCTION

In the landmark decision *Fabre v. Marin*,¹ Florida's Supreme Court revolutionized Florida tort law while leaving open some important questions.² One particularly troublesome issue created by *Fabre* is whether Florida juries should consider the fault of intentional tortfeasors when apportioning liability among multiple

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1. 623 So. 2d 1182 (Fla. 1993).

2. See, e.g., Thomas S. Edwards, Jr. & Sarah Helene Sharp, *Fabre/Allied Signal/Dosdourian Trilogy Questions Answered, More Created*, FLA. B.J., Apr. 1994, at 25-28 (observing that *Fabre* left open questions of how to set off settlements, the validity of high-low agreements, and whether the jury should include intentional tortfeasors when apportioning liability to non-parties).

tortfeasors under Florida's comparative fault statute.³ The *Fabre* court opened the door to the possibility of including non-party intentional tortfeasors on verdict forms by holding that juries could consider the fault of negligent non-party tortfeasors when apportioning liability among party defendants.⁴ This marks a dramatic shift from the common law, which excluded intentional tortfeasors from the computation of liability among their negligent counterparts.⁵

Recently, Florida's Third District Court of Appeal decided that *Fabre* authorized such a dramatic departure from the common law. In *Stellas v. Alamo Rent-a-Car, Inc.*,⁶ the court included a criminal assailant on the verdict form, thereby allowing the jury to consider the criminal when it apportioned liability in a negligent failure-to-warn case.⁷ The court justified its position by disowning the common-law distinction between negligent and intentional acts, and embracing the statute's "clear" purpose to promote a fairer distribution of liability.⁸ This decision caused a split among Florida's district courts⁹ — a split the Florida Supreme Court has promised to soon resolve.¹⁰

This Note takes the position that the *Stellas* court erred when it allowed a jury to compare the fault of an intentional criminal at-

3. See FLA. STAT. § 768.81 (1995). In *Fabre*, the supreme court allowed the jury to consider the percent fault of a plaintiff's husband in causing an auto accident, even though the interspousal immunity doctrine barred his inclusion as a party in the suit. See *Fabre*, 623 So. 2d at 1185.

4. See *Fabre*, 623 So. 2d at 1185. "Clearly, the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants." *Id.*

5. See *infra* note 59.

6. 673 So. 2d 940 (Fla. 3d Dist. Ct. App. 1996).

7. See *id.* at 941.

8. See *id.* at 942-43.

9. Compare *Stellas v. Alamo Rent-a-Car, Inc.*, 673 So. 2d 940 (Fla. 3d Dist. Ct. App. 1996), with *Days Inn of Am., Inc. v. Maus*, No. 96-3125, 1997 WL 345312, at *1 (Fla. 1st Dist. Ct. App. June 25, 1997) (holding that the jury should not consider an intentional tortfeasor's fault when apportioning liability in a negligence action and certifying the question to the Florida Supreme Court), *Wal-Mart Stores, Inc. v. Coker*, No. 96-2416, 1997 WL 338839, at *2 (Fla. 1st Dist. Ct. App. June 23, 1997), *Slawson v. Fast Food Enters.*, 671 So. 2d 255, 259 (Fla. 4th Dist. Ct. App. 1996) (holding that Florida's comparative fault statutes apply only to negligent conduct), and *Wal-Mart Stores, Inc., v. McDonald*, 676 So. 2d 12, 18 (Fla. 1st Dist. Ct. App. 1996) (holding that comparative fault does not apply to intentional conduct).

10. See *Stellas v. Alamo Rent-a-Car, Inc.* 683 So. 2d 485 (Fla. 1996) (granting review of *Stellas v. Alamo Rent-a-Car, Inc.*, 673 So. 2d 940 (Fla. 3d Dist. Ct. App. 1996)).

tacker with that of a defendant charged with negligent failure to warn. The Note will first explain the historical context of Florida's comparative fault statute and set forth the court's rationale. The Note will then examine the court's decision in light of principles of tort law and comparative fault in three critical areas: 1) whose fault is to be compared under comparative fault, 2) what factors are considered when comparing fault, and 3) why the intentional tortfeasor is excluded from the comparison. The Author argues that the jury should apportion liability among only those entities determined to be the legal cause of the plaintiff's injury. Likewise, when comparing fault, the jury should compare only negligence, and not causation-in-fact. This Note will re-examine the philosophical underpinnings of the common-law bar to apportioning liability between negligent and intentional actors, and will suggest that some "intentional" torts may properly be compared to negligence. Likewise, this Note will explain that when a negligent act combines with an intentional act to produce injury *outside a special relationship*, the negligent party's liability can be restricted to his or her percentage of fault without any comparison to the intentional act. Finally, the Note will argue that policy considerations regarding public safety in Florida's tourist-driven economy support the continued exclusion of intentional tortfeasors from jury verdict forms in negligent security and failure to warn cases.

II. FACTS

The plaintiffs, Mr. and Mrs. Stellas and their daughter, rented a car from Alamo's rent-a-car agency in Orlando and made a wrong turn off of the highway while returning the car to Alamo's Miami office.¹¹ While the plaintiffs were stopped for a traffic light, an assailant smashed the window on the passenger side, grappled with Mrs. Stellas, and fled with her purse.¹² Thereafter, the Stellas sued the rental agency for its negligent failure to warn them about the dangers of exiting into a high-crime area from a Miami freeway.¹³

After the jury found Alamo liable at trial, the judge allowed the

11. *See Stellas*, 673 So. 2d at 941.

12. *See id.*

13. *See id.*

jury to apportion fault between Alamo and Mrs. Stellas' assailant, a non-party to the proceedings.¹⁴ The Stellas appealed, charging that the trial court erred in allowing the jury to include a non-party intentional tortfeasor in allocating damages.¹⁵ However, the appellate court affirmed and expressly adopted¹⁶ the reasoning set forth by Judge Richard W. Ervin, III in *Department of Corrections v. McGhee*.¹⁷ The Third District Court of Appeal thus took a position contrary to Florida's First and Fourth Districts.¹⁸ HELD: Under Florida's comparative fault statutes, the trial court must include an intentional tortfeasor on the jury form in a cause of action for negligent failure to warn.¹⁹ The jury apportioned ninety percent of the fault to the criminal attacker since the court included him on the verdict form, thereby reducing Alamo's liability to only ten percent of the total damage award.²⁰

To support its decision, the *Stellas* court reasoned that the language of the comparative fault statute revealed the drafters' unmistakable intent to limit a negligent defendant's liability to his own pro-rata contribution to the "whole fault."²¹ The court consulted a dictionary and concluded that the legislature intended the "whole fault" to include all those entities that were causes-in-fact of the plaintiff's injury instead of those determined to be the legal cause of the injury.²² Having thus determined that legislative intent was "clear from language used in the statute," the court declined to look any further to justify its departure from legal causation as a basis of liability.²³

14. *See id.*

15. *See id.*

16. *See id.* at 942.

17. 653 So. 2d 1091 (Fla. 1st Dist. Ct. App. 1995). In *McGhee*, the majority held that the State owed no duty of care to protect the plaintiff from criminal attack by escaped prison inmates. *See id.* at 1092. Judge Ervin maintained that the State owes a duty to protect the public from injuries at the hands of escaped prisoners based on the State's special relationship as custodian of prisoners. *See id.* at 1098 (Ervin, J., concurring in part and dissenting in part). His comments regarding comparative fault were in response to the appellee's cross-appeal from the lower court's ruling requiring the jury to apportion damages between both the criminals and the state. *See id.* at 1099.

18. *See supra* note 9.

19. *See Stellas*, 673 So. 2d at 943 (concluding that liability equates with fault).

20. *See id.* at 945 (Jorgenson, J., dissenting).

21. *See id.* at 942-43.

22. *See infra* notes 132-33 and accompanying text.

23. *Stellas*, 673 So. 2d at 942 (citing *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984), for

III. HISTORICAL OVERVIEW

The court would have been better served had it looked further and considered the history of Florida's comparative fault statute. The history of comparative fault in Florida reveals that the legislature intended to include only those entities determined to be the legal cause of the plaintiff's injury as part of the "whole fault" picture.²⁴

Until 1973, Florida courts barred plaintiffs from recovering damages from negligent tortfeasors if their own negligence contributed in any way to their injuries.²⁵ Despite what has been described as "extraordinary resistance" to judicial abrogation of the contributory negligence bar,²⁶ the Florida Supreme Court forged ahead and, in the landmark decision *Hoffman v. Jones*,²⁷ adopted pure comparative negligence.²⁸

In adopting comparative negligence, the court declared that its purpose was twofold: 1) "[t]o allow a jury to apportion fault as it sees fit between negligent parties whose negligence was part of the legal and proximate cause of any loss or injury"; and 2) "[t]o apportion the

the rule that, when the language of a statute is clear and unambiguous and conveys a clear and definite meaning, the court must give the statute its plain and obvious meaning). Whether the term "fault" as used in the statute refers to "legal fault" or "causal fault" is an ambiguity that the dictionary cannot cure. See discussion *infra* part V(A)-(C).

24. See *infra* text accompanying notes 161-71.

25. The origin of the common-law doctrine that contributory negligence completely bars recovery is not fully understood, but can be partially explained as an outgrowth of distrust of juries, a protective measure for business in an emerging industrial economy, and the analytical difficulty presented by apportioning liability for a single indivisible injury. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 65, at 452-53 (5th ed. 1984).

26. See William J. McNichols, *Should Comparative Responsibility Ever Apply to Intentional Torts?*, 37 OKLA. L. REV. 641, 649 (1984).

27. 280 So. 2d 431 (Fla. 1973).

28. *Id.* at 438. Pure comparative negligence allows plaintiffs to recover even when their own negligence exceeds that of the defendant. See VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE § 3-2, at 58-59 (3d ed. 1994). Partially negligent plaintiffs' damages are reduced by the percentage of their contribution to their injuries. See *id.* Other jurisdictions employ a modified version of comparative fault, the most popular of which is the 50% system (also known as the Wisconsin system). See *id.* § 3-5, at 78. Under the 50% system, if the plaintiff's own negligence is equal to or greater than the defendant's, the plaintiff cannot recover. See *id.* § 3-5(b), at 80. In most jurisdictions applying the 50% system, the plaintiff is denied recovery only if his negligence exceeds that of the defendant. See *id.*

total damages resulting from the loss or injury according to the proportionate fault of each party."²⁹ Through comparative negligence, the court sought to ameliorate the "harsh" effects of the contributory negligence bar.³⁰

While the *Jones* decision provided relief to plaintiffs, Florida courts continued to apply the common-law rule barring contribution between joint tortfeasors.³¹ Thus, defendants still faced the threat that the plaintiff would allocate the entire burden of an award on one of two or more joint tortfeasors who were adjudicated jointly and severally liable.³² In June 1975,³³ however, the Florida Legislature enacted Florida's Uniform Contribution Among Tortfeasors Act.³⁴ The Act provides relief to defendants who pay more than their pro-rata share of a plaintiff's recovery by allowing them to sue other jointly liable parties for contribution.³⁵ Among the restrictions placed on the right of contribution, the Act denies a defendant who acts intentionally the right to sue for contribution.³⁶

29. *Hoffman*, 280 So. 2d at 439.

30. *See id.* at 437.

31. *See* *Lincenberg v. Issen*, 318 So. 2d 386 (Fla. 1975) (discussing the common-law rule and rejecting it).

32. *See* COMPARATIVE NEGLIGENCE AND CONTRIBUTION IN FLORIDA § 2.2 (The Florida Bar, Continuing Legal Educ. Comm. 4th ed. 1992) [hereinafter COMPARATIVE NEGLIGENCE IN FLORIDA].

33. *Lincenberg* was pending at the time the legislature enacted the contribution statute, and the court cited the statute in its opinion. *See Lincenberg*, 318 So. 2d at 392. The supreme court subsequently stated that "a joint tortfeasor has no right to contribution except that provided by statute." *Florida Patient's Compensation Fund v. St. Paul Fire & Marine Ins. Co.*, 559 So. 2d 195, 197 (Fla. 1990). *See generally* COMPARATIVE NEGLIGENCE IN FLORIDA, *supra* note 32, § 2.3.

34. 1975 Fla. Laws ch. 75-108.

35. The Florida Uniform Contribution Among Tortfeasors Act provides in part:

(2) RIGHT TO CONTRIBUTION

(a) Except as otherwise provided in this act, when two or more persons become jointly or severally liable in tort for the same injury to person or property, or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(c) There is no right of contribution in favor of any tortfeasor who has intentionally (willfully or wantonly) caused or contributed to the injury or wrongful death.

FLA. STAT. § 768.31(2)(a)-(c) (1995).

36. *See id.* § 768.31(2)(c).

The comparative fault statute provided some relief for defendants held jointly and severally liable,³⁷ but did not relieve the burden of financially responsible defendants who shared liability with insolvent or indigent defendants.³⁸ In 1986, the Florida Legislature attempted to ameliorate the situation by enacting a comparative fault statute.³⁹ The comparative fault statute does away with joint and several liability for damages exceeding \$25,000, and for economic damages, when the plaintiff's fault exceeds that of an individual defendant.⁴⁰ The statute explicitly exempts those causes of action based on intentional torts.⁴¹ The statute does not abrogate the

37. Joint and several liability provides that one defendant may be required to pay the entire award even when a verdict allocates more fault to other defendants. *See* COMPARATIVE NEGLIGENCE IN FLORIDA, *supra* note 32, § 2.5.

38. *See, e.g.*, *Walt Disney World Co. v. Wood*, 515 So. 2d 198 (Fla. 1987). In *Wood*, the jury apportioned liability for injuries suffered by the plaintiff when her fiancée rammed his car into hers while driving in Disney's grand prix race car attraction as follows: 1% to Disney, 85% to the fiancée, and 14% to the plaintiff. Because Disney and the fiancée were jointly and severally liable, the court required Disney to pay 86% of the judgment. *See id.* at 199.

39. 1986 Fla. Laws ch. 86-160.

40. The Comparative Fault Statute states that:

(3) APPORTIONMENT OF DAMAGES

In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

(4) APPLICABILITY

(a) This section applies to negligence cases. For purposes of this section, "negligence cases" includes, but is not limited to, civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories. In determining whether a case falls within the term "negligence cases" the court shall look to the substance of the action and not the conclusory terms used by the parties.

(b) This section does not apply to any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon any intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895.

(5) APPLICABILITY OF JOINT AND SEVERAL LIABILITY

Notwithstanding the provisions of this section, the doctrine of joint and several liability applies to all actions in which the total amount of damages does not exceed \$25,000.

FLA. STAT. § 768.81 (1995).

41. *See id.* § 768.81(4)(b).

right to contribution in joint and several liability cases.⁴²

The contribution statute's ambiguous language, however, has created confusion regarding its application.⁴³ A significant area of confusion surrounds the question of whose fault the jury is to consider when apportioning damages. Specifically, when apportioning liability for damages, should juries consider those persons who contribute to a plaintiff's injury but who are not parties to the lawsuit? Courts have targeted three important classes of non-party defendants for inclusion on the verdict form: defendants immune from suit,⁴⁴ defendants who settle before verdict,⁴⁵ and intentional tortfeasors in negligence cases based on special relationships.⁴⁶

The Florida Supreme Court has held that juries may consider non-parties fitting into either the first or second of the above categories when apportioning liability.⁴⁷ Whether the jury must include the intentional tortfeasor in an action based on a negligent party's duty to protect against the tortfeasor remains an open question.⁴⁸

42. *See Fabre*, 623 So. 2d at 1186 (observing that the enabling statute to the Tort Reform Act requires that conflicts between the comparative fault statute and pre-existing law are to be solved in favor of pre-existing law); *Gurney v. Cain*, 588 So. 2d 244, 245-46 (Fla. 4th Dist. Ct. App. 1991) (holding that when the wrongful death statute imposed joint and several liability, the comparative fault statute did not apply and the defendants could therefore pursue contribution).

43. For example, the statute's use of the word "party" was the subject of conflict between the Fourth and Fifth District Courts of Appeal. *See Messmer v. Teacher's Ins. Co.*, 588 So. 2d 610, 612 (Fla. 5th Dist. Ct. App. 1991) (holding that the jury must include parties immune from suit when apportioning liability); *Dosdourian v. Carsten*, 580 So. 2d 869, 871 (Fla. 4th Dist. Ct. App. 1991) (suggesting that the jury is not required to consider non-party defendants who have settled or are immune when apportioning liability), *quashed by* 624 So. 2d 241 (Fla. 1993). Likewise, the statute's use of "fault" has caused the confusion that is the subject of this Note.

44. *See Fabre*, 623 So. 2d at 1187 (holding that a non-party who contributed to an auto accident, but was barred from inclusion in the lawsuit because of interspousal immunity, should be included on the verdict form); *Allied-Signal, Inc. v. Fox*, 623 So. 2d 1180, 1182 (Fla. 1993) (holding that the negligence of a non-party employer immunized from a negligence action by the worker's compensation statute should be considered by the jury in apportioning liability).

45. *See Wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 659 So. 2d 249, 254 (Fla. 1995) (holding that the settling defendant's percentage of fault must be included in the whole fault picture and the amount of settlement used as a set-off against the total damage award).

46. *See Stellas*, 673 So. 2d at 941 (holding that intentional criminal conduct of a non-party tortfeasor is properly compared to negligence of party whose duty it is to protect plaintiff from criminal attack).

47. *See supra* notes 44-45.

48. However, the Florida Supreme Court has agreed to review *Stellas*. *See Stellas v. Alamo Rent-a-Car, Inc.*, 683 So. 2d 467 (Fla. 1996).

The problem of apportioning liability between negligent and intentional tortfeasors in the same cause of action encompasses a fairly narrow set of circumstances. In most cases in which an intentional tortfeasor injures a plaintiff, comparative fault does not apply because the statute explicitly excepts from comparative fault those actions based on intentional torts.⁴⁹ Likewise, a defendant found liable for an intentional tort may not seek contribution from other negligent parties in the case.⁵⁰ Similarly, defendants whose negligence is superseded by unforeseeable intervening intentional tortfeasors are not held liable for injuries inflicted by the intentional tortfeasors.⁵¹

The statute presents problems of interpretation in only those cases when a defendant's negligence either combines with or precedes an intentional tortfeasor's actions so that both contribute to produce a single injury to the plaintiff.⁵² These cases fall into two categories: 1) negligence cases based on breach of a duty to protect due to a special relationship,⁵³ and 2) negligence cases involving no special relationship, where the negligence of one defendant combines with the intentional act of another to produce a single injury.⁵⁴ In neither case does the law specifically address whether the court

49. See FLA. STAT. § 768.81(4)(b) (1995); see also *Cruise v. Graham*, 622 So. 2d 37, 40 (Fla. 4th Dist. Ct. App. 1993) (holding that comparative fault cannot be used to reduce a judgment awarded on the basis of intentional tort of fraud); *Department of Corrections v. Hill*, 490 So. 2d 118, 119 (Fla. 3d Dist. Ct. App. 1986) (holding that plaintiff's contributory negligence was no defense to a charge of false imprisonment and, therefore, that defendant was liable for the full amount of the damage award). Some commentators and courts have begun to question the policy of denying the benefits of comparative fault to intentional tortfeasors whose actions are not purposeful or malicious. See *infra* notes 242-52 and accompanying text.

50. See FLA. STAT. § 768.31(2)(c) (1995); see also *Publix Supermkts., Inc. v. Austin*, 658 So. 2d 1064, 1067 (Fla. 5th Dist. Ct. App. 1995) (reversing lower court's ruling to allow the jury to reduce Publix's liability for intentional sale of alcohol to a minor by the minor's percent negligence for subsequently injuring plaintiff in an auto collision).

51. See *Vining v. Avis Rent-a-Car Sys., Inc.*, 354 So. 2d 54, 56 (Fla. 1977).

52. See *Bach v. Florida R/S, Inc.*, 838 F. Supp. 559, 561 (M.D. Fla. 1993) (observing that Florida caselaw provides little guidance in interpreting the comparative fault statute).

53. This is the situation in *Stellas*. See text accompanying *infra* notes 175-79.

54. To illustrate, consider a three-car collision in which the plaintiff and one defendant are each partially negligent, and a third defendant has acted intentionally. No special relationship forms a duty requiring the negligent defendant to protect the plaintiff from the intentional actor. See Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. PUGET SOUND L. REV. 1, 27 (1992).

should allow the jury to reduce a negligent party's liability by apportioning to the intentional tortfeasor his percentage share of fault.⁵⁵

Courts grappling with this problem have done so largely in the context of cases brought in the first category, for negligent security or failure to warn of criminal attack.⁵⁶ Though arguably not relevant in these cases,⁵⁷ Florida courts most frequently employ the common-law distinctions between intentional and negligent conduct in deciding the issue.⁵⁸

Under the common law, courts refused to compare intentional to negligent conduct because the former was considered "different in kind," and thus incomparable.⁵⁹ This distinction was considered necessary to: 1) ameliorate the harsh effects of the contributory negligence bar on plaintiffs injured by intentional wrongdoing;⁶⁰ and, 2) to deter such wrongdoing by holding the wrongdoers fully liable

55. The statute only precludes comparing the fault of intentional and negligent tortfeasors in actions based on intentional torts. See FLA. STAT. § 768.81(4)(b) (1995); see also *supra* note 40. The contribution statute precludes an intentional tortfeasor from reducing his liability by the percentage fault of a negligent party — either plaintiff or co-defendant. See FLA. STAT. § 768.31 (1995). Both the contribution and comparative fault statutes are silent, however, as to whether negligent parties may reduce their liability by an intentional tortfeasor's percentage share of fault. See generally FLA. STAT. § 768.81 (1995).

56. See, e.g., *Wal-Mart Stores, Inc. v. McDonald*, 676 So. 2d 12, 22 (Fla. 1st Dist. Ct. App. 1996) (refusing to allow the jury to reduce Wal-Mart's liability for negligent security by the fault of a criminal assailant who shot the plaintiff in Wal-Mart's parking lot); *Stellas*, 673 So. 2d at 941 (allowing the jury to reduce Alamo's liability for failure to warn by apportioning 90% of fault to a non-party criminal assailant pursuant to a "smash and grab" on a Miami street); *Slawson v. Fast Food Enters., Inc.*, 671 So. 2d 255, 261 (Fla. 4th Dist. Ct. App. 1996) (refusing to allow the jury to reduce Burger King's liability for negligent security by the fault of a criminal assailant who raped the plaintiff in restaurant's lady's room).

57. The scope of the negligent defendant's duty defines the scope of liability in cases where a special relationship forms a duty to protect. The common-law approach distinguishing between intentional and negligent torts is only applicable in the second category of cases.

58. See *supra* note 9.

59. The common law governed the conduct of negligent and intentional tortfeasors according to separate legal standards. See *Stellas*, 673 So. 2d at 943 (Jorgenson, J., dissenting). See generally KEETON ET AL., *supra* note 25, § 65, at 462. "[T]he defense [of contributory negligence] has never been extended to such intentional torts. Such conduct differs from negligence not only in degree but in kind, and in the social condemnation attached to it." *Id.*

60. See Jake Dear & Steven E. Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations*, 24 SANTA CLARA L. REV. 1, 11 (1984).

regardless of the negligence of other parties.⁶¹ Upon Florida's adoption of pure comparative fault, courts no longer had to rely on the "different in kind" principle to provide recovery for those plaintiffs who had been intentionally injured.⁶² Likewise, Florida's contribution laws prevented an intentional wrongdoer from abrogating his own liability by shifting a portion of the blame to negligent parties.⁶³ Thus, through comparative fault and contribution, courts accomplished the twin goals of recovery and retribution without the necessity of allegiance to the "different in kind" principle.

Absent these policy reasons for maintaining the distinction, some commentators and courts reject as inequitable a system that denies the benefits of comparative fault to intentional tortfeasors.⁶⁴ The theory underpinning these positions is that negligence and some intentional conduct are rightly comparable because they differ only in degree, and not "in kind."⁶⁵ Proponents of this theory support allowing intentional tortfeasors in limited causes of action to reduce their liability by the percentage that a plaintiff's negligence contributes to her injuries.⁶⁶ Likewise, for cases in the second category,⁶⁷

61. See *Bartle v. Nutt*, 29 U.S. (4 Pet.) 184, 189 (1830). Intentional wrongdoers "must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other; or to equalize the benefits or burthens which may have resulted by the violation of every principle of morals and of laws." *Id.*

62. Regardless of whether a court accepted the principle, the statute allowed a partially negligent plaintiff to recover in negligence actions. See FLA. STAT. § 768.81 (1995).

63. See FLA. STAT. § 768.31(2)(c) (1995).

64. See, e.g., *Spivey v. Battaglia*, 258 So. 2d 815, 817 (Fla. 1972) (observing that "the distinction between intent and negligence boils down to a matter of degree"); *Blazovic v. Andrich*, 590 A.2d 222, 231 (N.J. 1991) (rejecting the common-law distinction as unfair); *Dear & Zipperstein*, *supra* note 60, at 20 (advocating that courts abandon the distinction and look at the nature of the conduct); *Sisk*, *supra* note 54, at 24 (commenting that adherence to the distinction has unfairly precluded negligent tortfeasors from reducing their liability when mere coincidence makes an intentional tortfeasor a concurrent cause).

65. See *Blazovic*, 590 A.2d at 231 (observing that the RESTATEMENT distinguishes intentional from wanton and willful conduct according to the degree of certainty that a given behavior will result in injury to another); RESTATEMENT (SECOND) OF TORTS § 8A cmt. b & § 500 cmt. a (1965) [hereinafter RESTATEMENT]; see also *Dear & Zipperstein*, *supra* note 60, at 2 (arguing that intentional torts "reflect a continuum of conduct in violation of a singular social norm" that acts to protect everyone).

66. Some commentators argue that nuisance is intentional conduct that is properly comparable to negligence. See *Dear & Zipperstein*, *supra* note 60, at 32-38 (advocating that the plaintiff's percentage of negligence reduce a defendant's liability in cases of nuisance, on the theory that, while nuisance is an intentional tort, it does not rise to the level of intent that warrants punitive treatment); see also *Blazovic*, 590 A.2d at 230 (observing that strictly liable defendants are allowed to seek contribution from negligent co-

these advocates argue that precluding a negligent defendant from reducing his liability by the percentage fault of an intentional actor makes no sense.⁶⁸

The debate over “different in kind” versus “different in degree” has impacted the allocation of liability in negligent failure to protect cases with predictably disparate results.⁶⁹ Decisions emanating from courts that confine their analyses to determining what philosophy to embrace produce predictable results of little real precedential value.⁷⁰ The recent New Jersey Supreme Court decision⁷¹ relied upon by the *Stellas* court highlights the analytical imprecision characteristic of the approach.⁷²

In *Blazovic v. Andrich*,⁷³ a patron brought a negligence action against a bar-owner for inadequate security after he was injured in a parking lot fight that the patron admitted to provoking.⁷⁴ The court clearly did not want to saddle the bar owner with one hundred percent of the liability on such facts.⁷⁵ The court devoted eight pages⁷⁶ to the “different in degree” theory, thereby justifying the holding that New Jersey's comparative fault statute applied to in-

defendants).

67. See *supra* note 54 and accompanying text.

68. See Sisk, *supra* note 54, at 21–31.

69. Compare *Blazovic*, 590 A.2d at 233 (holding that intentional conduct is rightly comparable to negligence in some negligent security cases), with *Gould v. Taco Bell*, 722 P.2d 511, 517 (Kan. 1986) (holding comparative fault inapplicable to causes of action involving intentional torts and negligence).

70. See *infra* text accompanying notes 201–08. This Author believes no decision regarding apportioning liability is well-reasoned without a consideration of issues of duty and legal causation. See, e.g., *Pamela B. v. Hayden*, 31 Cal. Rptr. 2d 147, 150–54 (Cal. Ct. App. 1994) (discussing issues of duty and causation as predicates for liability in negligent security cases).

71. See *Blazovic*, 590 A.2d at 222.

72. See *Stellas*, 673 So. 2d at 941; see also *infra* note 98 and accompanying text.

73. 590 A.2d 222 (N.J. 1995).

74. See *id.* at 224. In *Blazovic*, both the plaintiff and his attackers had been customers in the Plantation Restaurant and Lounge before their fight in the parking lot. See *id.* The plaintiff sued the restaurant because it had served his attacker alcohol prior to the fight, and failed to adequately light the parking lot. See *id.* Although both parties to the fight agreed the plaintiff did not initiate the violence, the plaintiff likely provoked the attack by cursing his would-be attacker after he observed his attacker throwing rocks at a sign. See *id.*

75. The court took pains to distinguish this case from other cases in which a “commercial-property owner's . . . negligence facilitated the commission of a criminal assault on a patron.” *Id.* at 233.

76. See *Blazovic*, 590 A.2d at 226–33.

tentional conduct.⁷⁷ Then, apparently recognizing that this reasoning could lead to the “diminution of a duty of care” if applied in other cases, the court neutralized the effect of its opinion by limiting its application to “the record before us.”⁷⁸ Other courts reach beyond the debate over theories of conduct to analyze issues relevant to determining whose fault to include when allocating liability.

In *Slawson v. Fast Food Enterprises, Inc.*,⁷⁹ the court sought to ascertain legislative intent through an interpretation of the statutory language that excluded from comparative fault “any action based upon an intentional tort.”⁸⁰ In deciding whether to reduce a restaurant's liability by comparing its negligence to criminal conduct, the *Slawson* court followed the statutory mandate⁸¹ and looked at the “substance of the action.” The court concluded that, while brought as a negligence case, the action was based on an intentional tort.⁸²

Similarly, in *Wal-Mart Stores, Inc. v. McDonald*,⁸³ the court held that a negligent security case brought by a plaintiff who had been shot in a store parking lot was “based on an intentional tort” and was therefore precluded from comparative fault.⁸⁴ Additionally, the *Wal-Mart* court advanced a well-documented argument⁸⁵ that nei-

77. *See id.* at 231. “[W]e view intentional wrongdoing as ‘different in degree’ By viewing the various types of tortious conduct in that way, we adhere most closely to the guiding principle of comparative fault — to distribute the loss in proportion to the respective faults of the parties causing that loss.” *Id.*

78. The court recognized that it would be improper to impose comparative negligence principles in “those cases” because it would lead to a dilution of the duty of care. *See id.* at 233. Furthermore, the court stated that “[o]n this record, however, we are unable to agree that legal principle should be applied in this case.” *Id.*; *see also infra* note 265 and accompanying text.

79. 671 So. 2d 255 (Fla. 4th Dist. Ct. App. 1996).

80. *See id.* at 258 (quoting FLA. STAT. § 768.81(4)(b) (1995)).

81. Section 768.81(4)(a) of Florida's comparative fault statute reads in part: “In determining whether a case falls within the term ‘negligence cases,’ the court shall look to the substance of the action and not the conclusory terms used by the parties.” FLA. STAT. § 768.81(4)(a) (1995).

82. *See Slawson*, 671 So. 2d at 258.

83. 676 So. 2d 12 (Fla. 1st Dist. Ct. App. 1996).

84. *See id.* at 22.

85. The court observed that statutes “in derogation of the common law . . . must be strictly construed in favor of the common law.” *Id.* at 17. The court noted that the common law anticipated comparison of fault only between joint tortfeasors. Because joint tortfeasors are those whose *negligence* combines to produce injury, the intentional tortfeasor could not be included in the whole fault contributing to an accident. *See id.* at 16–17.

ther the legislature nor the *Fabre* court envisioned including intentional tortfeasors within the purview of comparative fault.⁸⁶ According to the *Wal-Mart* court, the term “fault” as used in the statute was meant to include only negligence.⁸⁷ The supreme court’s stated purpose in *Hoffman v. Jones*,⁸⁸ as well as the language of *Fabre*,⁸⁹ provided the *Wal-Mart* court the unequivocal support it required to exclude the criminal assailant from the verdict form.⁹⁰

Unfortunately, courts tend to ignore issues of duty and legal causation when seeking to define the meaning of “fault” within the comparative fault statutes.⁹¹ By opening up the possibility that “fault” can be allocated to persons who owe no legal duty,⁹² the courts have given themselves a powerful tool to redesign the tort system.⁹³ If fault is not a product of the cause of action, but a creature of philosophical constructs and personal notions of fairness,

86. See *Wal-Mart*, 676 So. 2d at 18, 20.

87. See *id.* at 22.

88. 280 So. 2d 431 (Fla. 1973). See *supra* text accompanying note 29.

89. See 623 So. 2d at 1185 (speaking of fault in terms of an “accident”).

90. In his concurring opinion, Judge Webster consulted the staff analyses prepared for both Florida’s Senate and House of Representatives in preparation for enactment of the comparative fault statute. See *Wal-Mart*, 676 So. 2d at 23 (Webster, J., concurring). Noting that “staff analyses of legislation should be accorded significant respect in determining legislative intent.” Judge Webster concluded that “section 768.81 was intended to do two things, and nothing more: 1) to codify the law regarding comparative negligence as it then existed in the state; and 2) to abolish, subject to limited exceptions, the common-law doctrine of joint and several liability in negligence cases.” *Id.* (quoting Department of Env’tl. Regulation v. SCM Glidco Organics Corp., 606 So. 2d 722, 725 (Fla. 1st Dist. Ct. App. 1992)).

91. See, e.g., *Stellas*, 673 So. 2d at 942–43 (holding that the proper determination of whose fault to include when applying comparative fault is a product of discovering legislative intent from the clear language of the statute).

92. See *id.* (allowing a criminal attacker to reduce a negligent party’s liability when the criminal attacker had not breached the duty to protect that defined the cause of action); *Pamela B.*, 31 Cal. Rptr. 2d at 160 (holding that a rapist must be included on the verdict form when deciding percent liability of an apartment complex found by the jury to be the legal cause of the rape).

93. This power should not be underestimated. For example, in *Pamela B.*, the California Court of Appeal did not agree with the California Supreme Court’s decision that upheld causes of action for negligent security. See 31 Cal. Rptr. 2d at 152. The appellate court argued that in such cases the criminal attacker should be considered an intervening and superceding cause breaking the chain of causation. See *id.* at 151. In *Pamela B.*, the jury had awarded a rape victim \$1.2 million and apportioned liability 95% to the landlord, 4% to the rapist, and 1% to his accomplice. See *id.* at 149. Stating that “we know a blatantly unfair, inequitable and unsupported apportionment of fault when we see it,” the court remanded the case to the trial court for a new apportionment of damages that allocated to the criminal assailant “most if not all the blame.” *Id.* at 160.

then fault can be fashioned to justify whatever result the court is predisposed to embrace.⁹⁴ Adopting this analytical framework has thus had the pernicious effect of allowing courts to use comparative fault to undermine juries' allocation of legal causation.⁹⁵ Particularly, in negligence cases based on a duty to protect another from criminal attack, courts have used comparative fault to reduce the duty to a nullity by requiring juries to include the criminal in allocating fault.⁹⁶

IV. THE STELLAS COURT'S ANALYSIS

The *Stellas* court's opinion is an amalgam⁹⁷ of Judge Ervin's dissent in *Department of Corrections v. McGhee*,⁹⁸ the New Jersey Supreme Court's opinion in *Blazovic v. Andrich*,⁹⁹ and its own rationale.¹⁰⁰ These opinions flow from the premise that the principle purpose of comparative fault is to achieve a fairer distribution of loss in

94. For example, in *Blazovic*, the jury found that the defendant bar-owner's negligent failure to light his parking lot was the legal cause of the plaintiff's injuries. *See* 590 A.2d at 232. The court, however, found that the "causal connection between [defendant's] alleged negligence and the combined misconduct of plaintiff and the individual defendants was [in]sufficient to invoke the rationale" behind other failure-to-provide-security cases. *Id.* at 233. The court's solution was to remand for a new trial on the issue of liability in which the jury was required to include the intentional tortfeasor when allocating fault. *See id.* at 233-34.

95. *See supra* notes 93-94.

96. According to the RESTATEMENT, "[t]o deny recovery because the other's exposure to the very risk from which it was the purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity." RESTATEMENT, *supra* note 65, § 449 cmt. b.

97. The *Stellas* court declared that "[w]e adopt and embrace Judge Ervin's analysis of the present issue . . . as if it were our own opinion." *Stellas*, 676 So. 2d at 942 (adopting *Department of Corrections v. McGhee*, 653 So. 2d 1091 (Fla. 1st Dist. Ct. App. 1995) (Ervin, J., concurring in part and dissenting in part)). In his dissenting opinion, Judge Ervin was "greatly persuaded by the cogent analysis of the Supreme Court of New Jersey in *Blazovic v. Andrich*, 590 A.2d 222 (N.J. 1991), which appears to be in harmony with the spirit of Florida's comparative negligence law." *McGhee*, 653 So. 2d at 1101 (Ervin, J., concurring in part and dissenting in part). In the text of this Note, therefore, the Author treats the arguments presented in all three opinions as the product of the *Stellas* court and will refer to the amalgamated opinion as emanating from the "court." The reader may refer to the footnotes to ascertain from which court a particular argument originated.

98. 653 So. 2d 1091, 1093 (Fla. 1st Dist. Ct. App. 1995) (Ervin, J., concurring in part and dissenting in part).

99. 590 A.2d 222 (N.J. 1991).

100. *See Stellas*, 673 So. 2d at 942.

negligence actions by equating liability with fault.¹⁰¹ The court defined its task in terms of interpreting the word “fault” as used in the comparative fault statutes.¹⁰² According to the court, the legislature intended “fault” to include all tortious conduct — both intentional and negligent.¹⁰³ Therefore, in a negligence action under comparative fault, a jury must apportion liability for damages among intentional and negligent tortfeasors because they are all at “fault,” regardless of whether they are parties to the case.¹⁰⁴ The court argued that developing statutory and case law,¹⁰⁵ logical consistency,¹⁰⁶ and legislative intent¹⁰⁷ all require this dramatic departure from the common law.¹⁰⁸

The court viewed the common-law distinction between negligent and intentional conduct as an artificial construct created to ameliorate the harshness of the contributory negligence bar.¹⁰⁹ The court opined that the evolution of tort law has abrogated the need for this distinction because a partially faulty plaintiff can now recover under comparative fault.¹¹⁰ Likewise, the court argued that under comparative fault, the policy goal of punishing intentional wrongdoers can be accomplished by assessment of punitive damages against intentional tortfeasors.¹¹¹

The court maintained that evolving precedent likewise support-

101. *See id.* (observing that the backbone of Florida's comparative fault statute is the principle that “liability equates fault”); *McGhee*, 653 So. 2d at 1101 (Ervin, J., concurring in part and dissenting in part) (arguing that “the statute clearly requires a jury's consideration of each individual's fault contributing to an injured person's damages, even if such person is not or cannot be a party to the lawsuit”); *Blazovic*, 590 A.2d at 231 (declaring that “the effect and intent of the Comparative Negligence Act was not only to accord a fairer result to moderately negligent plaintiffs but also to accord fairer justice to joint tortfeasors”).

102. *See Stellas*, 673 So. 2d at 942–43.

103. *See id.* at 943.

104. *See id.*

105. *See id.* at 943 n.5; *McGhee*, 653 So. 2d at 1101 (Ervin, J., concurring in part and dissenting in part); *Blazovic*, 590 A.2d at 226–32.

106. *See Blazovic*, 590 A.2d at 231.

107. *See Stellas*, 673 So. 2d at 942; *McGhee*, 653 So. 2d at 1101 (Ervin, J., concurring in part and dissenting in part); *Blazovic*, 590 A.2d at 231.

108. *See supra* note 59.

109. *See McGhee*, 653 So. 2d at 1101 (Ervin, J., concurring in part and dissenting in part); *Blazovic*, 590 A.2d at 231; *supra* text accompanying notes 25–30.

110. *See Blazovic*, 590 A.2d at 231.

111. *See id.* at 232 (observing that comparative fault allows a jury to punish wrongdoers by awarding punitive damages, which are neither apportionable nor eligible for contribution).

ed applying comparative fault principles to both intentional and negligent conduct.¹¹² The court found particularly persuasive¹¹³ the Florida Supreme Court's decision in *Fabre*.¹¹⁴ *Fabre* did not address whether the comparative fault statute applied to intentional tortfeasors in an action based on negligence.¹¹⁵ Rather, *Fabre* held that a jury could apportion liability among all negligent actors contributing to an injury, even when one or more such actor was not a party to the lawsuit.¹¹⁶ Regardless, the *Stellas* court reasoned that if *Fabre* includes a phantom negligent tortfeasor in the whole fault from which a jury apportions liability, *Fabre* must likewise mandate including intentional non-parties as well.¹¹⁷ The *Stellas* court found support from outside the jurisdiction¹¹⁸ in cases applying comparative fault principles to negligent and strictly liable tortfeasors,¹¹⁹ and also to negligent tortfeasors and plaintiffs who act willfully and wantonly¹²⁰ — but not to negligent and intentional tortfeasors.

The court rejected as analytically unsound¹²¹ the common-law doctrine holding intentional conduct as “different in kind,”¹²² in favor of holding that intentional conduct is only “different in degree” from negligence.¹²³ The court reasoned that intentional, reckless, and negligent acts each represent different points on the same continuum of tortious conduct.¹²⁴ Each point on the continuum represents a different degree of knowledge regarding the harmful conse-

112. See *Allied-Signal, Inc. v. Fox*, 623 So. 2d 1180 (Fla. 1993); *Stellas*, 673 So. 2d at 943 (discussing *Fabre*'s ramifications); *McGhee*, 653 So. 2d at 1101 (Ervin, J., concurring in part and dissenting in part) (discussing *Fabre*); *Blazovic*, 590 A.2d at 226–27.

113. See *McGhee*, 653 So. 2d at 1101 (Ervin, J., concurring in part and dissenting in part). Judge Ervin quoted the *Fabre* court's rationale. See *supra* note 4.

114. See 623 So. 2d 1182 (Fla. 1993).

115. See *id.*

116. See *id.* at 1185.

117. See *Stellas*, 673 So. 2d at 943.

118. See *Blazovic*, 590 A.2d at 226–29.

119. See, e.g., *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140 (N.J. 1979) (allowing the jury to consider both a negligent plaintiff and a strictly-liable defendant in apportioning liability).

120. See, e.g., *McCann v. Lester*, 571 A.2d 1349 (N.J. Super. Ct. App. Div. 1990) (allowing jury to consider both negligent defendant and plaintiff whose conduct was willful and wanton in apportioning liability).

121. See *Blazovic*, 590 A.2d at 231.

122. See *supra* note 59.

123. See *Blazovic*, 590 A.2d at 231.

124. See *id.*

quences of a course of conduct.¹²⁵ If conduct is not different in kind, then the court opined that logic simply would not support withholding intentional tortious conduct from jury consideration.¹²⁶ Accordingly, the jury's task is to evaluate the degree of culpability causing all tortious conduct and apportion fault accordingly.¹²⁷

This approach was crucial, because the court defined its task as interpreting the legislative intent behind the use of the word "fault" in the comparative fault statute.¹²⁸ In seeking to discern the intended meaning of "fault," the *Stellas* court did not turn to the statute's legislative history.¹²⁹ Rather, the court declared that where "[legislative] intent is clear from the language used in the statute, the court need not look any further."¹³⁰ Accordingly, the court turned to the dictionary¹³¹ for the "plain meaning" of fault and discovered that "fault" included "the wrongdoing or negligence to which a specified evil is attributable."¹³² This dictionary definition of fault, coupled with the court's theoretical underpinnings,¹³³ supported the conclusion that the legislature intended the jury to apportion liability based on the whole fault — a unit that included both negligent and intentional acts.¹³⁴

Judge Jorgenson's dissent in *Stellas* vividly illustrates the problem with the majority's analytical framework.¹³⁵ Having determined that any ambiguity in the term "fault" as used in the comparative fault statute could be cured by a dictionary definition, the majority decision became immediately vulnerable to an alternative defini-

125. See Sisk, *supra* note 54, at 15 (explaining that the only difference is the "degree of the actor's knowledge of the harmful consequences, ranging from a low level of objective knowledge (negligence) to a very high level of subjective knowledge (intent)").

126. See *Blazovic*, 590 A.2d at 231.

127. See *id.*

128. See *Stellas*, 673 So. 2d at 942–43.

129. See *supra* note 91.

130. *Stellas*, 673 So. 2d at 942; see *supra* note 23.

131. See *id.* (quoting 4 OXFORD ENGLISH DICTIONARY 104 (1933)).

132. As quoted by the *Stellas* court, the complete definition is: "With reference to persons: Culpability; the blame or responsibility of causing or permitting some untoward occurrence; the wrongdoing or negligence to which a specified evil is attributable." *Id.*

133. See *supra* text accompanying note 65.

134. See *Stellas*, 673 So. 2d at 943.

135. See *id.* at 943–46 (Jorgenson, J., dissenting).

tion.¹³⁶ The dissent's careful analysis of the statutory language¹³⁷ provided evidence that the legislature did not intend to abrogate the common-law treatment of intentional tortfeasors in negligence actions.¹³⁸

More importantly, Judge Jorgenson considered the public policy ramifications behind the majority decision to apportion fault between a negligent tortfeasor and a criminal actor.¹³⁹ He argued that the majority's position — that intentional acts did not differ in kind from negligent acts¹⁴⁰ — ignored the foundation upon which juries in tort actions award damages.¹⁴¹ Juries award damages based on the degree of “fault” or culpability of a party, and culpability is largely a product of the foreseeability of injury.¹⁴² Since intentionally performed acts are almost 100% foreseeable, the jury must apportion the majority of liability to the criminal attacker.¹⁴³ Because “any rational juror will apportion the lion's share of the fault to the intentional tortfeasor,”¹⁴⁴ those whose duty it is to protect others from criminal attack will have no incentive to perform their obligations. The majority opinion thus renders the duty to protect a “nullity.”¹⁴⁵

The dissenting opinion suggests what this Author considers a fatal flaw in the majority position. By equating liability with fault, the *Stellas* court subverts the entire purpose of the trial process, which is to fix liability through a determination of legal causation.¹⁴⁶ If comparative fault requires courts to distribute liability to the causes-in-fact of an injury, then there is no need for the considerations of duty, breach, and legal causation that have heretofore gov-

136. See, e.g., *Wal-Mart*, 676 So. 2d at 21 (holding that “fault” as used in the comparative fault statute means “negligence”).

137. The statutory language that the dissent found persuasive reads in part: “This section applies to negligence cases This section does not apply to any action . . . based upon an intentional tort.” FLA. STAT. § 768.81(4)(a)(b) (1995).

138. See *Slawson*, 671 So. 2d at 255 (interpreting the same statutory language to exclude intentional tortfeasors from application of comparative fault, as does the *Stellas* dissent).

139. See *Stellas*, 673 So. 2d at 945–46 (Jorgenson, J., dissenting).

140. See *supra* text accompanying notes 127–28.

141. See *Stellas*, 673 So. 2d at 944–45 (Jorgenson, J., dissenting) (observing that the moral culpability that attaches to intentional wrongdoing makes apportioning liability between a negligent and intentional actor “analytically impossible”).

142. See *id.* at 945.

143. See *id.*

144. *Id.*

145. See *supra* note 97.

146. See discussion *infra* part V(A)(2).

erned tort law.¹⁴⁷ Further, the court's focus on the debate over comparing intentional to negligent conduct is misplaced. That debate is simply not relevant in a failure to warn or protect case.¹⁴⁸ This Note will discuss the situations when such comparisons are relevant, and suggest that comparative fault recommends a slight modification to the common-law approach.

V. CRITICAL ANALYSIS

A. Determining Whose Fault to Compare Under Comparative Fault

1. Logical Problems in the Court's Analysis

The issue confronting the *Stellas* court was whose fault to consider when apportioning liability for Ms. Stellas' injuries.¹⁴⁹ Specifically, should the jury consider the fault of the criminal who attacked the Stellas along with Alamo's fault in not warning the family of the dangers awaiting an inadvertent exit? The court reasoned that, since the irrefutable purpose of comparative fault was to promote fairness by equating liability with fault, its task was simply to define the word "fault" in a manner consistent with the statute's purpose.¹⁵⁰ Turning to the dictionary, the court discovered that "fault" was culpable conduct.¹⁵¹ The court opined that the "backbone" of the comparative fault statute is the principle that liability equates fault.¹⁵² From this premise, the court concluded that fault must therefore equate liability.¹⁵³ If fault equals liability, it follows that the court must consider all culpable conduct when apportioning liability.¹⁵⁴ The criminal attacker must therefore be included on the verdict form.¹⁵⁵

147. See discussion *infra* part V(A)(3).

148. See discussion *infra* part V(A)(4).

149. See *Stellas*, 673 So. 2d at 942.

150. See *id.*

151. See *supra* notes 132–33.

152. See *Stellas*, 673 So. 2d at 942.

153. See *id.* at 943.

154. See *id.* "The unmistakable intent of § 768.81(3) is to limit a negligent defendant's liability to his percentage of fault. The whole fault, of which a negligent defendant's acts are but a part, is broad enough to encompass an intentional tortfeasor's acts." *Id.*

155. See *Stellas*, 673 So. 2d at 943.

The court's attempt to discover the answer to a complex legal question in the single phrase, "liability equates fault," created three problems that render the decision fatally flawed. The first problem is purely logical. The legislature enacted comparative fault to enhance fairness to all parties by equating liability with fault.¹⁵⁶ To say that "liability equates fault," means that if one is not at fault, one is not liable. It does not follow, however, that if liability equates fault, that fault equates liability.¹⁵⁷ Yet the court insists that, from the language of the statute equating liability with fault, it is "clear" that all those at fault must be considered when apportioning liability.¹⁵⁸ This logical error provides the foundation of the court's determination that the legislature clearly intended that the jury consider all culpable conduct when apportioning liability.¹⁵⁹

2. *The Court's Problem with Legal Causation*

The second problem is that, even had the legislature intended to equate fault with liability, it did not necessarily intend to define fault in layman's terms.¹⁶⁰ The *Stellas* court mandated that, under comparative fault, a jury must consider the "whole fault" when apportioning liability.¹⁶¹ The court insisted that the "whole fault" is not the whole legal fault.¹⁶² Rather, the court determined that the

156. See *Blazovic*, 590 A.2d at 226.

157. The court's error is best illustrated by analogous syllogism. To say that all men are mammals is not to say that all mammals are men. All men are mammals means only that if one is not a mammal, one cannot be a man. Likewise, to say that liability equates fault is not to say that if one is at fault, one is automatically liable. Rather, liability equates fault means only that one who is not at fault cannot be liable.

158. See *Stellas*, 673 So. 2d at 943.

159. See *id.* Dean Prosser, in commenting on the connection between causation in fact and liability noted, "[i]t cannot be repeated too often that, although causation is essential to liability, it does not determine it." KEETON ET AL., *supra* note 25, § 41, at 268.

160. In *Wal-Mart*, Judge Webster noted that Florida's comparative fault statute represents the legislature's codification of *Hoffman*, decided one year earlier. See *Wal-Mart*, 676 So. 2d at 23 (Webster, J., concurring). In *Hoffman*, the supreme court enunciated its purpose as apportioning fault between "negligent parties whose negligence was a part of the legal and proximate cause of any loss or injury." 280 So. 2d at 439 (emphasis added).

161. See *Stellas*, 673 So. 2d at 942-43.

162. See *id.*; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 22 (5th ed. 1984). "[I]f we say that all liability rests on 'fault,' then the 'fault' must be 'legal' or 'social' fault . . . [that] has come to mean no more than a departure from the conduct required of the actor by society for the protection of others." *Id.*

“whole fault”¹⁶³ broadly encompasses all entities that are the causes-in-fact¹⁶⁴ of the plaintiff's injuries. Taken to its logical conclusion, the court's reasoning transmutes the tort system from a process designed to fix liability in the legal cause of a plaintiff's injury¹⁶⁵ to a system that fixes liability in physical causes of injury.

There is no doubt that the cause-in-fact of Ms. Stellas' injuries was her criminal attacker. However, the criminal attacker was not necessarily the legal cause of Ms. Stellas' injuries.¹⁶⁶ Dean Prosser observed that “[t]he mere fact of causation . . . can provide no clue of any kind to singling out those which are to be held legally responsible.”¹⁶⁷ A high-crime area carries a risk of producing an injurious event in much the same way as does a vicious dog or a broken bathroom fixture. If an actor who has a duty to warn a party of these potential injury-producing events neglects his duty and the party is injured, then there is no need to get six people together to determine that the criminal, the dog, and the fixture are the causes-in-fact of the injuries.¹⁶⁸ The jury's task is to determine the legal cause,¹⁶⁹ and depending on the foreseeability of the injuries, the legal cause may be the negligence of the actor who failed in his duty to protect the plaintiff from danger.¹⁷⁰ The law thus recognizes, in a way that is foreign to most jurors, that the cause-in-fact of an injury may not be the legal cause.¹⁷¹ To allow a jury to fix legal causation on a party

163. See *Stellas*, 673 So. 2d at 942–43.

164. See KEETON ET AL., *supra* note 162, § 41, at 265. “The term ‘cause in fact’ embraces all things which have so far contributed to the result that without them it would not have occurred.” *Id.*

165. See *id.* § 42, at 272–73. In describing the difference between legal causation and the layman's understanding of causation, Dean Prosser observed:

Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for the injury. Unlike the fact of causation, with which it is often hopelessly confused, this is primarily a problem of law.

Id. (citations omitted).

166. See *id.* § 42, at 266.

167. *Id.*

168. See *supra* note 160.

169. See *supra* note 163.

170. See KEETON ET AL., *supra* note 162, § 44, at 305. “[O]nce it is determined that the defendant has a duty to anticipate the intervening misconduct, and guard against it, it cannot supersede the defendant's liability.” *Id.*; see, e.g., *Vining*, 354 So. 2d at 56 (holding that foreseeability is the key to legal causation in cases of intervening criminal conduct).

171. See *supra* note 166.

and then apportion liability according to physical causation subverts the whole process.

3. *The Court's Problem with Duty*

The third problem is that the court, by limiting its task to defining fault, failed to consider the central issue necessary to any determination of legal liability — the issue of duty.¹⁷² It is axiomatic that ordinarily, one is under no duty to protect another from injury by a third party.¹⁷³ However, the law recognizes that persons who stand in a “special relationship” to one another may owe a duty to protect the each other from being injured by a third party, including a criminal attacker.¹⁷⁴ The most important of these special relationships is that of business inviters and their invitees.¹⁷⁵ The law imposes a duty on the business invitor¹⁷⁶ to provide a reasonably safe place for business invitees by performing the reasonably necessary acts to guard against the foreseeable risk of criminal attack.¹⁷⁷ By allowing business invitees to recover damages for their injuries from negligent businesses, the law promotes the policy objectives of compensating injured parties while simultaneously enhancing public

172. See KEETON ET AL., *supra* note 162, § 42, at 274. “It is quite possible to state every question . . . in the form of a single question: was the defendant under a duty to protect the plaintiff against the event which did in fact occur?” *Id.*

173. See RESTATEMENT, *supra* note 65, § 314.

174. See *id.* § 314A; see also *Nova Univ., Inc. v. Wagner*, 491 So. 2d 1116 (Fla. 1986) (recognizing that special relationship based on custodial arrangement with disturbed children informed a duty to protect third persons); *Palmer v. Shearson Lehman Hutton, Inc.*, 622 So. 2d 1085 (Fla. 1st Dist. Ct. App. 1993) (observing that absent a special relationship, a brokerage firm had no duty to protect the public from actions of a stockbroker); *Boynton v. Burglass*, 590 So. 2d 446 (Fla. 3d Dist. Ct. App. 1991) (refusing to extend special relationship that would support a duty to protect a third person to psychiatrist and patient relationship); *Garrison Retirement Home Corp. v. Hancock*, 484 So. 2d 1257 (Fla. 4th Dist. Ct. App. 1985) (observing that a retirement home had a special relationship with a worker on its premises and thus had a duty to protect the worker).

175. See RESTATEMENT, *supra* note 65, § 314(a)(3).

176. See KEETON ET AL., *supra* note 162, § 42, at 274 (observing that public policy informs the extent of legal “duty”).

177. Other duties of the business invitor include protecting the invitee from unreasonable risks of harm arising out of the invitor's own conduct, conditions of the invitor's land or chattels, forces of nature or animals, and other acts of third persons, be they innocent, negligent, intentional, or even criminal. The business invitor additionally has a duty to protect the invitee from the invitee's own negligent acts. RESTATEMENT, *supra* note 65, § 314A cmt. d.

safety.¹⁷⁸

Until *Stellas*, foreseeability was the determinant of liability in a failure to protect case.¹⁷⁹ Thus, when a business invitor negligently failed to provide security against foreseeable criminal attack, the business invitor became the legal cause of the criminal attack and, consequently, liable for the outcome.¹⁸⁰ To escape liability, defendants could argue that the criminal attacker was an intervening actor who thus broke the chain of causation.¹⁸¹ But when the criminal attack was a foreseeable risk, the defendant became liable for damages resulting from the failure to protect against such criminal attack.¹⁸² Dean Prosser observed that “[o]bviously, the defendant cannot be relieved from liability by the fact that the risk . . . to which the defendant has subjected the plaintiff has indeed come to pass.”¹⁸³

The Stellases sued Alamo to determine the legal cause of their injuries, and to fix liability on whomever the jury found to be that legal cause.¹⁸⁴ The jury found that Alamo had a duty to protect the Stellases against foreseeable criminal attack, and that Alamo's failure to do so was the legal cause of the criminal attack and the resultant injuries.¹⁸⁵ There is no reason to have a trial to fix liability through a finding of legal causation if the court thereafter ignores

178. See *infra* text accompanying note 286; KEETON ET AL., *supra* note 162, § 1, at 6. “The purpose of the law of torts is . . . to afford compensation for injuries sustained by one person as a result of the conduct of another.” *Id.*

179. See *Vining*, 354 So. 2d at 55–56 (holding that if an intervening criminal act is foreseeable, the chain of causation is not broken and thus the original negligence may be the proximate cause of the damages sustained); see also *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968). The *Rowland* court observed that a number of considerations must be weighed to determine the extent of duty owed — foreseeability of harm, degree of certainty that the plaintiff was injured, the closeness of the connection between the defendant's acts and the plaintiff's injury, the moral blameworthiness of defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant, the consequences to the community of imposing such a duty, and the availability, cost, and prevalence of insurance for the risk. See *id.*

180. See *Bach*, 838 F. Supp. at 561.

181. See *Lingefelt v. Hanner*, 125 So. 2d 325 (Fla. 3d Dist. Ct. App. 1960) (observing that a car theft resulting from defendant leaving the keys in the ignition can constitute an unforeseeable intervening criminal act, breaking the chain of causation between the car owner's negligence and the plaintiff's injuries).

182. See *Vining*, 354 So. 2d at 56.

183. KEETON ET AL., *supra* note 162, § 44, at 303.

184. See *id.* § 4, at 20 (observing that the primary function of tort law is to determine when to require compensation).

185. See *Stellas*, 673 So. 2d at 941–42.

the jury's finding and apportioning liability based on the "whole fault."¹⁸⁶ Unless tort law retreats from its tradition of fixing liability through determining legal fault,¹⁸⁷ the same reasoning that prevents a jury from fixing liability on an intervening criminal attacker¹⁸⁸ must apply to apportioning liability — or there is no reason to have a trial. Dean Prosser analyzed that legal fault does not necessarily correspond to conventional notions and dictionary definitions to encompass all culpable behavior contributing to injury.¹⁸⁹ If it did, there would be no logical point at which to cut off liability.¹⁹⁰ Rather, legal fault is a product of legal causation, and legal causation can only be determined within the parameters of the legal duty owed.¹⁹¹

The *Stellas* court's error, then, was ignoring legal duty and causation and instructing the jury to apportion liability on the basis of a layman's notion of fault. The criminal attacker simply did not owe the legal duty that defined the plaintiff's cause of action. Relying on *Fabre*, the court cast its net far beyond the parameters defined by the cause of action to fix fault on a criminal attacker who owed no duty to protect.¹⁹² Fortunately, neither the *Fabre* court's holding nor opinion sanction a fishing expedition for absent parties who may be at fault under a different theory of liability.¹⁹³ *Fabre* allowed the jury to apportion fault among all entities who breached the duty of

186. See *supra* notes 163–65. The court relies on the dictionary definition of "fault" which encompasses all culpable conduct. This definition is thus no different than the definition of "cause in fact."

187. See *supra* note 166.

188. See *supra* text accompanying note 184.

189. See KEETON ET AL., *supra* note 162, § 4, at 22–23.

190. See *id.* § 41, at 264. "[T]he causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts . . ." *Id.*

191. See *id.* § 42, at 273–74.

192. The criminal had no special relationship with the *Stellas* family and thus owed no duty to protect. See *supra* text accompanying note 173.

193. In *Fabre*, the issue was whether the negligence of the plaintiff's husband, who was not a party to the proceeding because of interspousal immunity, could be included in the whole fault from which the jury apportioned liability. See 623 So. 2d at 1183. But for the interspousal immunity doctrine, which the court later abandoned in *Waite v. Waite*, 618 So. 2d 1360, 1362 (Fla. 1993), the negligent husband could have been found the legal cause of the plaintiff's injuries under the plaintiff's cause of action for negligence associated with an automobile accident. Unlike the criminal attacker in *Stellas*, the non-party tortfeasor in *Fabre* owed, and likely breached, the same duty of reasonable care that inspired the plaintiff's suit. See *Fabre*, 623 So. 2d at 1186 n.2.

care under which the plaintiff brought her cause of action.¹⁹⁴ In marked contrast, the *Stellas* court searched beyond the parameters of the breach of duty asserted by the Stellas family to allocate fault to an absent tortfeasor who could never be liable for breaching a duty to protect.¹⁹⁵

Perhaps the court lost its bearings because the injury producing event involved a human actor who intended the injury. However, the fact that a criminal attack requires a human actor is irrelevant to fixing liability unless the jury finds that the attack was an intervening act breaking the chain of causation between the defendant and the injury.¹⁹⁶ By apportioning liability to a non-party who could never be the legal cause of the plaintiff's injuries, the court ignored the policy considerations supporting the cause of action for negligent failure to warn and rendered the cause of action a nullity.¹⁹⁷

4. *The Court's Problem Using the Intentional-Negligent Conduct Distinction*

The court assumed that the common-law distinction between negligent and intentional conduct was all that stood in the way of including the criminal attacker as part of the whole fault from which the jury should apportion damages.¹⁹⁸ Because the court rejected the common-law notion that intentional conduct is "different in kind" from negligence,¹⁹⁹ the court argued that the criminal attacker's conduct was rightly comparable to that of the negligent rental car agency.²⁰⁰ However, in *Stellas*, the attacker owed no duty to protect the Stellas and could not, therefore, be a part of the legal cause of the injury.²⁰¹ Unless the intentional tortfeasor shares legal causation with a negligent actor, the scope of the cause of action forecloses a comparison of their respective degrees of "fault."²⁰² The debate over

194. See *Fabre*, 623 So. 2d at 1185.

195. See *Stellas*, 673 So. 2d at 943.

196. See *supra* note 179.

197. See *Stellas*, 673 So. 2d at 945 (Jorgenson, J., dissenting). "To allow such an apportionment removes all incentive from businesses to protect their customers from criminal attacks or to warn them of known dangers, and renders that duty illusory." *Id.*

198. See *McGhee*, 653 So. 2d at 1101; see also *Stellas*, 673 So. 2d at 942 n.5.

199. See *supra* note 59.

200. See *Stellas*, 673 So. 2d at 942.

201. See *supra* discussion part V(A)(3).

202. Unless, of course, one accepts the court's position and abandons notions of legal

comparing the intentional tortfeasor with the negligent tortfeasor is simply not relevant here because only the negligent actor is (or can be) the legal cause of the injury.

That is not to say, however, that the debate over the comparability of intentional and negligent conduct is never relevant to deciding when to apply comparative fault. Particularly, two common-law rules have come under closer scrutiny because they deny either a negligent party or an intentional tortfeasor the benefits of comparative fault: 1) holding an intentional tortfeasor 100% liable when the plaintiff's own negligence contributes to his injuries;²⁰³ and 2) denying the benefits of comparative fault to a negligent tortfeasor who owes no special duty to protect because he shares liability with an intentional tortfeasor.²⁰⁴

The first rule is rooted in the common-law doctrine that intentional behavior is "different in kind" and therefore cannot be compared to negligence.²⁰⁵ The second rule is a theoretical outgrowth of the first common-law rule. Since examples of intentional and negligent conduct combining to cause a single injury are rare absent a duty based on a special relationship, Florida caselaw is bereft of its application.²⁰⁶ However, it is important to recognize the situation, since detractors of the common-law rationale use it to argue against the common-law approach.²⁰⁷ Understanding the doctrine and its modern detractors first requires an appreciation of the debate over the concept of fault.

B. What Juries Compare when They Compare Fault

fault and legal causation in favor of causation-in-fact as the sole determinant of liability. See *supra* text accompanying notes 167–71.

203. See Jake Dear & Steven E. Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations*, 24 SANTA CLARA L. REV. 1, 66 (1984) (advocating reducing a defendant's liability by the percentage of plaintiff's fault in nuisance cases).

204. See Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. PUGET SOUND L. REV. 1, 30 (1992) (supporting comparison of fault when intentional and negligent torts combine to create a single harm absent a special relationship).

205. See *supra* note 59 and accompanying text.

206. See case cited *supra* note 52.

207. See Sisk, *supra* note 204, at 15.

1. *Fault as Causation-in-Fact*

The doctrine of comparative fault assumes that juries are capable of quantifying fault.²⁰⁸ The court must instruct juries not only whose fault they are to compare, but what they are comparing when they compare “fault.”²⁰⁹ Specifically, the jury must know if it is to compare causation or negligence.²¹⁰ The *Stellas* court's determination that the jury compare causation-in-fact represents a marked departure from traditional approaches²¹¹ and presents unresolvable analytic problems.

The physical causes, or causes-in-fact, of an injury are matters of fact and are therefore not apportionable.²¹² Either a particular act causes an injury or it does not. It is analytically impossible to measure degrees of physical causation.²¹³ By way of illustration,²¹⁴ consider a motorcyclist speeding down the highway, losing control and crossing the median, colliding with a truck traveling ten miles over the speed limit. At least ninety percent of the physical cause of the injury is the force supplied by the truck. But for its presence, the motorcycle would have recovered control or collided with a smaller vehicle. Therefore, if physical causation is the formula for fault, the jury must apportion to the truck driver the lion's share of the damages.²¹⁵ Yet, the jury may find that the motorcyclist was the entire legal cause of his own injuries and deny any judgment against the truck driver, although the truck supplied ninety percent of the physical causation.

208. See VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 17-1 (3d ed. 1994).

209. See Richard N. Pearson, *Apportionment of Losses Under Comparative Fault Laws — An Analysis of the Alternatives*, 40 LA. L. REV. 343, 344 (1980) (observing that before the jury can apportion losses under comparative fault, it must know that which is to be compared — negligence or causation).

210. See *id.*

211. See SCHWARTZ, *supra* note 208, § 17-1(a).

212. See William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 481–82 (1953) (maintaining that the extent that each party's conduct deviates from a standard of reasonable care is the only logical way to compare each party's fault).

213. See Aaron D. Twerski, *The Many Faces of Misuse: An Inquiry into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 413 (1978) (stating that “[a]s a statement of fact and pure logic, it is clear that cause-in-fact is not subject to apportionment”).

214. The illustration is a modified version of that provided by Professor Schwartz. See SCHWARTZ, *supra* note 208, § 17-1(a).

215. See *id.* (commenting that “the jury's line of inquiry under comparative negligence does not focus on physical causation; rather, it considers and weighs culpability”).

Until *Stellas*, no jurisdictions apportioned fault based on causation-in-fact.²¹⁶ All courts agree that legal causation is the basis for apportioning liability.²¹⁷ However, courts are split²¹⁸ as to whether they should compare fault, compare the extent that the negligent party's fault contributed to the injury,²¹⁹ or some combination of both.²²⁰

2. Fault as Negligence

Dean Prosser was adamant that causation as such be left out of the fault picture: “[A]pportionment must be made on the basis of comparative fault rather than comparative contribution.”²²¹ The Florida Supreme Court embraced this approach in *Hoffman v. Jones*,²²² mirroring the United States Supreme Court's interpretation of comparative fault.²²³ In a decision pre-dating *Stellas*, Florida's Third District Court of Appeal also held that the jury must determine whose negligence proximately caused an injury and then compare each party's negligence.²²⁴ In this prior Third District decision, the court distinguished each party's relative contribution to an injury from each party's fault and held that the jury's proper task is to apportion liability based on each party's relative fault.²²⁵ The

216. See HENRY WOODS & BETH DEERE, *COMPARATIVE FAULT* § 5:1, at 103 (3d. ed. 1996) (stating that “[a]lthough the statutory language does not specifically so provide, the decisions restrict the effect of contributory negligence to that which is direct or proximate, in considering diminution of damages”); see also RESTATEMENT, *supra* note 65, § 432 (containing the traditional rule of proximate causation — that negligence which does not contribute to harm is not a basis for imposing liability).

217. See SCHWARTZ, *supra* note 208, § 4-3(a).

218. Compare *Kalland v. North Am. Van Lines*, 716 F.2d 570, 574 (9th Cir. 1983) (comparing fault of parties as advocated by Prosser), with *Kohler v. Dumke*, 108 N.W.2d 581, 583–84 (Wis. 1961) (comparing causative negligence of parties).

219. See WOODS & DEERE, *supra* note 216, § 5:5, at 118. Judge Woods observes, however, that most statutes “seem to suggest that only faults are to be compared.” *Id.*

220. See *id.*

221. Prosser, *supra* note 212, at 481.

222. 280 So. 2d 431 (Fla. 1973); see also *supra* text accompanying note 29.

223. Under the Federal Employers' Liability Act, federal and state courts were required to apply comparative fault in cases brought by injured railroad workers. The statute read, in part that “damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.” EMPLOYERS' LIABILITY ACT, 45 U.S.C.A. §§ 51–59 (1908); see, e.g., *Norfolk & W. Ry. v. Earnest*, 229 U.S. 114 (1913).

224. See *Metropolitan Dade County v. Cox*, 453 So. 2d 1171, 1173 (Fla. 3d Dist. Ct. App. 1984).

225. See *id.* In *Cox*, a county hospital sought to shield from the jury's inspection its

Florida Supreme Court reiterated this approach in *Fabre*.²²⁶

While there is no uniform method for comparing fault, the fault-line²²⁷ approach best demonstrates the mechanics of comparing total fault as opposed to comparing contribution to the injury. Using a fault-line, the jury determines the percentage that each party's conduct fell short of an objective standard of care.²²⁸ For example, the plaintiff might have deviated twenty percent from reasonable conduct, with one defendant deviating twenty-five percent, and another thirty percent. The jury must then compare their fault by converting these percentages into relative shares of one hundred percent.²²⁹ The relative fault of each party then converts to 26.6% for the plaintiff, and 33.3% and 40% for each defendant. The plaintiff's total award is therefore reduced by 26.6% or his percentage fault, and the remaining award is apportioned to each defendant according to his share of fault.²³⁰

3. *Fault as Causal Negligence*

Other courts embrace an approach focusing on the extent to which a party's negligence contributes to an injury.²³¹ This view is embodied in some statutes,²³² as well as the Uniform Comparative

records regarding a drain backup in the hallway where an injured party fell. *See id.* at 1172. The court held that the jury must hear the "totality of fault," which included the fact that the hospital's negligence was more egregious than they thought. *See id.* at 1173. "The trier of fact compares the negligence of plaintiff and defendant. Fault is compared to fault." *Id.* (quoting *Amend v. Bell*, 570 P.2d 138, 142 (Wash. 1977)).

226. *See supra* note 4. The reader should observe that the *Fabre* court did not mandate a comparison of each party's contribution to the accident, but a comparison of fault. *See Fabre*, 623 So. 2d at 1185.

227. *See Pearson, supra* note 209, at 348-49.

228. This method was adopted by Oregon's Supreme Court and requires the jury to assess each individual whose negligence is determined to be the proximate cause of an injury against behavior "that would have been faultless under the circumstances." *Sandford v. Chevrolet Div. of Gen. Motors, Inc.*, 642 P.2d 624, 642 (Or. 1982) (Peterson, J., concurring).

229. *See id.*

230. Note that under this approach, if a plaintiff's conduct deviated from the standard of reasonableness by 80%, and the defendant's behavior likewise deviated by 80%, each would share liability equally.

231. *See Dunbar v. Thompson*, 901 P.2d 1285, 1292-93 (Haw. Ct. App. 1995) (rejecting Prosser's approach and apportioning liability among negligent parties determined to be the legal cause of injury based on their comparative contribution to injury).

232. *See, e.g.*, IOWA CODE § 2315.19(B)(4) (1980) (stating that "[i]f contributory negligence . . . is established . . . the jury in a jury action shall [consider] [t]he percentage

Fault Act.²³³ Its adherents argue that juries consider cause-in-fact regardless of the court's instructions on applying the law.²³⁴ Therefore, instead of deceiving ourselves with the "fantasy" that jurors abide by the court's instructions, the law should comport with the reality of the deliberative process.²³⁵ Under this scheme, the jury does not compare the degree that each party's conduct departs from the standard of reasonable care. Rather, after determining which parties' negligence proximately caused an injury, the jury then apportions shares according to each party's relative contribution to the injury.²³⁶

Proponents of the traditional fault allocation approach are on sounder theoretical footing than are those who focus on causation.²³⁷ The statutes clearly require the jury to distribute liability by comparing "fault" or "negligence."²³⁸ Because causation is a matter of fact that either exists or does not, theories that include causation are requiring the jury to compare the incomparable.²³⁹ The jury properly determines each party's negligence as a cause-in-fact of an injury when determining legal causation.²⁴⁰ However, cause-

of negligence . . . that directly and proximately caused the injury, death, or loss to person or property, in relation to one hundred percent").

233. UNIF. COMPARATIVE FAULT ACT § 2(b), 12 U.L.A. 126 (1996) (stating that "[i]n determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed"); see also SCHWARTZ, *supra* note 208, § 17-1(a) (observing that the comment to the uniform act mandates the jury consider legal causation, not cause-in-fact).

234. See Twerski, *supra* note 213, at 413-14. "[T]he inevitable effect of instructing a jury that proximate cause is an item for comparison will be that cause-in-fact will be factored into the jury's consideration." *Id.* at 413.

235. See Ray J. Aiken, *Proportioning Comparative Negligence — Problems of Theory and Special Verdict Formulation*, 53 MARQ. L. REV. 293, 295 (1970). "[I]t is sheer fantasy to assume that subjective standards of evaluation will not continue to govern the matter where no rational or objective legal standard or definition is possible, or is even suggested." *Id.* (emphasis omitted).

236. See Twerski, *supra* note 213, at 413; see also *Stueve v. American Honda Motors Co.*, 457 F. Supp. 740 (D. Kan. 1978) (applying "causal fault" in a products liability case).

237. See Pearson, *supra* note 209, at 346.

238. See WOODS & DEERE, *supra* note 216, § 5:5, at 118.

239. See Pearson, *supra* note 209, at 346.

240. The causes in fact of a plaintiff's injuries are factored into the jury's determination of proximate or legal cause. Thus, if the defendant's negligence did not contribute to the injury, the defendant is not found the legal cause of the injury. For example, if a drunk motorist enters an intersection and is broadsided by a driver who negligently runs a red light, the plaintiff's negligent drunkenness was not the negligent act that legally

in-fact alone has no theoretical or precedential value as a basis for apportioning liability.²⁴¹

C. Why Not Compare Intentional and Negligent Conduct?

As the discussion above suggests, comparative fault statutes have been construed to mandate a comparison of the negligence of the parties contributing to an injury.²⁴² Most comparative fault statutes have retained the common-law animus toward benefiting the intentional tortfeasor²⁴³ and preclude extending the benefits of the statute to actions based on intentional torts.²⁴⁴ This animus is supported by a belief that juries cannot compare intentional and negligent acts because they differ in kind.²⁴⁵ The belief, in turn, is fueled by the tort law's dual purpose of compensating victims and deterring wrongdoing.²⁴⁶ Notwithstanding, modern judicial application of comparative fault has begun to chip away at the common-law aversion to benefiting intentional actors, suggesting that such comparison is possible.²⁴⁷

1. Intentional Conduct as Different in Kind

Whether and how far the judiciary should abandon traditional thinking depends, in part, on how well the different-in-kind theory withstands challenge. The principle challenge is that the only difference between negligent and intentional conduct is the difference in the degree of the actor's knowledge of his conduct's harmful consequences.²⁴⁸ Accordingly, the state of mind of the actor is the fea-

caused his injuries. If the injury would have occurred regardless of the plaintiff's negligence, then his negligence is not the legal cause. *See Altieri v. Bremer*, 159 N.W.2d 664 (Wis. 1968). *See generally* SCHWARTZ, *supra* note 28, § 4-1(a)(b), at 90; Pearson, *supra* note 209 at 347.

241. *See, e.g.*, WOODS & DEERE, *supra* note 216, § 17-1(a).

242. *See* discussion *supra* part V(B).

243. *See* SCHWARTZ, *supra* note 208, § 5-2, at 113.

244. *See* William J. McNichols, *Should Comparative Responsibility Ever Apply to Intentional Torts?*, 37 OKLA. L. REV. 641, 663 (1984).

245. *See supra* note 59.

246. *See* case cited *supra* note 61.

247. *See supra* notes 119-20 and accompanying text.

248. This is the position taken by the *Stellas* court. *See Stellas*, 673 So. 2d at 942; The RESTATEMENT offers a curious combination of both approaches, however:

As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and

ture that distinguishes conduct.²⁴⁹ Challengers assert that these different levels of culpability can merely be reflected in the jury's apportionment of fault.²⁵⁰ Evaluating the challenger's arguments requires an analysis of the common-law "different-in-kind" theory.

Dean Prosser championed the "different-in-kind" theory, distinguishing negligent from intentional conduct based on the moral opprobrium that attached to intentional wrongdoing.²⁵¹ Supporters of the common-law approach hold that comparing negligent and intentional conduct is logically impossible, since intentional actors must be one hundred percent responsible for their actions.²⁵² But detractors maintain that neither Prosser nor his supporters ever advanced any theoretical foundation to support their "different in kind" theory.²⁵³ This Author believes, however, that while Dean Prosser and common-law courts did not enunciate the theoretical foundation of their approach,²⁵⁴ the foundation is solid, resting firmly on the definition of negligence.²⁵⁵

"Negligence is a matter [of] risk."²⁵⁶ A person acts negligently if she is conscious that her acts will cause an appreciable risk of harm

becomes mere recklessness, as defined in § 500. As the probability decreases further, and amounts to a risk that the result will follow, it becomes ordinary negligence, as defined in § 282.

RESTATEMENT, *supra* note 65, § 8A. In discussing recklessness, the RESTATEMENT ungracefully attempts to straddle the fence: "[the] difference of degree" may be so "marked as to amount substantially to a difference in kind." *Id.* § 500 cmt. g.

249. *See* Dear & Zipperstein, *supra* note 203, at 15 (stating that "the knowledge aspects of intentional fault are but higher degrees of the same knowledge component that courts attribute objectively to every negligent and to some reckless tortfeasors").

250. *See Blazovic*, 590 A.2d at 231. Of course, the problem for those who reject this "solution" is precisely that the jury will apportion the lion's share of the fault to the intentional actor. *See also* *Veazey v. Elmwood Plantation Assocs., Ltd.*, 650 So. 2d 712, 719 (La. 1994).

251. *See supra* note 59.

252. *See, e.g., Veazey*, 650 So. 2d at 721 (Watson, J., concurring) (observing that "[i]t is not the difficulty of comparison: it is the impossibility. The rapist or murderer is 100% at fault.>").

253. *See* Dear & Zipperstein, *supra* note 203, at 16.

254. Dean Prosser never stated exactly why the moral opprobrium that attached to intentional conduct made it incomparable to negligence. Likewise, courts that despair of the impossibility of comparison never explain why, other than to say the intentional actor is 100% at fault. *See, e.g., Veazey*, 650 So. 2d at 719.

255. According to the RESTATEMENT, negligence is "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." RESTATEMENT, *supra* note 65, § 282.

256. *See* KEETON ET AL., *supra* note 162, § 31, at 169.

to another.²⁵⁷ When comparing the amount of negligence between two parties, the jury assesses the reasonableness of the risks taken by the parties in view of the magnitude of the potential harm and the burden of avoiding the risk.²⁵⁸ Ironically, the continuum of conduct proposed by the “different in degree” school best illustrates and supports the “different in kind” concept.

\$ssPLACE TABLE 1 HERE\$ss

As the above illustration shows, classifying conduct according to the actor's “knowledge of the consequences,” is the same as classifying conduct according to the risk the actor takes that his conduct will cause injury.²⁵⁹ As a person's conduct approaches the level where he is consciously acting to achieve a result, the person reduces the risk of failing to achieve the result. Thus, a risk-free zone exists at either end of the continuum of human conduct. The lower end of the continuum represents persons who eliminate the risk of injuring another by acting with due care. Likewise, the upper end of the continuum represents those who eliminate the risk of *not* injuring another by acting intentionally to injure another.

Thus, intentional conduct, like conduct characterized as due care, is different in kind from negligent conduct because such conduct lacks the critical component of risk that characterizes negligence. Since what the jury compares when comparing “fault” is the reasonableness of a person's conduct in risking injury to another,²⁶⁰ the jury can only compare conduct in the risk zone. When an actor

257. *See id.*

258. *See id.* § 31, at 171. The law tolerates less risk and imposes a greater burden to avoid the injury, as the seriousness of potential injury increases. *See United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

259. Risk is defined as “a danger which is apparent, or should be apparent, to one in the position of the actor.” KEETON ET AL., *supra* note 162, § 32, at 170.

260. *See Prosser, supra* note 212, at 482.

eliminates the risk of injury by intentional conduct, the conduct is per se unreasonable and the jury has nothing to evaluate and nothing to compare. Because of the social condemnation attaching to conduct that is certain to cause harm, courts deny the intentional wrongdoer the benefit of reducing his liability by the negligence of another.

2. Reducing Intentional Tortfeasor's Liability

Regardless of these theoretical constraints, the judiciary has carved out three exceptions to the rule that intentional tortfeasors may not reduce their liability by the amount of a plaintiff's contributory negligence: 1) actions involving strictly liable defendants;²⁶¹ 2) batteries involving provocative plaintiffs;²⁶² and 3) nuisances. The exceptions make sense because the defendant's "intentional conduct" either involves a level of risk that mimics the plaintiff's negligence, or the plaintiff's conduct involves a level of risk that mimics the defendant's intentional acts.

In strict liability actions, the law imputes knowledge of a product's defect to its manufacturer, so that the manufacturer's intentional conduct can be recharacterized as "negligence with imputed knowledge."²⁶³ Comparing such conduct to the plaintiff's negligent conduct does not pose the same theoretical problem as comparing a defendant's purposeful conduct to that of a negligent plaintiff.²⁶⁴ Similarly, when a plaintiff "negligently" provokes a battery, the jury actually compares intentional conduct of both the plaintiff and defendant when apportioning liability.²⁶⁵

261. See *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 90 (Fla. 1976) (holding that the plaintiff's award for injuries sustained as a result of a design error in a tractor could be reduced by the proportion his own negligence contributed to his injuries).

262. See, e.g., *Comeau v. Lucas*, 455 N.Y.S.2d 871 (N.Y. App. Div. 1982) (allowing a rock band member who assaulted a guest to reduce liability by the amount of fault attributed to the guest who had provoked the fight).

263. See B. Scott Andrews, Comment, *Premises Liability — The Comparison of Fault Between Negligent and Intentional Actors*, 55 LA. L. REV. 1149, 1160–61 (1995).

264. See *id.* The moral opprobrium attached to a purposeful, risk-free act does not similarly attach to "negligence with imputed knowledge." *Id.* The same theoretical constraints do not therefore apply when comparing the defendant's "negligence with imputed knowledge" to the plaintiff's "negligence with knowledge." *Id.*

265. See Andrews, *supra* note 263, at 1162 (observing that "in a typical provocation case, even though the courts considered the victim's conduct negligent, the victim is actually acting in a manner that is substantially certain to bring about harm"). The

Denying the benefits of comparative fault to the defendant in nuisance cases has created a fair amount of indignant commentary,²⁶⁶ as well as judicial creativity.²⁶⁷ Some nuisances are created by defendants who, with knowledge and substantial certainty, invade a plaintiff's interests but do not do so with the purpose of causing the resultant harm.²⁶⁸ Although classified as intentional torts, this level of intent does not create the moral outrage that typically accompanies other intentional torts. Courts appear to abrogate the harshness of the common-law aversion to benefiting the intentional tortfeasors in these cases by simply reclassifying the nuisance as based on negligence.²⁶⁹ The jury can then apportion liability.

Together, the strict liability, battery, and nuisance issues suggest a modification to the continuum of conduct that would allow reducing the intentional tortfeasor's liability when he either does not intend the harm, or the plaintiff acts with a similar level of intent. Where conduct is informed by "knowledge and substantial certainty" of invading another's interest, but the resulting harm is not intended, logic may allow its reclassification into the "risk" category.²⁷⁰ The level of intent supporting a nuisance action does not always eliminate the risk of harm, and in such cases it can rightly be compared to negligence.²⁷¹ Similarly, when a plaintiff acts with the knowledge or purpose of provoking retaliatory conduct, unless

Blazovic court's decision is better understood in terms of comparing the intentional conduct of a provocative plaintiff with the intentional conduct of the defendant who battered him — and not comparing intentional and negligent conduct, as explained by the court. See *Blazovic*, 590 A.2d at 226–33; *supra* notes 73–78 and accompanying text.

266. See *Dear & Zipperstein*, *supra* note 203, at 33; see also *McNichols*, *supra* note 244, at 671–72.

267. See, e.g., *Terrell v. Alabama Water Serv. Co.*, 15 So. 2d 727, 730–31 (Ala. 1943) (holding that the city's discharge of water onto a bridge was negligent, thus any contributory negligence of driver who was injured when skidding on the icy bridge cut off city's liability); *Sandifer Motors, Inc. v. City of Roeland Park*, 628 P.2d 239, 248 (Kan. Ct. App. 1981) (holding that the city's liability for inadequate drainage at its dump must be reduced by plaintiff's own negligence because city did not intend to cause flooding at plaintiff's auto salvage yard).

268. See RESTATEMENT, *supra* note 65, § 825 cmt. d.

269. See, e.g., *Terrell*, 15 So. 2d at 730–31 (holding that if a nuisance is a result of nonfeasance, as opposed to affirmative conduct, then the nuisance is based on negligence and the rules applicable to intentional torts do not apply).

270. Even though the defendant is certain that his conduct invades the interests of another, he may be uncertain that the conduct will cause harm.

271. See *Sandifer Motors*, 628 P.2d at 245.

otherwise prevented by public policy,²⁷² there is no theoretical basis for denying comparative fault.²⁷³

3. Reducing Negligent Co-Tortfeasor's Liability

Since comparative fault has been expanded to apply to multiple defendants,²⁷⁴ a question has arisen regarding the distribution of liability in actions where negligent and intentional defendants are found to be concurrent legal causes of injury.²⁷⁵ According to some commentators, such situations present a convincing argument for reconsidering the rule against comparing intentional and negligent conduct.²⁷⁶ Theoretically, applying the rule could deny a negligent

272. See *Barker v. Kallash*, 459 N.Y.S.2d 296, 299–300 (N.Y. App. Div. 1983) (affirming the rule recognized in New York that one may not take advantage of his own wrongs or profit from his own crime to prevent recovery by plaintiff against suppliers of the ingredients for the pipe bomb that exploded during construction).

273. These cases suggest the following modification to the continuum that would reflect a smaller “no risk” zone of intentional conduct that cannot be compared to conduct that creates a risk.

Regardless, the basic tenet of denying comparison between intentional and negligent conduct remains unscathed. Also, the battery cases allow for comparisons within the “no risk” zone of intentional conduct when the court determines that policy so justifies.

274. The history of comparative fault suggests that, since the contributory negligence bar inspired these statutes, they should be limited to comparing a plaintiff's fault with that of a negligent defendant. Accordingly, some commentators and courts have questioned whether the legislature ever intended comparative fault to apply to cases where multiple tortfeasors are concurrent causes of injury. See, e.g., SCHWARTZ, *supra* note 208, § 17-1, at 351 (stating “[c]omparative negligence becomes operative only when evidence has been presented which would support a jury finding that a plaintiff negligently contributed to his own injury”); see also *Gardner v. Morrison*, 427 F.2d 654 (5th Cir. 1970).

275. See *supra* note 54. The objections to maintaining the distinction between intentional and negligent conduct when both categories of conduct are the concurrent legal cause of injury do not apply when the negligent party has a duty to prevent the intentional act. In such cases, intentional actors can never be the legal cause of injury because they do not owe any duty to prevent their own actions.

276. See, e.g., Sisk, *supra* note 54, at 30.

defendant the benefits of comparative fault if his negligence happened to combine with the intentional acts of an independent tortfeasor over whom he had no control.²⁷⁷ Without the benefits of comparative fault, the negligent defendant would remain jointly and severally liable for all damages regardless of his percentage of fault.²⁷⁸ Commentators raise both logical and constitutional objections to thus excluding a class of negligent defendants from application of comparative fault simply because their actions happen to combine with intentional acts to cause injury.²⁷⁹

Courts considering the above scenario might properly carve out an exception to the rule against comparing intentional and negligent acts and allow the jury to apportion a negligent defendant's liability according to her percentage of fault.²⁸⁰ However, courts should remain mindful that such an exception is only appropriate if the negligent actor owes no duty to protect the plaintiff from the intentional act.²⁸¹ Outside the narrow context of the above theoretical scenario, the rule against comparing the fault of negligent and intentional conduct is irrelevant. If the negligent defendant owes a duty to protect the plaintiff from injury by an intentional actor, then principles of duty and legal causation foreclose comparing their respective conduct — not the common-law rule against comparing intentional and negligent acts.

D. Policy Considerations

277. See, e.g., Sisk, *supra* note 54, at 27–30.

278. See Sisk, *supra* note 54, at 30.

279. See *id.* at 28 (observing that “[i]t may be a denial of equal protection to arbitrarily apply the modification of joint and several liability to all negligent tortfeasors except those, who through no action of their own, happen to be found at fault together with another defendant who independently engaged in intentional misconduct”).

280. See *id.* (advocating that courts adopt a “hybrid” form of comparative fault that limits a negligent defendant's liability to his percentage of fault when the negligent conduct combines with conduct of an intentional co-defendant over whom the negligent party had no control).

281. See, e.g., *Kansas State Bank & Trust Co. v. Specialized Transp. Servs., Inc.*, 819 P.2d 587 (Kan. 1991) (declining to allow the jury to compare the fault of a school bus driver who molested a child in his charge, with the school district and bus service in an action for negligent retention and supervision of the bus driver).

Negligent failure to protect and negligent security cases provide a most dramatic illustration of the connection between the outcome of disputes between private litigants and the interests of society.²⁸² Since singer Connie Francis' multi-million dollar damage award in her negligent security cases against Howard Johnson's Motor Lodge,²⁸³ the hospitality industry has operated under an increasing threat of liability for crimes committed against its guests.²⁸⁴ Premises-security litigation is the "fastest growing area of civil litigation in the United States."²⁸⁵

Such litigation is a part of a social fabric in which the threat of criminal attack runs like an ever present thread, interwoven into the daily activities of the citizenry. The threat of lawsuits over criminal attacks on business premises has forced the hospitality industry to initiate widespread and welcome reforms, increasing the standard of care nationwide.²⁸⁶ Before the threat of huge judgments for negligent security, the industry had "policies and procedures for their motel operators on how to fold the toilet paper in the bathroom, but nothing about how to provide security and safety for their guest."²⁸⁷

Tort law works to protect legitimate individual interests, and in so doing, protects the interests of society and business as a whole.²⁸⁸

282. See KEETON ET AL., *supra* note 25, § 3, at 15 (stating "[t]he twentieth century has brought an increasing realization of the fact that the interests of society in general may be involved in disputes in which the parties are private litigants").

283. In 1974, Connie Francis was beaten and sexually assaulted when her assailant easily entered her hotel room through a sliding glass door. Francis recovered a \$1.7 million settlement. Her suit is considered the "grandfather" of negligent security lawsuits. See Larry Talley, *Pay Attention to Security*, LODGING HOSPITALITY, Oct. 1, 1991, at 46, available in 1991 WL 2917702.

284. Texas courts were the battleground for two recent high profile cases. A jury awarded a Corpus Christi, Texas nurse \$14 million for injuries she sustained when abducted from her apartment by an assailant who easily accessed her key from the apartment manager's pegboard. Motel 6 settled with a woman raped while a guest at a Fort Worth inn for \$10 million on the third day of its trial for negligent security. See *id.*

285. *Id.*

286. See Carlo Wolff, *Setting Security*, LODGING HOSPITALITY, Dec. 1, 1993, at 73, available in 1993 WL 3043864. According to Wolff, the hotel industry has initiated a three-pronged attack to counter negative publicity generated by recent high profile lawsuits for premises security: 1) professionalization of the security field; 2) attention to special traveler segments; and 3) implementation of more stringent security measures. See *id.* The most visible security enhancement is the electronic lock, but other measures include video monitors, trained security personnel on premises, and staff training. See *id.*

287. Talley, *supra* note 281, at 46. Attorney Richard Frank made this statement while representing Connie Francis. See *id.*

288. See KEETON ET AL., *supra* note 162, § 3, at 16.

Lawsuits resulting from rapes, robberies, beatings, and murders on business premises have made it less likely that others will suffer from similar heinous acts. Likewise, by forcing business to respond to legitimate social interests, this litigation ultimately benefits the businesses it targets.

Thus, tort law injects into the calculations of the hospitality industry the legitimate safety concerns of the citizens. Tort law fails in its purpose if businesses can rely on the courts to misapply comparative fault so that business owners face no real threat of liability for poor premises security. Florida's recent tourist crisis²⁸⁹ portends disastrous economic consequences should Florida courts sabotage tort law and apportion liability according to causation in fact.

VI. CONCLUSION

The *Stellas* decision, like its progenitors outside the jurisdiction, stands as a testament to what can happen when a court surrenders legal reasoning to laymen's notions of fairness. Comparative fault was designed to limit applications of joint and several liability, not to undermine the tort system. Simply put, the *Stellas* court ignored the principles governing the "who," "what," and "why" of apportioning liability under comparative fault.

The first principle is that comparative fault must be limited to those whose fault the jury determines — or could determine — to be the legal cause of an injury. The entity must have a duty, breach it, and have its negligence found to be a cause in fact of the injury before legal causation will inure. Apportioning liability among the causes in fact of an injury ignores both the letter of the law and the public policy considerations supporting concepts of duty and legal causation.

The second principle is that the percentage that a party's conduct deviates from a standard of reasonable care representing an unreasonable risk of harm must be what is compared when a jury compares fault. Causation in fact cannot logically be the "what" of the fault apportioned by the jury. It is existentially a fixed sum certain and cannot be apportioned.

289. See *German Tourist Found Shot to Death*, ST. PETERSBURG TIMES, July 10, 1996, at 1B (reporting that following a barrage of negative publicity in Europe after 10 foreign tourists were killed in 13 months in Florida, the number of visitors to the state dropped by nearly 1 million).

The third principle is that the “why” of comparative fault is governed by the logic and public policy behind the common-law aversion to benefiting intentional wrongdoers. Intentional conduct is different in kind and the continuum of conduct theory proffered by the Restatement is not only consistent with the common-law doctrine, but helps to prove it.

The Florida Supreme Court should not allow Florida's courts to use comparative fault to render the duty to protect another from criminal attack a nullity. The supreme court should reverse *Stellas* because principles governing both tort law and comparative fault demand reversal — and because sound public policy requires Florida's courts to withhold from Florida's business community any temptation to relax its vigilance over public safety.