

January 2002

## Consideration of Intentional Torts in Fault Allocation: Disarming the Duty to Protect against Intentional Conduct

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### Recommended Citation

Brown, Christopher M. and Morgan, Kirk A. (2002) "Consideration of Intentional Torts in Fault Allocation: Disarming the Duty to Protect against Intentional Conduct," *Wyoming Law Review*. Vol. 2: No. 2, Article 6. Available at: <https://scholarship.law.uwyo.edu/wlr/vol2/iss2/6>

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## COMMENTS

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## I. INTRODUCTION

Two men returning from a day of fishing come upon a roadblock in the middle of the highway. The police make an opening and frantically wave the men through. Once the men are through, a fleeing criminal smashes into the back of their car. The men file suit against the police because they believe the police breached their duty to protect the men from the intentional wrongdoer. At trial, the plaintiffs win; however, on appeal the court holds that the intentional wrongdoer must be considered in the allocation of fault.<sup>1</sup> Why does it matter? It matters because the victims will probably *not* be compensated for their injuries and the duty to protect against intentional conduct may be weakened.

In tort law, problems dealing with the inclusion of intentional tortfeasors in fault allocations surfaced as states moved from contributory negligence systems to comparative fault systems.<sup>2</sup> At common law, the defense of contributory negligence was not available to intentional tortfeasors.<sup>3</sup> More recently, some states have concluded that under their comparative fault systems intentional tortfeasors must be included in

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1. These facts are based on *Bd. of County Comm'rs of Teton County v. Bassett*, 8 P.3d 1079 (Wyo. 2000).

2. Although the term "comparative negligence" is the term used by many jurisdictions to describe systems that apportion liability, "comparative fault" is the term that will be used in this comment to describe those systems. The reader should be aware, however, that the specific statutory language used in a particular jurisdiction may control the types of conduct that are compared under the statute. *See infra* notes 89-92 and accompanying text.

3. *See Steinmetz v. Kelly*, 72 Ind. 442, 446 (1880). *See also infra* note 22 and accompanying text.

fault allocations.<sup>4</sup> While the concept may seem benign, it can be detrimental to injured plaintiffs.<sup>5</sup>

The question examined in this comment is whether an intentional tortfeasor should be considered in the allocation of fault when one party has breached his specific duty to protect another from an intentional tortfeasor's conduct.<sup>6</sup> For instance, in the above example the police breached their duty to protect the fishermen from the intentional conduct of the fleeing criminal. States that have addressed the question have reached different solutions.<sup>7</sup> The various solutions result from the policies cited by state courts and the specific language used by legislatures when enacting comparative fault statutes. States that advocate comparing intentional and negligent conduct cite the fairness of holding people responsible only for the amount of damage they have caused.<sup>8</sup> States that do not compare intentional and negligent conduct cite the common law rule denying the comparison or recognize that the duty to protect the plaintiff may be compromised.<sup>9</sup>

This comment will examine the development of tort law in this area from the common law doctrine of contributory negligence to current systems of comparative fault. Specifically, this comment will consider: (1) the common law doctrine of contributory negligence and its policies; (2) the treatment of intentional conduct with respect to contributory negligence in cases with a negligent plaintiff and an intentional tortfeasor; (3) the duty-to-protect problem as it was treated under the doctrine of contributory negligence; (4) the transition most states have made from contributory negligence to comparative fault systems; (5) the two main types of comparative fault systems and available choices within those systems; (6) how different states have addressed the duty-to-protect

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4. See *infra* note 100 and accompanying text.

5. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14 cmt. b (1999) (noting that because of the greater culpability of the intentional tortfeasor, the jury will most likely assign the majority of responsibility to the intentional tortfeasor; therefore the inclusion of intentional tortfeasors would limit plaintiff's recovery when the intentional tortfeasor is either unavailable or insolvent).

6. This situation will be referred to as "the duty-to-protect problem" throughout the remainder of this comment.

7. Compare note 95 with note 100 and accompanying text.

8. See *Bd. of County Comm'rs of Teton County v. Bassett*, 8 P.3d 1079 (Wyo. 2000).

9. See, e.g., *Turner v. Jordan*, 957 S.W.2d 815, 823 (Tenn. 1997) (stating that negligent and intentional torts are different in degree, in kind, and in society's view and therefore should not be compared); *Wal-Mart Stores, Inc. v. McDonald*, 676 So. 2d 12, 22 (Fla. Dist. Ct. App. 1996) (concluding that allocating fault largely on the intentional tortfeasor would provide a disincentive for the negligent defendant to uphold its duty to protect).

problem under their respective comparative fault systems; and (7) the adoption and development of Wyoming's comparative fault system, including the case of *Board of County Commissioners of Teton County v. Bassett* in which the Wyoming Supreme Court considered the duty to protect.

After discussing how the duty to protect developed, this comment will analyze the duty-to-protect problem. Particularly, this comment will: (1) describe those comparative fault systems whose attributes potentially raise the duty-to-protect problem; (2) consider the policies behind the adoption of comparative fault, the duty to protect, and the continuing need to further those policies; (3) discuss and advocate the Restatement (Third) of Torts position with regard to the duty to protect; (4) identify and discuss deficiencies with the Wyoming Supreme Court's analysis in *Bassett*; and (5) propose potential solutions for jurisdictions, like Wyoming, that have severely limited the efficacy of the duty to protect.

In conclusion, this comment advocates adoption of the Restatement (Third) of Torts position where defendants who have failed to protect against the harm it was their duty to prevent are held responsible for the entire amount of the injured plaintiffs' damages when the intentional tortfeasor is unknown or insolvent.

## II. BACKGROUND

### A. Contributory Negligence

Historically, the doctrine of contributory negligence was one of the most common defenses to allegations of negligence.<sup>10</sup> Basically, the plaintiff's recovery was completely barred if the defendant could prove that the plaintiff was also negligent.<sup>11</sup> The defense was sometimes referred to as the "all-or-nothing rule" because a plaintiff recovers all, or none, of his damages.<sup>12</sup> The principle underlying the doctrine is that

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10. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 65, at 451 & n.1 (5th ed. 1984). Keeton and others date the beginning of contributory negligence to the case of *Butterfield v. Forrester*, 103 Eng. Rep. 926 (1809). The earliest American case recognizing the doctrine of contributory negligence is *Smith v. Smith*, 19 Mass. 621 (1824). See also CHARLES FISK BEACH, BEACH ON CONTRIBUTORY NEGLIGENCE § 8, at 9 (2d ed. 1892); William J. McNichols, *Should Comparative Responsibility Ever Apply to Intentional Torts?*, 37 OKLA. L. REV. 641, 647 (1984).

11. Keeton, *supra* note 10, § 65, at 461.

12. *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1090 (Fla. 1987); *Zigler v. United States*, 954 F.2d 430, 433 (7th Cir. 1992); *Carroll v. Whitney*, 29 S.W.3d 14, 16 (Tenn. 2000); *Luther v. Danner*, 995 P.2d 865, 867 (Kan. 2000).

plaintiffs are denied recovery because of their own culpable conduct.<sup>13</sup> Contributory negligence purported to advance a number of policies, such as to serve an instinctive sense of justice, to make people more cautious in their actions, to prohibit people from taking advantage of their own lack of care, and to punish the plaintiff for his own misconduct.<sup>14</sup>

Since its inception, the doctrine of contributory negligence received criticism because of its harsh effect on plaintiffs.<sup>15</sup> As a result, several doctrines were developed to alleviate its perceived harshness.<sup>16</sup> These doctrines, along with certain statutory exceptions, allowed plaintiff recovery.<sup>17</sup> Later, some courts abandoned contributory negligence, mentioning various problems with the defense, such as: (1) it promoted negligence by giving defendants a reason to believe they may escape liability;<sup>18</sup> (2) the defendant was usually in a better position than the plaintiff to bear the financial burden of the loss;<sup>19</sup> (3) it was unreason-

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13. Contributory negligence has been defined as "conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm." RESTATEMENT (SECOND) OF TORTS § 463 (1965).

14. *The Explorer*, 20 F. 135, 139 (C.C.E.D.La. 1884); *Swindell v. Hellkamp*, 232 So. 2d 186, 188 (Fla. Dist. Ct. App. 1970); *McKinnon v. Morrison*, 10 S.E. 513, 515 (N.C. 1889); *Wagner v. Olsen*, 482 P.2d 702, 708 (Utah 1971); *Keeton*, *supra* note 10, § 65, at 452. *See also Beach*, *supra* note 10, § 9, at 10 (stating that contributory negligence commends itself to our instinctive sense of justice, makes people more cautious, and prohibits them from taking advantage from their own lack of care).

15. William L. Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1, 4 (1953). As the dominant goal of accident law became compensation for injuries, the defense of contributory negligence was looked upon with more disfavor by the courts. *Keeton*, *supra* note 10, at 453.

16. For example, the last clear chance doctrine generally applied when the defendant had the last opportunity to avoid the injury. *See McNichols*, *supra* note 10, § 65, at 647. *See also Prosser*, *supra* note 15, at 6.

17. *Prosser*, *supra* note 15, § 65, at 6. Examples of statutory exceptions to contributory negligence were child labor acts and workplace safety acts. Plaintiffs were not barred from recovery because of their negligence if the defendant's actions were controlled by one of these statutes because the statutes protected plaintiffs from their own negligence. *Keeton*, *supra* note 10, § 65, at 461. However, workplace plaintiffs might have confronted other obstacles such as the fellow servant rule. *Id.* at 569.

18. *Alvis v. Ribar*, 421 N.E.2d 886, 893 (Ill. 1981); *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1231 (Cal. 1975); *Kaatz v. State*, 540 P.2d 1037, 1048 (Alaska 1975); *Kirby v. Larson*, 256 N.W.2d 400, 416 (Mich. 1977); *Langley v. Boyter*, 325 S.E.2d 550, 563 (S.C. Ct. App. 1984).

19. *Kaatz v. State*, 540 P.2d 1037, 1048 (Alaska 1975) (citing WILLIAM L. PROSSER, THE LAW OF TORTS § 67, at 433 (4th ed. 1971)). *See also Allison v. Davies*, 381 N.E.2d 1034, 1039 (Ill. App. Ct. 1978) (Alloy, J., concurring); *Prosser*, *supra* note 15, at 4 ("The attack upon contributory negligence has been founded upon the obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one

able to place the entire risk of loss on the plaintiff when the defendant also caused a portion of the injury;<sup>20</sup> and (4) juries were capable of apportioning fault.<sup>21</sup>

### *B. Negligent Plaintiff v. Intentional Defendant at Common Law*

Under common law, the contributory negligence defense was applicable when there was ordinary negligence on the part of the plaintiff and the defendant; however, it was not applicable when the defendant was an intentional tortfeasor.<sup>22</sup> Some courts reasoned that it was necessary to distinguish between intentional and negligent conduct to circumvent the harsh effect of contributory negligence.<sup>23</sup> Other courts reasoned that intentional conduct should be treated differently from negligent conduct because the conduct of the plaintiff and defendant were different in kind.<sup>24</sup> The theory that negligent and intentional conduct are different in kind was explained by the greater social condemnation attached to

of them alone, and that one the injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot free.”)

20. *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1230 (Cal. 1975) (citing WILLIAM L. PROSSER, *THE LAW OF TORTS* § 67, at 433 (4th ed. 1971); *Scott v. Rizzo*, 634 P.2d 1234, 1241 (N.M. 1981); *Hoffman v. Jones*, 280 So. 2d 431, 437 (Fla. 1973); *Goetzman v. Wichern*, 327 N.W.2d 742, 752 (Iowa 1982); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 882 (W.Va. 1979).

21. *Alvis v. Ribar*, 421 N.E.2d 886, 894-95 (Ill. 1981); *Scott v. Rizzo*, 634 P.2d 1234, 1241 (N.M. 1981); *Hoffman v. Jones*, 280 So. 2d 431, 437 (Fla. 1973); *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1231 (Cal. 1975); *Goetzman v. Wichern*, 327 N.W.2d 742, 749 (Iowa 1982).

22. *Graves v. Graves*, 531 So. 2d 817, 820 (Miss. 1988); *Steinmetz v. Kelly*, 72 Ind. 442, 446 (1880); *Ruter v. Foy*, 46 Iowa 132, 132-33 (1877); *Brendle v. Spencer*, 34 S.E. 634, 635 (N.C. 1899); *Moore v. Atchinson, Topeka & Santa Fe Ry.*, 110 P. 1059, 1064 (Okla. 1910); *Deane v. Johnston*, 104 So. 2d 3, 7-8 (Fla. 1958); *RESTATEMENT (SECOND) OF TORTS* § 481 (1965).

23. *Steinmetz v. Kelly*, 72 Ind. 442, 446 (1880) (“An intentional assault and unlawful battery, inflicted upon a person, is an invasion of his right of personal security, for which the law gives him redress, and of this redress he cannot be deprived on the ground that he was negligent and took no care to avoid such invasion of his right.”). *See also* *Christian v. Illinois Cent. Ry.*, 12 So. 710, 711 (Miss. 1893); *Montgomery v. Lansing City Elec. Ry.*, 61 N.W. 543, 545 (Mich. 1894).

24. *See Atchison Ry. v. Baker*, 98 P. 804, 807 (Kan. 1908); *Zeni v. Anderson*, 243 N.W.2d 270, 286 & n.34 (Mich. 1976); *Gibbard v. Cursan*, 196 N.W. 398, 401-02 (Mich. 1923) (the court refused to compare negligence and intentional conduct, stating that if “one willfully injures another . . . he is guilty of more than negligence. The act is characterized by willfulness, rather than inadvertence, it transcends negligence -- [it] is different in kind.”); *Jackson v. Brantley*, 378 So. 2d 1109, 1112 (Ala. Ct. App. 1979), *aff'd*, 378 So.2d 1112 (Ala. 1979); *Frontier Motors v. Horrall*, 496 P.2d 624, 627 (Ariz. Ct. App. 1972); *Civille v. Bullis*, 25 Cal. Rptr. 578, 581 (Cal. Ct. App. 1962); *Jenkins v. N. Carolina Dep't of Motor Vehicles*, 94 S.E.2d 577, 581 (N.C. 1956); *Mills v. Reynolds*, 807 P.2d 383, 403 (Wyo. 1991).

intentional conduct.<sup>25</sup> In addition, contributory negligence was not a defense when the defendant's conduct was willful, wanton, or reckless.<sup>26</sup> However, if the plaintiff's conduct was also intentional or reckless, he was barred from recovery.<sup>27</sup> Many courts still hold that intentional and negligent conduct are different in kind; therefore, these jurisdictions do not compare intentional and negligent conduct.<sup>28</sup>

### C. *Duty to Protect at Common Law*

The duty-to-protect problem addresses situations in which a party has a duty to protect another from the actions of an intentional tortfeasor. This duty has not always been present. At the beginning of the nineteenth century, courts developed the "last human wrongdoer" rule.<sup>29</sup> That rule provided that when the culpable conduct of another intervenes after the defendant's negligence, the intervener's conduct insulates the original defendant from liability; hence, the "last human wrongdoer" was held responsible for the plaintiff's harm.<sup>30</sup> However, this rule was criti-

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25. Keeton, *supra* note 10, § 65, at 462 ("The 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."). See also McNichols, *supra* note 10, at 679 (noting "[t]he different-in-kind rationale is also based on the notion that deliberate injurious conduct has a moral quality sufficiently outrageous and different from negligence to justify treating plaintiff's conduct as irrelevant to the amount of his recovery."); B. Scott Andrews, Comment, *Premises Liability—The Comparison of Fault Between Negligent and Intentional Actors*, 55 LA. L. REV. 1149, 1159 (1995) ("This different-in-kind argument is rooted in the moral culpability involved in intentional acts, which is objectively absent from the mind of the negligent actor.").

26. See, e.g., *Rimer v. Rockwell Int'l Corp.*, 641 F.2d 450, 456 (6th Cir. 1981) (applying Ohio law); *Newman v. Piazza*, 433 P.2d 47, 49-50 (Ariz. 1967); *Atchison, T. & S.F.Ry. v. Baker*, 98 P. 804, 805 (Kan. 1908); *Mihelich v. Butte Elec. Ry.*, 281 P. 540, 545 (Mont. 1929); *Coleman v. Hines*, 515 S.E.2d 57, 59 (N.C. Ct. App. 1999). See also Keeton, *supra* note 10, § 34, at 212-13 (willful, wanton, or reckless, conduct is "conduct which is still, at essence, negligent, rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if it were so intended.").

27. McNichols, *supra* note 10, at 647 & n.31. See also RESTATEMENT (SECOND) OF TORTS §§ 482(2) and 503(3) (1965).

28. See e.g., *Merrill Crossings Assocs. v. McDonald*, 705 So. 2d 560, 562 (Fla. 1997); *Turner v. Jordan*, 957 S.W.2d 815, 823 (Tenn. 1997); *Veazey v. Elmwood Plantation Assocs., Ltd.*, 650 So. 2d 712, 719 (La. 1994); *Burke v. Rothschild's Liquor Mart, Inc.*, 593 N.E.2d 522, 532 (Ill. 1992).

29. 2 FOWLER V. HARPER & FLEMMING JAMES, JR., THE LAW OF TORTS, § 22.1, at 1195 & n.14 (1956).

30. Laurence H. Eldredge, *Culpable Intervention and Superseding Cause*, 86 U. PA. L. REV. 121, 124 (1937). The policies behind the rule were that it was easy to apply and plaintiffs should be content as long as they could bring an action to recover from the intentional tortfeasor. *Id.*

cized because it often led to undesirable results, such as the inequity of exculpating the first wrongdoer who also caused the harm and the inability to compensate the plaintiff for the injury suffered when the third party was unknown or judgment proof.<sup>31</sup> As a result of these deficiencies, jurisdictions abandoned the rule.<sup>32</sup>

After courts abandoned the last human wrongdoer rule, they began to focus on whether a third party's actions were foreseeable by the negligent defendant.<sup>33</sup> The general rule developed by courts held the negligent defendant liable for the injuries caused in part by a subsequent intentional act that was reasonably foreseeable (i.e., an intervening cause).<sup>34</sup> However, if the intervening cause was unforeseeable, it was deemed superceding and the negligent defendant was not liable.<sup>35</sup> Essentially, the foreseeability of the conduct determines whether a particular intervening cause will be superceding and relieve the defendant of liability.<sup>36</sup>

The fact that intentional conduct is foreseeable does not create the defendant's negligence.<sup>37</sup> There must be a preexisting duty on the part of the defendant to protect the plaintiff from the intentional conduct, or the defendant's actions must create an increased risk of harm to the plaintiff.<sup>38</sup> In the first category of cases, a preexisting duty on the part of

31. *Id.* at 134. See also Jordan H. Leibman, *Comparative Contribution and Intentional Torts: A Remaining Roadblock to Damages Apportionment*, 30 AM. BUS. L. JOUR. 677, 697 (1993) ("A major problem with assigning all damages to intentional actors is that frequently they are financially unable to meet judgments. Batterers and the like often have difficulty paying for the harm they cause."); Stephen Scallan, *Proximate Cause Under RICO*, 20 S. Ill. U. L.J. 455, 458 (1996).

32. Eldredge, *supra* note 30, at 125.

33. FRANCIS H. BOHLEN, *STUDIES IN THE LAW OF TORTS*, at 504-05 (1926).

34. Lester W. Freezer, *Intervening Crime and Liability for Negligence*, 24 MINN. L. REV. 635, 647 (1940); See also RESTATEMENT (SECOND) OF TORTS § 441 (1965). Although the courts, and the term "intervening cause" itself, suggest that the problem is one of causation, the problem is really one concerning the policy of whether the defendant should be held liable for his part in causing the harm when a subsequent cause has entered the picture. Keeton, *supra* note 10, § 44, at 301.

35. RESTATEMENT (SECOND) OF TORTS §§ 448, 449 (1965).

36. RESTATEMENT (SECOND) OF TORTS § 442 (1965).

37. RESTATEMENT (SECOND) OF TORTS § 449 cmt. a. (1965) ("It is only where the actor is under a duty to the other, because of some relation between them, to protect him against such misconduct, or where the actor has undertaken the obligation of doing so, or his conduct has created or increased the risk of harm through the misconduct, that he becomes negligent."). The defendant's action has to be negligent because of the failure to protect against the likelihood of the hazard. *Id.* See also Keeton, *supra* note 10, § 33, at 201-02.

38. RESTATEMENT (SECOND) OF TORTS § 449 (1965) ("If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes

the defendant arises when a relationship exists between the parties. The duty may arise by contract<sup>39</sup> or through a special relationship.<sup>40</sup> In the latter category of cases, liability may exist when the defendant's actions created an opportunity for an intentional actor to foreseeably harm another person. This recognizes that there are certain situations in which people intentionally harm others and that certain places are particularly dangerous.<sup>41</sup>

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the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby."); RESTATEMENT (SECOND) OF TORTS § 448 (1965) ("The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.").

39. See, e.g., *Douglas W. Randall, Inc. v. AFA Protective Systems, Inc.*, 516 F.Supp. 1122 (E.D. Pa. 1981), *aff'd*, 688 F.2d 820 (3d Cir. 1982) (defendant breached agreement to maintain a burglary alarm system in the plaintiff's store).

40. Keeton, *supra* note 10, § 33, at 202. This special relationship between the parties can arise in a number of situations. See, e.g., *Brower v. New York Central & H. R. R. Co.*, 103 A. 166 (N.J. 1918) (carrier and passenger); *Sage Club v. Hunt*, 638 P.2d 161, 162 (Wyo. 1981) (employer and employee); RESTATEMENT (SECOND) OF TORTS § 344 (1965) (innkeeper and guest); Marjorie A. Caner, Annotation, *Liability of Owner or Operator of Shopping Center, or Business Housed Therein, for Injury to Patron on Premises From Criminal Attack by Third Party*, 31 A.L.R. 5th 550 (1995) (invitor and business visitor); Joel E. Smith, Annotation, *Liability of University, College, or Other School for Failure to Protect Student From Crime*, 1 A.L.R. 4th 1099 (1980) (school and pupil); Tracy A. Bateman and Susan Thomas, Annotation, *Landlord's Liability for Failure to Protect Tenant from Criminal Acts of Third Person*, 43 A.L.R. 5th 207 (1996) (landlord and tenant). The special relationship may also arise because of the defendant's position of control over the intentional tortfeasor. See *Sosa v. Coleman*, 646 F.2d 991 (5th Cir. 1981) (sheriff liable for actions of dangerous criminal who escaped); *Daniels v. Anderson*, 237 N.W.2d 397 (Neb. 1975) (police held liable after plaintiff was assaulted in jail). See also Wade R. Habeeb, Annotation, *Liability of Hospital for Injury Caused Through Assault by a Patient*, 48 A.L.R. 3d 1288 (1973). A special relationship also exists when the defendant is in a unique relationship with the plaintiff, such as the doctor and patient relationship. See *Tarasoff v. Regents of Univ. of California*, 551 P.2d 334 (Cal. 1976) (holding therapist liable for failing to warn a third party of threats made by a patient); *Williams v. United States*, 450 F.Supp. 1040 (D.S.D. 1978) (Veterans Administration hospital held liable for the violent acts of a dangerous patient because hospital failed to notify local authority of release of the dangerous patient); John C. Williams, Annotation, *Liability of One Treating Mentally Afflicted Patient for Failure to Warn or Protect Third persons Threatened by Patient*, 83 A.L.R. 3d 1201 (1978).

41. RESTATEMENT (SECOND) OF TORTS § 448 cmt. b (1965). See also *Brower v. New York Central & H. R. R. Co.*, 103 A. 166, 167 (N.J. 1918) (holding that a railroad company, after negligently colliding with a cider truck, was liable for failing to protect the cider from thieves in an area the company knew was frequented by thieves because it was foreseeable that the thieves (intervening actors) would steal the cider); *Richardson v. Ham*, 285 P.2d 269, 272 (Cal. 1955) (defendant's failure to lock bulldozer was

#### D. Transition to Comparative Fault

The transition from contributory negligence to comparative fault occurred, for the most part, in the middle of the twentieth century.<sup>42</sup> The major impetus behind the transition was dissatisfaction with the inequities created by contributory negligence.<sup>43</sup> Under the doctrine of comparative fault, damages are apportioned between the negligent plaintiff and defendant.<sup>44</sup> Consequently, a plaintiff's contributory negligence no longer bars recovery; rather, it simply reduces recovery in proportion to fault.<sup>45</sup> The different choices made by states as they adopted comparative fault systems directly affect the duty-to-protect problem.

#### E. Available Choices for Apportionment

Two main types of comparative fault systems exist—pure comparative fault and modified comparative fault.<sup>46</sup> While each of the two

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negligent because he should have foreseen that young men would steal the bulldozer); *Easley v. Apollo Detective Agency, Inc.*, 387 N.E.2d 1241, 1248 (Ill. App. Ct. 1979) (holding detective agency liable for wilful and wanton conduct in hiring a security guard who had a prior arrests and poor prior employment record). See also Donald K. Armstrong, Comment, *Negligent Hiring and Negligent Entrustment: The Case Against Exclusion*, 52 OR. L. REV. 296 (1973); Jack W. Shaw, Annotation, *Hospital's Liability for Negligence in Selection or Appointment of Staff Physician or Surgeon*, 51 A.L.R. 3d 981 (1978).

42. Keeton, *supra* note 10, § 67, at 471. The bulk of the shift to comparative fault occurred in the 1970s and early 1980s. *Id.* Unlike other areas of the law, comparative fault was the general rule in maritime law since the 1700s. However, under early maritime law, true comparisons were not made and damages were divided equally between the parties. *Id.* See also HENRY WOODS & BETH DEERE, *COMPARATIVE FAULT*, § 1:10, at 15 (3d ed. 1996). Later, as maritime law developed, apportionment of damages was made according to the parties' degree of fault. *Id.* at 16. See, e.g., *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).

43. See *supra* notes 15, 18-21 and accompanying text. See also Keeton, *supra* note 10, § 67, at 468-69.

44. VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE*, § 2-1, at 31 (3d ed. 1994) ("The term 'comparative negligence' might be used to describe any system of law that by some method and in some situations apportions costs of an accident, at least in part, on the basis of relative fault of the responsible parties.").

45. Keeton, *supra* note 10, § 67, at 472. There are two basic arguments for why a comparative system should not be adopted: (1) it is impossible to compare fault with fault and any attempt would be a guess; and (2) juries cannot be trusted to divide damages according to fault because they will take the side of the injured plaintiff against corporations and insurance companies. Prosser, *supra* note 15, at 9.

46. Keeton, *supra* note 10, § 67, at 471. There is a third type of system called the slight-gross system, which has been adopted only by South Dakota. Under the slight-gross system, the plaintiff's contributory negligence bars recovery unless his negligence is "slight" and, in comparison, the defendant's negligence is "gross." Courts determine whether the plaintiff's negligence is "slight" by comparing the plaintiff's negligence to

systems has general characteristics, the choices jurisdictions make within each system control how the plaintiff and defendant's negligence are compared and to what recovery, if any, the plaintiff is entitled. This section will describe the two main comparative fault systems and then consider the different choices within those systems, the policies behind those choices, and how those choices affect the outcome in duty-to-protect cases.

## 1. General Systems

### a. Pure Comparative Fault

The simplest form of comparative fault is pure comparative fault.<sup>47</sup> In a pure system, a plaintiff's damages are reduced in proportion to the amount of negligence attributable to him unless his negligence is the sole proximate cause of the injury, in which case he receives nothing.<sup>48</sup> The plaintiff may still recover even if he is more liable for the injury than the defendant; however, he recovers only the amount of damages that are proportionate to the defendant's fault.<sup>49</sup> When there is more than one defendant, each is responsible for his proportionate share of the fault, even if that fault is less than the fault of the plaintiff.<sup>50</sup>

### b. Modified Comparative Fault

Generally, in modified comparative fault systems the contributory negligence of the plaintiff will not bar recovery as long as the amount of the plaintiff's fault remains below a fixed level (the "cut-off level") in comparison to the fault of the negligent defendant.<sup>51</sup> The cut-off levels fixed under these systems are usually fifty or fifty-one percent. In some states, if the plaintiff's fault is equal to the defendant's fault (i.e., fifty percent), then the plaintiff will be barred from recovery.<sup>52</sup> In other states, the plaintiff's fault has to be greater than (i.e., more than fifty percent) the defendant's fault before the plaintiff's recovery is

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the defendant's negligence on a case-by-case basis. Schwartz, *supra* note 44, § 3-4(b), at 72.

47. Schwartz, *supra* note 44, § 3-2, at 58.

48. *Id.* at 58-59.

49. *Id.* at 63. For example, if the jury allocates 85% of the fault to the plaintiff, he will recover 15% of the total damages.

50. Keeton, *supra* note 10, § 67, at 472 (noting that the one major objection to the pure system is that even when the plaintiff is more at fault for the injury suffered, the less culpable defendants are required to pay).

51. Schwartz, *supra* note 44, § 3-5, at 78.

52. *Id.* This is the situation when the statute states that the plaintiff may recover when his "negligence is not as great as the defendant's negligence." *Id.*

barred.<sup>53</sup> The plaintiff will have his damages reduced by the percentage he was at fault up to the cut-off level. Once the plaintiff's fault exceeds the cut-off level, his recovery is completely barred.<sup>54</sup>

In modified systems, problems arise when multiple parties are joined in the action.<sup>55</sup> In some states, the negligence of the plaintiff is compared to each individual defendant. In those states, if the fault apportioned to the plaintiff is lower than the fault apportioned to each defendant, the plaintiff will recover.<sup>56</sup> This result encourages defendants to join other defendants because it decreases their exposure to financial loss.<sup>57</sup> Other states follow the "unit rule" which provides that the plaintiff's negligence is compared to the aggregate of the defendants' negligence.<sup>58</sup> In these states, the plaintiff will be able to recover as long as his apportioned fault remains less than the combined fault of all the defendants.<sup>59</sup>

## 2. Choices Available Within Comparative Fault Systems

### a. Joint and Several Liability versus Several Liability

Some jurisdictions retained the common law rule of joint and several liability after their transition to a comparative fault system.<sup>60</sup> Joint and several liability increases the plaintiff's chance of recovering the entire amount of the judgment because the plaintiff can recover the entire amount from any liable defendant.<sup>61</sup> The basis for joint and several liability is that when the acts of two or more individuals merge to pro-

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53. Schwartz, *supra* note 44, § 3-5(b), at 80.

54. Schwartz, *supra* note 44, § 3-5(b)(3), at 83. For example, in a state that has a 50% cut-off level, if the plaintiff was 49% at fault and the defendant 51% at fault for the injury, the plaintiff would recover 51% of the total damages. If the plaintiff was 51% at fault and the defendant 49% at fault, the plaintiff would not recover.

55. Prosser, *supra* note 15, at 33.

56. Reiter v. Dyken, 290 N.W.2d 510 (Wis. 1980). See also Keeton, *supra* note 10, § 67, at 473.

57. Keeton, *supra* note 10, § 67, at 473. As the number of defendants in the action increases, assuming that each bears some responsibility for the plaintiff's injuries, the greater the chance that the plaintiff's negligence will be greater than an individual defendant's negligence.

58. Keeton, *supra* note 10, § 67, at 474. See also Walton v. Tull, 356 S.W.2d 20 (Ark. 1962).

59. Walton, 356 S.W.2d at 26.

60. Woods, *supra* note 42, § 13:4, at 234. See also Keeton, *supra* note 10, § 67, at 475.

61. Coney v. J.L.G. Industries, Inc., 454 N.E.2d 197, 204 (Ill. 1983). See also Keeton, *supra* note 10, § 67, at 475.

duce a single, indivisible injury, the individuals should be held jointly responsible for the injury.<sup>62</sup>

Generally, four policy reasons support joint and several liability: (1) Each defendant is responsible for the entire judgment because his actions alone could have caused the entire indivisible injury, even if a percentage of fault can be assigned to each defendant; (2) it would be improper for a plaintiff who is not at fault to bear the burden of insolvent defendants; (3) a defendant's negligence results from the lack of due care for others while the plaintiff's negligence only results from a lack of due care for himself; and (4) the abolition of joint and several liability may keep the plaintiff from being fully compensated for his injuries.<sup>63</sup> In duty-to-protect cases, the result of joint and several liability is that the negligent defendant and the intentional tortfeasor are each individually liable for the entire amount of the judgment.

Jurisdictions that have abolished or limited the doctrine of joint and several liability have replaced it with some form of several liability.<sup>64</sup> In a several liability jurisdiction, each defendant is liable only for his corresponding portion of fault.<sup>65</sup> Accordingly, in cases with multiple defendants, the plaintiff will not recover a defendant's proportional share if that defendant is unable to pay.

Three main policy reasons support several liability: (1) fairness requires that defendants should be liable only for injuries they have caused; (2) juries can apportion fault for indivisible injuries, as evidenced by their ability to apportion fault in comparative systems gener-

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62. JOSEPH W. LITTLE, 2 COMPARATIVE NEGLIGENCE, § 13.30[2] (Barry D. Denkensohn ed., 2d ed. 1990). Where the acts of two or more individuals produce divisible injuries, then liability is individual. *Id.* An indivisible result occurs "where two or more causes combine to produce a single result, incapable of reasonable division, each may be a substantial factor in bringing about the loss, and if so, each is charged with all of it." Keeton, *supra* note 10, § 52, at 347. Examples of indivisible injuries are a broken leg or the burning down of a house. *Id.*

63. *Coney v. J.L.G. Industries, Inc.*, 454 N.E.2d 197, 205 (Ill. 1983). *See also* *Am. Motorcycle Ass'n v. Superior Court*, 578 P.2d 899, 905-06 (Cal. 1978); *Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426, 436 (Alaska 1979); *Tucker v. Union Oil Co.*, 603 P.2d 156, 164 (Idaho 1979); *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 588 P.2d 1308, 1313 (Wash. 1978); *Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp.*, 291 N.W.2d 825, 834 (Wis. 1980).

64. Little, *supra* note 62, § 13.30[1]. Some jurisdictions have abolished or modified the common law doctrine of joint and several liability only with respect to specific factors, such as types or amounts of damages. *See* Schwartz, *supra* note 44, § 15-4, at 308; Woods, *supra* note 42, § 13:4, at 234.

65. *Anderson Highway Signs and Supply, Inc. v. Close*, 6 P.3d 123 (Wyo. 2000). *See also* Little, *supra* note 62, § 13.30[3].

ally; and (3) because plaintiffs bear the burden of an insolvent tortfeasor when there is only one defendant, there is no reason to shift the burden of insolvent tortfeasors to defendants in multiple defendant situations.<sup>66</sup> In duty-to-protect cases in several liability states, if an intentional tortfeasor is included in the allocation of fault, the negligent defendant is responsible only for his amount of allocated fault.

#### b. Contribution and Indemnification

Contribution is designed to compensate the defendant who has paid a plaintiff more than his share of the proportionate fault by allowing that defendant to maintain an action against other non-paying defendants for their proportional shares.<sup>67</sup> At common law, a tortfeasor who paid a judgment for which other tortfeasors were jointly and severally liable was unable to seek contribution.<sup>68</sup> Additionally, at common law, it was impossible to determine exactly what proportion of the judgment should be attributed to each defendant because injuries were considered indivisible.<sup>69</sup> Accordingly, early statutes and judicial pronouncements overturning the common law rule that prohibited contribution among joint tortfeasors provided for an equal distribution of damages among the tortfeasors rather than by their proportionate degree of fault.<sup>70</sup> However, with the adoption of comparative fault it became possible to determine what proportion of fault was attributable to each defendant. As a result, the amount of contribution available to joint tortfeasors became a func-

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66. Paul Bargren, Comment, *Joint and Several Liability: Protection for Plaintiffs*, 1994 WIS. L. REV. 453, 468-69 (1994); Kathleen M. O'Conner & Gregory P. Sreenan, *Apportionment of Damages: Evolution of a Fault Based System of Liability for Negligence*, 61 J. AIR L. & COM. 365, 378 (1995). See also Bd. of County Comm'rs of Teton County v. Bassett, 8 P.3d 1079, 1084 (Wyo. 2000).

67. BLACK'S LAW DICTIONARY, 328-29 (6th ed. 1990). See *Markey v. Skog*, 322 A.2d 513, 517-18 (N.J. Super. Ct. Law Div. 1974); RESTATEMENT (SECOND) OF TORTS § 886A (1977).

68. Schwartz, *supra* note 44, § 16-1, at 325. See also Woods, *supra* note 42, § 13:5, at 237; Keeton, *supra* note 10, § 50, at 336. This rule originated from *Merrywether v. Nixan*, 101 Eng.Rep.1337 (1799) (holding an intentional tortfeasor is not entitled to contribution). This rule was, however, subject to many exceptions. See 1 STUART M. SPEISER ET. AL., THE AMERICAN LAW OF TORTS, § 3:17, at 432 (1983).

69. See *supra* notes 62-63 and accompanying text. See also Speiser, *supra* note 68, § 3:15, at 428 (stating that other reasons cited for retaining the no contribution rule are that it serves to deter misconduct and the wrongdoing of the person seeking contribution precludes its availability).

70. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 1 (amended 1955), 12 U.L.A. 194 (1996). See also Speiser, *supra* note 68, § 3:23, at 468. Some jurisdictions did allow contribution based on fault as evidenced by the earlier 1939 version of the Uniform Contribution Among Tortfeasors Act. Uniform Contribution Among Tortfeasors Act § 2(4), 12 U.L.A. 185 (1996) (the 1939 version of the Act provided that when an equal distribution would be inequitable, degrees of fault should be considered.).

tion of their degree of fault.<sup>71</sup> The main policy reason for the adoption of contribution was that it relieved the inequity of requiring one defendant to pay the entire judgment when others were also responsible for the plaintiff's injury.<sup>72</sup> The right to contribution varies from jurisdiction to jurisdiction and is generally controlled by statute.<sup>73</sup> In several liability jurisdictions contribution is not needed because each defendant is responsible only for his proportionate share of the fault.<sup>74</sup> In duty-to-protect cases in jurisdictions that allow contribution, if the negligent defendant compensates the plaintiff for the intentional tortfeasor's proportionate share, he can maintain an action against the intentional tortfeasor for that amount.

Indemnity differs from contribution in that the damages are not apportioned between the defendant and a joint tortfeasor. Indemnity is "a contractual or equitable right under which the entire loss is shifted from a tortfeasor who is only technically or passively at fault to another who is primarily or actively responsible."<sup>75</sup> Indemnity may be contractual or implied at law to prevent an unjust result.<sup>76</sup> As a general rule, the indemnitor must owe the indemnitee a duty to entitle the latter to indemnification from the former.<sup>77</sup> Therefore, although not always the case, courts have held that a negligent defendant is not entitled to indemnification from an intentional tortfeasor in the same action.<sup>78</sup>

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71. Speiser, *supra* note 68, § 3:23, at 471. Courts have, however, generally refused to allow contribution in favor of intentional tortfeasors as against co-tortfeasors. See *Allen v. Sundean*, 186 Cal. Rptr. 863 (Cal. Ct. App. 1982); RESTATEMENT (SECOND) OF TORTS § 886A (1977) ("There is no right of contribution in favor of any tortfeasor who has intentionally caused the harm.").

72. Keeton, *supra* note 10, § 50, at 337-38 ("There is obvious lack of sense and justice in a rule which permits the entire burden of loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or the plaintiff's collusion with the other wrongdoer, while the latter goes scot free.").

73. Schwartz, *supra* note 44, § 16-1, at 325.

74. *Anderson Highway Signs and Supply, Inc. v. Close*, 6 P.3d 123 (Wyo. 2000). See also Little, *supra* note 62, § 13.30[3].

75. BLACK'S LAW DICTIONARY, 769 (6th ed. 1990). RESTATEMENT OF RESTITUTION § 76 (1937) ("A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct."). See also RESTATEMENT (SECOND) OF TORTS § 886B (1977).

76. Keeton, *supra* note 10, § 51, at 341. See also *Diamond Surface Inc. v. Cleveland*, 963 P.2d 996, 1002 (Wyo. 1998) ("[t]he independent relationship may be established by an express indemnity agreement, indemnity implied from contract, or indemnity imposed by equitable considerations.").

77. Keeton, *supra* note 10, § 51, at 344.

78. *Jacobs v. General Accident, Fire & Life Assurance Corp.*, 109 N.W.2d 462,

### c. Persons Included in the Comparison

The allocation of fault in duty-to-protect cases often depends on whether states include non-party actors in the allocation.<sup>79</sup> A minority of jurisdictions apportion fault to non-parties.<sup>80</sup> These jurisdictions differ in how they approach the issue: (1) in some, only certain types of damages may be allocated to a non-party actor; (2) other jurisdictions allow for contribution and the party defendants can later recover from the absent tortfeasor; and (3) in others, the plaintiff will not recover any amount attributed to the absent tortfeasor.<sup>81</sup> However, only six of the jurisdic-

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468 (Wis. 1961) (holding negligent tortfeasor is not entitled to indemnity from grossly negligent tortfeasor); *Panasuk v. Seaton*, 277 F.Supp. 979, 982 (D. Mont. 1968). *But see* *United Airlines Inc. v. Wiener*, 335 F.2d 379, 400-01 (9th Cir. 1964).

79. *Woods*, *supra* note 42, § 13:2, at 230. A non-party actor is a person who has contributed the injury of the plaintiff but is not a party to the legal action. *See generally* Leonard E. Eilbacher, *Comparative Fault and the Nonparty Tortfeasor*, 17 IND. L. REV. 903 (1984); Duane Coyle, Comment, *Torts: Comparative Negligence and Absent Parties*, 18 WASHBURN L.J. 692 (1979).

80. Sixteen states, including Wyoming, which have addressed the issue either legislatively or judicially, have found apportioning fault to non-party actors appropriate. These states are Alaska, Arizona, California, Colorado, Indiana, Minnesota, Hawaii, Florida, Illinois, Kansas, New Mexico, Oklahoma, Tennessee, West Virginia, and Wisconsin. *See* *Benner v. Wichman*, 874 P.2d 949, 956 (Alaska 1994) (construing "party" in the Alaska Comparative Fault Act to mean all persons, including non-parties, involved in the accident which led to the plaintiff's injury); ARIZ. REV. STAT. ANN. § 12-2506(B) (West 2001); *Evangelatos v. Superior Court*, 753 P.2d 585 (Cal. 1988); COLO. REV. STAT. § 13-21-111.5 (2001); IND. CODE ANN. § 34-51-2-7(b)(1) (West 2000); *Johnson v. Niagara Mach. & Tool Works*, 666 F.2d 1223, 1226 (8th Cir. 1981) (applying Minnesota law which allows the jury to be presented with evidence of all potentially negligent parties); *Wheelock v. Sport Kites, Inc.*, 839 F. Supp. 730, 734 (D. Haw. 1993) (applying Hawaii law, and allowing the inclusion of a non-party on a special verdict form); *Fabre v. Marin*, 623 So. 2d 1182, 1184 (Fla. 1993) (allowing jury to allocate fault to the injured party's immune spouse); *Parsons v. Carbondale Township*, 577 N.E.2d 779, 787 (Ill. App. Ct. 1991) (permitting the consideration of non-party tortfeasors); *Miles v. West*, 580 P.2d 876, 880 (Kan. 1978) (holding that a jury must apportion fault among all the tortfeasors, including, in this case, an immune spouse); *Martinez v. First Nat'l Bank*, 755 P.2d 606, 608 (N.M. Ct. App. 1987) (allowing allocation of fault to tortfeasors not joined in the action); *Paul v. N.L. Indus.*, 624 P.2d 68, 69 (Okla. 1980) (affirming the allocation of fault to non-party tortfeasors); *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79, 81 (Tenn. 1996) (holding that the jury must consider the negligence of a non-party to accurately determine the liability of defendants); *Bowman v. Barnes*, 282 S.E.2d 613, 621 (W.Va. 1981) (holding that plaintiff's contributory negligence must be ascertained in relation to all persons' negligence, not just the named defendants); *Connar v. West Shore Equip. Inc.*, 227 N.W.2d 660, 661 (Wis. 1975) (finding error when trial court refused to include a non-party's negligence); WYO. STAT. ANN. § 1-1-109(b) (Lexis 2001).

81. Daniel Levi, Note, *A Comparison of Comparative Negligence Statutes; Jury Allocation of Fault – Do Defendants Risk Paying for the Fault of Nonparty Tortfeasors?*, 76 WASH. U. L.Q. 407, 410 (1998). *See* FLA. STAT. ANN. § 768.81(3) (West

tions that allow allocation of fault to non-party actors hold a negligent tortfeasor who breached his duty to protect severally liable when the non-party actor is an intentional tortfeasor.<sup>82</sup> In addition, the highest courts in two jurisdictions have held their comparative fault statutes unconstitutional, at least in part because they allocated fault to non-parties without any corresponding procedural safeguards.<sup>83</sup>

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1996). Nine states have expressly held it improper to include non-party actors in the apportionment process. These states are Connecticut, Iowa, Kentucky, Michigan, Missouri, New Jersey, Ohio, Oregon, and Utah. *See Bradford v. Herzig*, 638 A.2d 608, 612 (Conn. App. Ct. 1994) (holding that the negligence of a non-party physician should not have been considered by the jury); *Payne Plumbing & Heating Co. v. Bob McKiness Excavating & Grading*, 382 N.W.2d 156, 159 (Iowa 1986) (holding that the negligence of a party dismissed from the suit may not be considered, as that party is no longer a "party" as used in the Iowa Comparative Fault Act); *Baker v. Webb*, 883 S.W.2d 898, 899 (Ky. Ct. App. 1994) (upholding trial court's decision to refrain from instructing jury as to non-party liability because the Kentucky comparative fault statute supports exclusion of non-party liability); *Anderson v. Harry's Army Surplus, Inc.*, 324 N.W.2d 96, 101 (Mich. Ct. App. 1982) (holding that equitable principles would not justify apportioning fault to non-party tortfeasors); *Adams v. Children's Mercy Hosp.*, 848 S.W.2d 535, 539 (Mo. 1993) (holding allocation of fault to non-parties is not permitted, unless the non-party has already been released from liability by virtue of settlement); *Bencivenga v. J.J.A.M.M., Inc.*, 609 A.2d 1299, 1303 (N.J. Super. Ct. App. Div. 1992) (holding the intentional tortfeasor cannot be included when he is unknown); *Eberly v. A-P Controls, Inc.*, 572 N.E.2d 633, 638 n.5 (Ohio 1991) ("Neither the former nor the current version [of the Ohio Comparative Fault Act] provides for allocation of fault to a nonparty."); *Ewen v. McLean Trucking Co.*, 689 P.2d 1309, 1311-12 (Or. Ct. App. 1984) (holding trial court's refusal to instruct the jury on non-party liability proper); *Field v. Boyer Co.*, 952 P.2d 1078, 1081 (Utah 1998) (holding comparative fault statute compares both negligent and intentional conduct but does not allow apportionment of fault to unknown, non-party actors).

82. These states are Arizona, California, Colorado, New York, North Dakota, and Wyoming. *See Hutcherson v. City of Phoenix*, 961 P.2d 449, 453 (Ariz. 1998); *Martin v. United States*, 984 F.2d 1033, 1040 (9th Cir. 1993) (applying California law); *Siler v. 146 Montague Assocs.*, 652 N.Y.S.2d 315, 321 (N.Y. App. Div. 1997); *Champagne v. United States*, 513 N.W.2d 75, 79 (N.D. 1994); *Bd. of County Comm'rs of Teton County v. Bassett*, 8 P.3d 1079 (Wyo. 2000).

83. *See Newville v. Dept. of Family Serv's*, 883 P.2d 793, 803 (Mont. 1994) (finding the state's provision as unconstitutional, and declaring it a violation of equal protection and due process rights); *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1064 (Ill. 1997) (invalidating the Illinois tort reform law citing provisions as arbitrary and against equal protection). *See also* John M. Burman, *Wyoming's New Comparative Fault Statute*, 31 LAND & WATER L. REV. 509, 538-45 (1996) (discussing how the lack of procedural safeguards may render comparative fault statute unconstitutional). Generally, two types of safeguards are employed. First, a notice requirement obligating the defendant to give notice to the plaintiff before arguing a non-party is partially liable. *See, e.g.,* COLO. REV. STAT. ANN. § 13-21-111.5(3)(b) (West 2001). Second, imposing the burden of proof on the defendant who asserts a non-party was at fault. *See e.g.,* IND. CODE ANN. § 34-4-33-10(b) (2000). Wyoming's comparative fault statute currently does not have any procedural safeguards. *See* WYO. STAT. ANN. § 1-1-109(b) (Lexis 2001).

The arguments for and against allocating fault to a non-party tortfeasor are similar to the arguments for and against joint and several liability.<sup>84</sup> Proponents of allocating fault to non-parties argue that defendants should be responsible only for their percentage of the fault.<sup>85</sup> Accordingly, the proportionate share of fault for non-party actors must be considered in order to determine the appropriate share of fault for party defendants.<sup>86</sup> Conversely, opponents of apportioning fault to non-parties argue that the plaintiff should be fully compensated for his injuries and that the more culpable defendant should bear the burden of a non-party's portion of fault as opposed to the plaintiff.<sup>87</sup> In duty-to-protect cases, the jury will probably apportion the majority of fault to the intentional tortfeasor, given the greater culpability of intentional conduct; therefore the plaintiff may be precluded from the majority of her recovery.<sup>88</sup>

#### d. Statutory Language

Whether a particular jurisdiction will allow the comparison of intentional and negligent conduct in duty-to-protect cases will depend on the language of the jurisdiction's comparative fault statute.<sup>89</sup> The language of some statutes only pertains to actions based on negligence.<sup>90</sup>

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84. Compare note 63 and accompanying text with note 66 and accompanying text.

85. O'Conner, *supra* note 66, at 378. See also Carroll v. Whitney, 29 S.W.3d 14, 17 (Tenn. 2000). Some courts have held the apportioning of fault to non-parties is appropriate in order more accurately assess the parties percentage of fault. See Paul v. N.L. Indus., 624 P.2d 68, 69-70 (Okla. 1980); Bowman v. Barnes, 282 S.E.2d 613, 619-21 (W.Va. 1981); Pocatello Indus. Park Co. v. Steel West, Inc., 621 P.2d 399, 403 (Idaho 1980). Apportioning fault to non-party actors may also conserve judicial resources and promote settlement. See Nat'l Farmers Union Property and Cas. Co. v. Frackelton, 662 P.2d 1056, 1059-60 (Colo. 1983); Paul v. N.L. Indus., 624 P.2d 68, 69 (Okla. 1980).

86. Frackelton, 662 P.2d at 1059-60; Paul, 624 P.2d at 69.

87. Alvis v. Ribar, 421 N.E.2d 886, 890-91 (Ill. 1981).

88. O'Conner, *supra* note 66, at 378. See also *infra* note 141 and accompanying text. But see Hutcherson v. City of Phoenix, 961 P.2d 449, 453 (Ariz. 1998) (holding apportionment of fault as twenty-five percent to murderer and seventy-five percent to city for failure of 911 operator to properly dispatch police appropriate); Roman Catholic Diocese v. Secter, 966 S.W. 2d 286, 291 (Ky. Ct. App. 1998) (upholding a verdict awarding 75% of fault for negligent supervision to church, and 25% to the teacher who sexually assaulted a student).

89. Schwartz, *supra* note 44, § 2-2(a), at 35 ("In comparative negligence, statutes provide themselves in many instances a clear guide to their application other than to common-law negligence actions.").

90. See DEL. CODE ANN. tit. 10, § 8132 (2001) ("all actions brought to recover damages for negligence"); KAN. STAT. ANN. § 60-258a (1991) ("damages for negligence"); S.D. CODIFIED LAWS § 20-9-2 (Michie 1995) ("caused by the negligence of another").

Other statutes, however, reference conduct that is negligent or reckless.<sup>91</sup> A few statutes expressly prohibit the comparison of intentional and negligent conduct, while others expressly permit the comparison.<sup>92</sup> Hence, the language of the jurisdiction's comparative fault statute may determine whether the jurisdiction will compare intentional and negligent conduct.

#### *F. Duty to Protect Under Various Comparative Fault Systems*

There is little consistency in how jurisdictions address duty-to-protect cases because each jurisdiction's comparative fault system is different. With the exception of those few jurisdictions where the legislature has provided provisions in the comparative fault statute precluding or permitting the comparison of negligent and intentional acts,<sup>93</sup> the courts in most jurisdictions have relied on statutory interpretation to determine whether intentional and negligent conduct should be compared.<sup>94</sup> These jurisdictions are split on whether to allow the comparison of intentional and negligent conduct.

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91. IOWA CODE ANN. § 668.1 (West 1998) ("fault" means one or more acts or omissions that are in any measure negligent or reckless . . ."); MINN. STAT. 604.01 (West 2001) ("Fault" includes acts or omissions that are in any measure negligent or reckless . . ."). See also UNIFORM COMPARATIVE FAULT ACT § 1, 12 U.L.A. 127 (1996) (defining fault to include "acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability."). The comments to the Uniform Comparative Fault Act state that "[t]he Act does not include intentional torts." *Id.* at 128.

92. States that prohibit the comparison are Mississippi and Connecticut. See MISS. CODE ANN. § 85-5-7(1) (1999) ("Fault" shall not include any tort which results from an act or omission committed with a specific wrongful intent."); CONN. GEN. STAT. § 52-572h(o) (2001) ("there shall be no apportionment of liability or damages between parties liable for negligence and parties liable on any basis other than negligence including, but not limited to, intentional, wanton or reckless misconduct . . ."). States that allow the comparison are Alaska, Indiana, and Michigan. See ALASKA STAT. § 09.17.900 (Michie 2000) ("fault" includes acts or omissions that are in any measure negligent, reckless, or intentional toward the person or property of the actor or others . . ."); MICH. COMP. LAWS ANN. § 600.6304(8) (West 2001) ("fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party."); IND. CODE ANN. § 34-6-2-45 (West 2001) ("Fault" . . . includes any act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others.").

93. See *supra* note 92 and accompanying text.

94. See *e.g.*, *Bd. of County Comm'rs of Teton County v. Bassett*, 8 P.3d 1079 (Wyo. 2000); *Allard v. Liberty Oil Equip. Co., Inc.*, 756 A.2d 237, 245 (Conn. 2000) (holding that one purpose of the state's comparative fault statute was to make clear that apportionment principles only applies to negligent conduct, and does not apply "intentional, wanton or reckless misconduct.").

## 1. Jurisdictions That Do Not Compare Negligent and Intentional Conduct

Twenty-five jurisdictions have held that their comparative fault statutes do not permit the comparison of intentional and negligent conduct.<sup>95</sup> Almost all of these jurisdictions have determined that the two

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95. These states are Arkansas, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Maine, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, Washington, and Wisconsin. *Whitlock v. Smith*, 762 S.W.2d 782, 783 (Ark. 1989) (upholding the lower court's decision not to give a comparative fault instruction because conduct was based on an intentional tort); *Allard v. Liberty Oil Equip. Co., Inc.*, 756 A.2d 237, 245 (Conn. 2000) (holding that one purpose of the state's comparative fault statute was to make clear that apportionment principles only applies to negligent conduct, and does not apply to "intentional, wanton or reckless misconduct."); *Barton Protective Services, Inc. v. Faber*, 745 So. 2d 968, 976 (Fla. Dist. Ct. App. 1999) (holding that comparative fault principles do not apply to intentional torts); *Flanagan v. Riverside Military Academy*, 460 S.E.2d 824, 827 (Ga. Ct. App. 1995) (holding the principle of comparative fault cannot be applied to bar a claim premised on an intentional tort); *Fitzgerald v. Young*, 670 P.2d 1324, 1326 (Idaho Ct. App. 1983) (holding comparative fault apportionment does not apply to intentional torts); *Hills v. Bridgeview Little League Ass'n*, 713 N.E.2d 616, 623 (Ill. App. Ct. 1999), *rev'd on other grounds*, 745 N.E. 2d 1166 (Ill. 2000) (holding that the Illinois comparative fault statute distinguishes between actions based on negligence, to which the statute applies, and actions based on intentional torts, to which it is inapplicable); *Tratchel v. Essex Group, Inc.*, 452 N.W.2d 171, 181 (Iowa 1990) (finding inapplicable a comparative fault defense to an intentional tort); *Kansas State Bank & Trust Co. v. Specialized Transp. Services*, 819 P.2d 587 (Kan. 1991) (holding it inappropriate to compare the fault of negligent tortfeasors with the fault of a third party whose intentional acts the negligent tortfeasors had a duty to prevent); *McLain v. Training & Dev. Corp.*, 572 A.2d 494, 497 (Me. 1990) (refusing to recognize contributory or comparative fault as a defense to the intentional torts of assault and battery); *Flood v. Southerland Corp.*, 616 N.E.2d 1068, 1071-72 (Mass. 1993) (holding the Massachusetts' comparative fault statute does not apply to intentional tortious conduct); *Florenzano v. Olson*, 387 N.W.2d 168, 175 (Minn. 1986) (stating "[w]ithout question, principles of comparative negligence would not apply to an intentional tort."); *Whitehead v. Food Max, Inc.*, 163 F.3d 265, 280 (5th Cir. 1998) (holding Mississippi law does not allow actions by intentional tortfeasors to be allocated fault); *Martel v. Montana Power Co.*, 752 P.2d 140, 143 (Mont. 1988) (holding that all conduct is to be compared if it falls short of intentional conduct); *Brandon v. County of Richardson*, 624 N.W. 2d 604, 620 (Neb. 2001) (holding the plain language of Nebraska's comparative fault statute does not allow for allocation of damages to intentional tortfeasors); *Davies v. Butler*, 602 P.2d 605, 610-11 (Nev. 1979) (holding that Nevada's comparative fault statute applies to conduct that is "grossly negligent" but not to conduct that more closely approaches intentional); *Hawkins v. Ivy*, 363 N.E.2d 367, 369 (Ohio 1977) (holding comparative fault may not affect the general rule that intentional and wanton conduct is not subject to the defense of contributory negligence); *Shugart v. Cent. Rural Elec. Co.*, 110 F.3d 1501, 1504 (10th Cir. 1997) (applying Oklahoma law and holding contributory negligence may not be compared either to preclude or reduce a plaintiff's recovery where the defendant's conduct is willful or wanton); *Hampton Tree Farms, Inc. v. Jewett*, 974 P.2d 738, 746-48 (Or. Ct. App. 1999) (stating that comparative fault

types of conduct are fundamentally different and therefore cannot be compared.<sup>96</sup> Courts have articulated various reasons for declining to apportion damages in cases in which one party has acted intentionally. Some of these courts have relied on the fact that early common law distinguished between negligent and intentional conduct in order to circumvent the doctrine of contributory negligence.<sup>97</sup> Other courts have reached the same result by reasoning that the two types of conduct are not merely different in degree from one another, but are different in kind.<sup>98</sup>

The consequence of not apportioning any liability to intentional tortfeasors in those cases where there are both intentional and negligent defendants is that the entire amount of fault is distributed between the plaintiff and the negligent defendant. Many of the jurisdictions that do not allow the comparison have found this outcome particularly appealing in duty-to-protect cases. These courts have determined that the policy reasons for not allowing the intentional tortfeasor to be apportioned any liability outweigh the competing consideration that a negligent tortfeasor will have to pay for damages that he did not entirely cause.<sup>99</sup>

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does not apply to a defendant whose liability is based on willful misconduct rather than negligence); *Hutchison v. Luddy*, 763 A.2d 826, 847-48 (Pa. Super. Ct. 2000) (holding that when willful and wanton misconduct is involved, comparative fault should not be applied); *Frey v. Kouf*, 484 N.W.2d 864, 868-69 (S.D. 1992) (holding that comparative fault is not a defense to an intentional tort); *McCrary v. Taylor*, 579 S.W.2d 347, 350 (Tex. App. 1979) (holding that comparative fault does not apply to the intentional tort of fraud); *Turner v. Jordan*, 957 S.W.2d 815, 823 (Tenn. 1997) (holding that the defendant's negligence should not have been compared with intentional conduct); *Stephan v. Lynch*, 388 A.2d 376, 379 (Vt. 1978) (holding that comparative fault does not apply to deliberate acts); *Welch v. Southland Corp.*, 952 P.2d 162, 163 (Wash. 1998) (holding intentional acts are not included in the statutory definition of "fault" under Washington's comparative fault statute); *Schulze v. Kleeber*, 103 N.W.2d 560, 564 (Wis. 1960) (stating that a plaintiff's negligence is not a defense to the intentional tort of battery).

96. See, e.g., *Turner v. Jordan*, 957 S.W.2d 815, 823 (Tenn. 1997) (stating that negligent and intentional torts are different in degree, in kind, and in society's view and therefore should not be compared).

97. Keeton, *supra* note 10, § 65, at 462. See also Victor E. Schwartz, *Li v. Yellow Cab Company: A Survey of California Practice Under Comparative Negligence*, 7 PAC. L.J. 747, 752-53 (1976).

98. See *supra* notes 24-25 and accompanying text.

99. See *Wal-Mart Stores, Inc. v. McDonald*, 676 So. 2d 12, 21 (Fla. Dist. Ct. App. 1996) ("The public policy underlying our construction [of the comparative-responsibility statute] is that negligent tortfeasors such as Wal-Mart and Merrill Crossings should not be permitted to reduce their fault by shifting it to another tortfeasor whose intentional, criminal conduct was a foreseeable result of their negligence."). *Slawson v. Fast Food Enters.*, 671 So.2d 255, 258 (Fla. Dist. Ct. App. 1996) ("On the one hand Burger King owed a duty to protect [the victim, a patron] from foreseeable intentional assaults by other patrons; but on the other hand, Burger King contends, it is entitled . . . to diminish or defeat its liability for the breach of that duty by transferring it to the very intentional actor it was charged with protecting her against.").

## 2. Jurisdictions that Compare Intentional and Negligent Conduct

Fifteen jurisdictions, either judicially or statutorily, allow the comparison of negligent and intentional acts.<sup>100</sup> The courts in these jurisdictions have adopted two different lines of reasoning for allowing the comparison. First, some courts have rejected the “different-in-kind” approach.<sup>101</sup> These courts have held that intentional conduct is merely different in degree from intentional conduct and therefore must be compared.<sup>102</sup> Second, other courts have not distinguished between the different types of conduct; rather, they have held that the comparative fault

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100. These states include: Alaska, Arizona, California, Colorado, Hawaii, Indiana, Kentucky, Louisiana, Michigan, New Jersey, New Mexico, New York, North Dakota, Utah, and Wyoming. *See* ALASKA STAT. § 09.17.900 (Michie 2000) (“‘fault’ includes acts or omissions that are in any measure negligent, reckless, or intentional toward the person or property of the actor or others . . . .”); *Hutcherson v. City of Phoenix*, 961 P.2d 449, 453 (Ariz. 1998) (holding apportionment of fault as twenty-five percent to murderer and seventy-five percent to city for failure of 911 operator to properly dispatch police appropriate); *Martin v. United States*, 984 F.2d 1033, 1040 (9th Cir. 1993) (applying California law, holding the state’s comparative fault statute applies to cases in which one tortfeasor acts intentionally and the other negligently); *Slack v. Farmers Ins. Exchange*, 5 P.3d 280, 285 (Colo. 2000) (holding Colorado’s comparative fault statute applied even though chiropractor committed an intentional tort); IND. CODE ANN. § 34-6-2-45 (2001) (“‘Fault’ . . . includes any act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others.”); *Ozaki v. Ass’n of Apartment Owners*, 954 P.2d 644, 650 (Haw. 1998) (holding comparison between murderer, victim, and condominium owner appropriate); *Roman Catholic Diocese v. Secter*, 966 S.W. 2d 286, 291 (Ky. Ct. App. 1998) (upholding a verdict awarding 75% of fault for negligent supervision to church, and 25 % to the teacher who sexually assaulted a student); *Morrison v. Kappa Alpha PSI Fraternity*, 738 So. 2d 1105, 1120 (La. Ct. App. 1999) (holding that intentional and negligent conduct are compared under state comparative fault statute); MICH. COMP. LAWS ANN. § 600.6304 (West 2001) (“‘Fault’ includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.”); *Blazovic v. Andrich*, 590 A.2d 222, 231 (N.J. 1991) (holding New Jersey’s Comparative Negligence Act encompasses negligence and intentional torts.); *Barth v. Coleman*, 878 P.2d 319, 321-22 (N.M. 1994) (reversing trial court and remanding for determination of intentional tortfeasor’s fault); *Siler v. 146 Montague Assocs.*, 652 N.Y.S.2d 315, 321 (N.Y. App. Div. 1997) (remanding for apportionment of liability between negligent landlord and intentional tortfeasor who assaulted plaintiff in her apartment); *Champagne v. United States*, 513 N.W.2d 75, 79 (N.D. 1994) (holding “[f]ault now includes an intentional act.”); *Field v. Boyer Co.*, 952 P.2d 1078, 1081 (Utah 1998) (holding that Utah’s comparative fault statute’s definition of “fault” includes both negligent and intentional conduct.); *Bd. of County Comm’rs of Teton County v. Bassett*, 8 P.3d 1079, 1083 (Wyo. 2000) (holding that willful and wanton conduct must be compared to negligent conduct).

101. *See, e.g., Blazovic v. Andrich*, 590 A.2d 222, 231 (N.J. 1991).

102. *Id.*; *Hutcherson v. City of Phoenix*, 961 P.2d 449, 453 (Ariz. 1998).

statutes in their jurisdictions render the separate treatment of negligent and intentional conduct unnecessary.<sup>103</sup> These courts reason that the comparative fault doctrine was designed to compare all types of misconduct and apportion fault in accordance with culpability.<sup>104</sup> Additionally, these courts have held that maintaining a distinction between intentional and negligent conduct would not effectively deter such conduct and that abolishing these categories promotes judicial economy.<sup>105</sup>

a. Effect of Joint and Several Liability on the Comparison of Negligent and Intentional Conduct

The majority of jurisdictions apply the doctrine of joint and several liability when dealing with the comparison of negligent and intentional conduct.<sup>106</sup> Jurisdictions have applied the doctrine of joint and several liability in three different ways: (1) some have adopted joint and several liability in all comparative fault claims regardless of whether the conduct was negligent or intentional;<sup>107</sup> (2) some jurisdictions, which normally hold defendants severally liable, have statutory exceptions providing that intentional tortfeasors are jointly and severally liable;<sup>108</sup> and (3) some several liability jurisdictions have held that their comparative fault statutes do not apply to intentional conduct and therefore reverted

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103. *Hutcherson v. City of Phoenix*, 961 P.2d 449, 453 (Ariz. 1998) (holding a jury may apportion fault among defendants and non-parties without distinguishing between intentional and negligent conduct); *Bd. of County Comm'rs of Teton County v. Bassett*, 8 P.3d 1079, 1083 (Wyo. 2000) (holding that adoption of several liability requires the comparison of willful and negligent conduct).

104. *Slack v. Farmers Ins. Exchange*, 5 P.3d 280, 285 (Colo. 2000) (holding that fault contemplates more than mere negligence and includes intentional acts).

105. See *Blazovic v. Andrich*, 590 A.2d 222, 227-39 (N.J. 1991).

106. This is also the approach taken by RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14 (1999) ("A person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor . . .").

107. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 (1999). These states include: Alabama, Arkansas, Delaware, Maine, Maryland, Massachusetts, Minnesota, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia, West Virginia. *Id.*

108. See e.g., NEV. REV. STAT. ANN. § 41.141(5)(b) (Michie 2002) ("This section does not affect the joint and several liability, if any, of the defendants in an action based upon . . . [a]n intentional tort."); N.M. STAT. ANN. § 41-3A-1(C) (Lexis 2001) ("The doctrine imposing joint and several liability shall apply: (1) to any person or persons who acted with the intention of inflicting injury or damage."); HAW. REV. STAT. ANN. § 663-10.9(2)(A) (Michie 2001) ("Joint and several liability for joint tortfeasors as defined in section 663-11 is abolished except [in cases involving] . . . Intentional torts.").

to the common law doctrine of joint and several liability in these cases.<sup>109</sup>

### G. Wyoming's Comparative Fault Statute and Allocation of Fault in Duty-to-Protect Cases

#### 1. Historic Overview of Wyoming's Comparative Fault Statute

Wyoming first adopted a comparative negligence statute in 1973.<sup>110</sup> The Wyoming Legislature adopted the statute to "eliminate the unjust concept of common law contributory negligence" and to promote judicial economy.<sup>111</sup> The 1973 comparative negligence statute provided Wyoming with a modified comparative system under which a plaintiff could recover only if his negligence was less than the negligence of each individual defendant.<sup>112</sup> In 1977, and again in 1986, the Legislature amended the comparative negligence statute.<sup>113</sup> The 1986 amendments changed Wyoming law in four ways. First, many of the references to "negligence" in the 1977 version were replaced with "fault."<sup>114</sup> Second, the amendments eliminated joint and several liability.<sup>115</sup> Third, the amendments changed Wyoming's comparative negligence scheme to a

109. *Barton Protective Services, Inc. v. Faber*, 745 So.2d 968, 975 (Fla. Dist. Ct. App. 1999) (holding that Florida's comparative fault statute does not apply to an action based on intentional torts; therefore, the defendants were held jointly and severally liable); *Hills v. Bridgeview Little League Ass'n*, 713 N.E.2d 616, 623 (Ill. App. Ct. 1999), *rev'd on other grounds*, 745 N.E. 2d 1166 (Ill. 2000) (holding the statute governing the apportionment of fault among defendants distinguishes between actions based on negligence, to which the statute applies, and actions based on intentional torts, to which it is inapplicable).

110. 1973 Wyo. Sess. Laws ch. 28 (codified as Wyo. Stat. ANN. § 1-7.2 (Supp. 1973)).

111. See *Kirby Bldg. Sys. v. Mineral Explorations Co.*, 704 P.2d 1266, 1275 (Wyo. 1985); *Bd. of County Comm'rs of Campbell County v. Ridenour*, 623 P.2d 1174, 1192 n.14 (Wyo. 1981).

112. WYO. STAT. ANN. §1-7.2(a) (Supp. 1973) (providing that "[c]ontributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought. Any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering."). *Id.*

113. 1977 Wyo. Sess. Laws ch. 188; 1986 Wyo. Sess. Laws ch. 24.

114. While the title of the 1986 statute remained "Comparative Negligence," the legislature arguably took steps towards adopting a comparative fault system. Compare WYO. STAT. ANN. § 1-1-109 (Michie 1977) with WYO. STAT. ANN., § 1-1-109 (Michie 1986). The 1977 law made no reference to fault and made eight references to negligence. The 1986 statute made six references to "fault" and four to "negligence."

115. WYO. STAT. ANN. § 1-1-109(d) (Michie 1986) ("Each defendant is liable only for . . . the percentage of the amount of fault attributed to him . . .").

system that compared a plaintiff's negligence to that of all tortfeasors collectively, rather than individually.<sup>116</sup> Finally, the amendments eliminated statutory contribution.<sup>117</sup>

In 1994, the Wyoming Legislature amended its comparative negligence statute (section 1-1-109) and renamed it "Comparative Fault."<sup>118</sup> In addition, the 1994 amendments added a comprehensive definition section.<sup>119</sup> Wyoming's comparative fault statute has remained the same since 1994. The statute now provides for a modified comparative fault system, with a fifty percent cut-off level, and it requires that tortfeasors be held severally liable.<sup>120</sup>

## 2. Board of County Commissioners of Teton County v. Bassett

The Wyoming Supreme Court interpreted the Wyoming comparative fault statute as it applied to non-party, intentional tortfeasors in

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116. WYO. STAT. ANN. § 1-1-109(d) (Michie 1986).

117. 1986 Wyo. Sess. Laws ch. 30 § 2.

118. See WYO. STAT. ANN. § 1-1-109 (Michie 1994).

119. WYO. STAT. ANN. § 1-1-109(a) (Lexis 2001). The definition section provides:

(i) "Actor" means a person or other entity, including the claimant, whose fault is determined to be a proximate cause of the death, injury or damage, whether or not the actor is a party to the litigation;

(ii) "Claimant" means a natural person, including the personal representative of a deceased person, or any legal entity, including corporations, limited liability companies, partnerships or unincorporated associations, and includes a third party plaintiff and a counterclaiming defendant;

(iii) "Defendant" means a party to the litigation against whom a claim for damages is asserted, and includes third party defendants. Where there is a counterclaim, the claimant against whom the counterclaim is asserted is also a defendant;

(iv) "Fault" includes acts or omissions, determined to be a proximate cause of death or injury to person or property, that are in any measure negligent, or that subject an actor to strict tort or strict products liability, and includes breach of warranty, assumption of risk and misuse or alteration of a product;

(v) "Injury to person or property," in addition to bodily injury, includes, without limitation, loss of enjoyment of life, emotional distress, pain and suffering, disfigurement, physical or mental disability, loss of earnings or income, damage to reputation, loss of consortium, loss of profits and all other such claims and causes of action arising out of the fault of an actor;

(vi) "Wrongful death" means that cause of action authorized by Wyoming statute to recover money damages when the death of a person is caused by the fault of an actor such as would have entitled the party injured to maintain an action to recover damages if death had not ensued.

*Id.*

120. WYO. STAT. ANN. § 1-1-109(b) (LexisNexis 2001).

*Board of County Commissioners of Teton County v. Bassett*.<sup>121</sup> In *Bassett*, the Wyoming Highway Patrol and other law enforcement agencies constructed a roadblock to stop a fleeing suspect (Ortega). As the plaintiffs neared the roadblock, officers motioned for them to go through and moved a police car so they could pass through the roadblock. Ortega then approached and collided with the plaintiffs' vehicle as it was proceeding through the roadblock.<sup>122</sup> The plaintiffs sued the law enforcement agencies alleging that they were negligent in pursuing Ortega, operating the roadblock, and for failing to warn the plaintiffs of the danger.<sup>123</sup> After a jury trial, the trial court concluded that it was improper under Wyoming law to compare negligent conduct with willful and wanton conduct; therefore, it excluded Ortega (the intentional tortfeasor) from the fault allocation.<sup>124</sup>

The Wyoming Supreme Court reversed the trial court for several reasons. First, the court concluded the amended language in section 1-1-109 was broad enough to include willful conduct in the fault allocation.<sup>125</sup> Second, the Wyoming Supreme Court held that when making fault allocations, the inclusion of all actors whose actions contribute to the plaintiff's harm is required by several liability.<sup>126</sup> Third, the court distinguished the precedent that the trial court relied on by characterizing the applicable portions of the earlier case as dicta and focused instead on the amended language in section 1-1-109.<sup>127</sup> The court therefore

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121. 8 P.3d 1079 (Wyo. 2000).

122. *Id.* at 1081-83.

123. *Id.* at 1082. The plaintiffs passed several officers as they headed towards the roadblock but were not warned of the hazardous situation. *Id.*

124. *Id.* at 1083. The trial court relied on *Danculovich v. Brown*, 593 P.2d 187 (Wyo. 1979). The jury allocated fault as follows: zero percent to Coziah (driver of the plaintiffs' car), 40% to the Highway Patrol, 20% to the Sheriff's Department, and 40% to the National Park Service. *Id.* at 1082.

125. *Bassett*, 8 P.3d at 1083. The Wyoming Supreme Court focused on the fact that the legislature had replaced the term "negligence" with the broader term "fault." Additionally, the court reasoned that the use of the term "includes" in the statutory definition of fault "implies that there are other items includable, though not specifically enumerated." *Id.* As such, the court held that the amended language in the statute signaled a change in the existing state of the law, which should be made effective by including willful and wanton conduct in the comparison of fault. *Id.* at 1083-84.

126. *Id.* at 1084. The court stated that "[t]he legislature has clearly opted to relieve joint tortfeasors of liability beyond that for which they bear proportional fault rather than shift the burden of insolvency of one joint tortfeasor to the others for the protection of potential plaintiffs." *Id.* The court recognized that the incentives for those with a duty to protect against intentional harm would be reduced, however, it still concluded that the statutory adoption of several liability precluded its consideration. *Id.*

127. *Id.* The statute relied on by the court in *Danculovich v. Brown* used the term "negligence" to define the conduct and not the term "fault" as used in the amended comparative fault statute. *Id.*

held that willful and wanton conduct must be compared to negligent conduct in order to effectuate the intent of section 1-1-109 and that the trial court erred when it excluded the intentional tortfeasor from the verdict form.<sup>128</sup>

### III. ANALYSIS

The duty-to-protect problem, as it has been defined by this comment, addresses whether an intentional tortfeasor should be considered in the allocation of fault when one party has breached his specific duty to protect another from an intentional tortfeasor's conduct.<sup>129</sup> Resolution of the problem will depend on the policy choices made by legislatures when adopting their comparative fault statutes and judicial interpretation of those statutes. As legislatures and courts make these decisions, they should adopt a comparative fault system that holds the negligent defendant responsible for the entire amount of damages that he and the intentional tortfeasor have caused when the intentional tortfeasor is unknown or insolvent.

#### *A. Comparative Fault Systems Raising the Duty to Protect Problem*

This comment will focus on those comparative fault systems that diminish a defendant's incentive to protect others. The negligent defendant's incentive to protect will be diminished only in several liability jurisdictions that compare intentional and negligent conduct.<sup>130</sup> In these jurisdictions, the negligent defendant is responsible only for his proportionate share of fault, not the intentional tortfeasor's share of fault.<sup>131</sup>

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128. *Bassett*, 8 P.3d at 1084.

129. The duty to protect problem posed in this comment does not focus on whether the defendant has a duty to protect the plaintiff. Rather, it assumes that the duty to protect has been found and the sole remaining question is whether the intentional tortfeasor should be included in the comparison of fault.

130. Jurisdictions that have retained the rule of joint and several liability will not diminish a defendant's incentive to protect others if intentional and negligent conduct are compared because both the negligent and intentional tortfeasors will be responsible for the entire amount of the judgment. *See supra* note 61 and accompanying text. As a result, the negligent defendant will be encouraged to protect others to avoid paying the entire judgment in joint and several liability jurisdictions. *See Wal-Mart Stores, Inc. v. McDonald*, 676 So.2d 12, 31 (Fla. Dist. Ct. App. 1996) ("Reducing the responsibility of a negligent tortfeasor by allowing that tortfeasor to place the blame entirely or largely on the intentional wrongdoer would serve as a disincentive for the negligent tortfeasor to meet its duty to provide reasonable care to prevent intentional harm from occurring."); *Turner v. Jordan*, 957 S.W.2d 815, 822 (Tenn. 1997) ("allocating fault to the intentional party may reduce the incentive for the negligent actor to act with due care . . .").

131. *Anderson Highway Signs and Supply, Inc. v. Close*, 6 P.3d 123 (Wyo. 2000).

The negligent defendant's incentive to protect will be diminished because his amount of apportioned fault will likely be minimal.<sup>132</sup> In addition, if these jurisdictions allow allocation of fault to non-party actors, the duty-to-protect problem is exacerbated because if an unknown, intentional tortfeasor is included in the comparison, there is little likelihood that the plaintiff will receive compensation for his injuries.<sup>133</sup> The remainder of this section will address the effects of these types of comparative fault systems when intentional and negligent conduct is compared.

### *B. Comparative Fault and the Duty to Protect: Policies Revisited*

With the advent of comparative fault, jurisdictions have begun to reexamine the settled rule that intentional and negligent conduct should not be compared.<sup>134</sup> The policies underlying both the adoption of comparative fault and the duty-to-protect rules themselves should be considered in duty-to-protect cases as jurisdictions revisit this issue. These policies support the argument that a negligent defendant should be held liable for the entire harm caused when he breaches his duty to protect against specific intentional conduct.

Jurisdictions adopted comparative fault principles to alleviate the harshness of the contributory negligence doctrine.<sup>135</sup> Courts and legislatures decided that the doctrine was unfair to the plaintiff because the plaintiff had to bear the burden of the entire loss if he was only slightly negligent.<sup>136</sup> Jurisdictions also concluded it was unjust to allow a defendant to escape liability when he contributed to the loss and was in better position to bear the loss.<sup>137</sup> Additionally, courts opined that by allowing negligent defendants to escape liability, negligence was promoted.<sup>138</sup> Similarly, courts abandoned the "last human wrongdoer" rule in duty-to-protect situations because it was unfair to plaintiffs and had the tendency to abrogate a defendant's duty to protect the plaintiff.<sup>139</sup> These results will likely re-occur if a negligent defendant is not held responsible for all the damages he and an intentional tortfeasor caused. This conclusion

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*See also* Little, *supra* note 62, § 13.30[3].

132. *See infra* notes 141, 145-46 and accompanying text.

133. *See infra* notes 141-42 and accompanying text. This is also the result when the intentional tortfeasor is party to the action but insolvent.

134. *See, e.g.,* Blazovic v. Andrich, 590 A.2d 222 (N.J. 1991).

135. Kirby Bldg. Sys. v. Mineral Explorations, 704 P.2d 1266, 1275 (Wyo. 1985).

*See also supra* notes 15, 18-21 and accompanying text.

136. *See supra* notes 19-20 and accompanying text.

137. *Id.*

138. *See supra* note 18 and accompanying text.

139. *See supra* note 31 and accompanying text.

is unavoidable if: (1) including intentional tortfeasors in the allocation of fault in several liability jurisdictions will effectively deny the plaintiff recovery in most cases; and (2) the defendant will suffer only minimal consequences for breaching his duty to the plaintiff, thereby diminishing his incentive to fulfill the duty.

In most cases, including the intentional tortfeasor in the allocation of fault in a several liability jurisdiction will effectively deny the plaintiff recovery. Under several liability, after the jury apportions fault to the negligent defendant and the intentional tortfeasor, the negligent defendant will be responsible only for his proportion of fault.<sup>140</sup> An intentional tortfeasor will be apportioned the greatest share of fault because his actions are intentional and not merely negligent; accordingly, the negligent defendant will be apportioned a lesser amount of the fault.<sup>141</sup> This effectively precludes the plaintiff from recovering for his injuries because the intentional tortfeasor will most likely be insolvent or unavailable.<sup>142</sup> Consequently, the policies of spreading the burden of loss

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140. See Little, *supra* note 62, § 13.30[3].

141. Knott v. State of California 28 Cal.Rptr.2d 514, 528 (Cal. Dist. Ct. App. 1994) (stating that it is reasonable to assume the jury will apportion fault so that the one who acted intentionally should bear most if not all the blame.); Veazey v. Elmwood Plantation Assocs., Ltd., 650 So. 2d 712, 719 (La. 1994) ("any rational juror will apportion the lion's share of the fault to the intentional tortfeasor when instructed to compare the fault of a negligent tortfeasor and an intentional tortfeasor."); Brandon v. County of Richardson, 624 N.W.2d 604, 620 (Neb. 2001) ("Fact finders are likely to allocate most, if not all, of the damages to the intentional tort-feasor due to the higher degree of social condemnation attached to intentional, as opposed to negligent, torts."). *But see* Hutcherson v. City of Phoenix, 961 P.2d 449, 453 (Ariz. 1998) (holding apportionment of fault as twenty-five percent to murderer and seventy-five percent to city for failure of 911 operator to properly dispatch police appropriate); Roman Catholic Diocese v. Sexter, 966 S.W. 2d 286, 291 (Ky. Ct. App. 1998) (upholding a verdict awarding 75% of fault for negligent supervision to church, and 25% to the teacher who sexually assaulted a student).

142. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14 cmt. b (1999) ("When a person is injured by an intentional tortfeasor and another person negligently failed to protect against the risk of an intentional tort, the great culpability of the intentional tortfeasor may lead a factfinder to assign the bulk of responsibility for the harm to the intentional tortfeasor, who will often be insolvent."). According to statistics released by the Federal Bureau of Investigation, only 47.5 % of the violent crime offenses in the United States known to law enforcement agencies were cleared by arrest in 2000. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, CRIME IN THE UNITED STATES 2000 UNIFORM CRIME REPORTS, at 207 (2001). Violent crimes included in the statistic are murder, forcible rape, robbery, and aggravated assault. *Id.* at 208. According to the U.S. Department of Justice, between 1992 and 1996, 82.8% of defendants charged with a violent crime in the nations 75 most populous counties were represented by public defenders. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, DEFENSE COUNSEL IN CRIMINAL CASES, at 5 (Nov. 2000) (NCJ 179023). If these statistics were applied to intentional tortfeasors in duty-to-

and fairly compensating the injured plaintiff, which legislatures and courts sought to advance with the adoption of comparative fault, are undermined. Ironically, plaintiffs in these jurisdictions who are not contributorily negligent would actually be better off under the doctrine of contributory negligence than they are under comparative fault. Under the contributory negligence doctrine, a plaintiff who is not contributorily negligent would have been able to recover all of his damages from the negligent defendant pursuant to joint and several liability.<sup>143</sup>

In addition, negligent defendants will probably have little incentive to honor their duty to protect plaintiffs in several liability jurisdictions if intentional tortfeasors are included in fault allocations. As discussed above, juries will probably allocate the majority of fault to the intentional tortfeasor, leaving the negligent defendant with only minimal liability.<sup>144</sup> Defendants faced with only minimal liability for breaching their duty to protect plaintiffs will have little incentive to uphold that duty, thereby promoting negligence.<sup>145</sup> As stated by one court,

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protect cases, only about 51% will be found and, of those, only about 17% will be solvent enough not to require a public defender in criminal proceedings. Additionally, intentional actions are not covered by insurance. See 1 WARREN FREEDMAN, FREEDMAN'S RICHARDS ON INSURANCE, § 1:13, at 47-48 (6th ed. 1990) ("[i]t is universally recognized that an implied exception to coverage under any form of insurance is an intentional or expected injury, damage or loss"); R. KEETON & A. WIDISS, INSURANCE LAW, § 5.4(d), at 518 (1988) ("[t]he principle that insurance should only be employed to transfer risks associated with fortuitous occurrences means that generally no coverage will exist for a loss that is caused intentionally.").

143. *Coney v. J.L.G. Industries, Inc.*, 454 N.E.2d 197, 204 (Ill. 1983). See also Keeton, *supra* note 10, § 67, at 475.

144. See *supra* note 141 and accompanying text.

145. *Veazey v. Elmwood Plantation Assocs., Ltd.*, 650 So. 2d 712, 719 (La. 1994) ("application of comparative fault principles in . . . [a duty to protect case] would operate to reduce the incentive of the lessor to protect against the same type of situation occurring again in the future. Such a result is clearly contrary to public policy."); *Merrill Crossings Assocs. v. McDonald*, 705 So. 2d 560, 562-63 (Fla. 1997) ("it would be irrational to allow a party who negligently fails to provide reasonable security measures to reduce its liability because there is an intervening intentional tort, where the intervening intentional tort is exactly what the security measures are supposed to protect against."); *Kansas State Bank & Trust Co. v. Specialized Transp. Servs. Inc.*, 819 P.2d 587, 606 (Kan. 1991) (stating that a negligent defendant should not be permitted to reduce its liability by intentional acts they had a duty to prevent); *Blazovic v. Andrich*, 590 A.2d 222, 233 (N.J. 1991) (while the court upheld the comparison of negligent and intentional conduct, it recognized that apportionment of fault between tortfeasors may be precluded "when the duty of one encompassed the obligation to prevent the specific misconduct of the other."); *Turner v. Jordan*, 957 S.W.2d 815, 823 (Tenn. 1997) ("Such comparison also reduces the negligent person's incentive to comply with the applicable duty of care . . . . [F]airness dictates that it should not be permitted to rely upon the foreseeable harm it had a duty to prevent so as to reduce its liability."); *Dawson v. Townsend & Sons, Inc.*, 735 So. 2d 1131, 1140 (Miss. Ct. App. 1999) ("A weakening of

"[r]educing the responsibility of a negligent tortfeasor by allowing that tortfeasor to place the blame entirely or largely on the intentional wrongdoer would serve as a disincentive for the negligent tortfeasor to meet its duty to provide reasonable care to prevent intentional harm from occurring."<sup>146</sup> As a result, the duty to protect may itself become a nullity and its policies may be undermined. In addition, this undesirable result could have a significant limiting impact on several growing areas of tort law.<sup>147</sup>

Negligent defendants should be liable for the entire harm suffered in duty-to-protect cases notwithstanding a jurisdiction's adoption

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the incentives would occur if a large part of the responsibility remained on the criminal who directly caused the harm."); *Brandon v. County of Richardson*, 624 N.W.2d 604, 620 (Neb. 2001) ("[I]t would be irrational to allow a party who negligently fails to discharge a duty to protect to reduce its liability because there is an intervening intentional tort when the intervening intentional tort is exactly what the negligent party had a duty to protect against."). See also RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 14 cmt. b (1999) (recognizing that placing little liability on the negligent defendant in duty-to-protect cases "significantly diminishes the purpose for requiring a person to take precautions against the risk."); 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, 33 (1992) (stating the duty to protect "would effectively be nullified if we were to allow a negligent guardian to escape responsibility by shifting the lion's share of fault to an intentional wrongdoer who was not deterred because the guardian afforded inadequate protection."). But see *Bhinder v. Sun Co., Inc.*, 717 A.2d 202, 239 n.11 (Conn. 1998) ("The plaintiff's skepticism regarding the effectiveness of apportionment, as compared to joint liability, in achieving an incentive for employers to maintain safe premises 'does not render [apportionment] against public policy.'").

146. *Wal-Mart Stores, Inc. v. McDonald*, 676 So. 2d 12, 22 (Fla. Dist. Ct. App. 1996).

147. These areas include premises liability, duty to warn, negligent hiring, and employee reference cases. See Marjorie A. Caner, Annotation, *Liability of Owner or Operator of Shopping Center, or Business Housed Therein, for Injury to Patron on Premises From Criminal Attack by Third Party*, 31 A.L.R. 5th 550 (1995) (premises liability); Tracy A. Bateman & Susan Thomas, Annotation, *Landlord's Liability for Failure to Protect Tenant From Criminal Acts of Third Person*, 43 A.L.R. 5th 207 (1996) (premises liability); D.L. Rosenhan et. al., *Warning Third Parties: The Ripple Effects of Tarasoff*, 24 PAC. L.J. 1165 (1993) (duty to warn); Phoebe Carter, Annotation, *Employer's Liability for Assault, Theft, or Similar Intentional Wrong Committed by Employee at Home or Business of Customer*, 13 A.L.R. 5th 217 (1993) (negligent hiring); Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45 (1995) (employee reference). Also affected are those cases traditionally considered under the duty to protect such as carrier and passenger, invitor and business visitor, and innkeeper and guest. See *supra* note 40 and accompanying text. Moreover, in those cases where the defendant's actions have created a dangerous situation that affords an intentional tortfeasor the opportunity to act may also be affected. See *supra* note 41 and accompanying text.

of several liability. Admittedly, an additional policy advanced by several liability jurisdictions is to hold a defendant liable only for his percentage of proportional fault.<sup>148</sup> However, duty-to-protect cases do not resemble those situations several liability was mainly adopted to prevent.<sup>149</sup> In duty-to-protect cases, a negligent defendant is liable for breaching his duty to protect a plaintiff from a specific risk of intentional harm.<sup>150</sup> In other words, but for the failure to protect the plaintiff from the intentional harm suffered, the negligent defendant would not be liable. As noted by one commentator, ordinarily there is no rational basis for holding a tortfeasor liable for more than his proportion of fault; however, in duty-to-protect cases, “[a] rational and legitimate basis does arise . . . when the duty of care that has been breached by a negligent tortfeasor is the affirmative duty to protect the injured plaintiff from intentional wrongdoing by a third person.”<sup>151</sup> In these situations, legislatures and courts must not fail to support the main policies underlying both comparative fault and the duty-to-protect rules: compensating victims and encouraging the duty to protect.

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148. See *supra* note 66 and accompanying text. See also *Bd. of County Comm’rs of Teton County v. Bassett*, 8 P.3d 1079, 1084 (Wyo. 2000) (“The legislature has clearly opted to relieve joint tortfeasors of liability beyond that which they bear proportional fault . . .”).

149. See Schwartz, *supra* note 44, § 15-4, at 311 (stating “[i]n the mid-1980’s a significant number of states changed the joint liability rule, in part because of growing awards against ‘deep pocket’ defendants who might be only peripherally responsible for the plaintiff’s injuries.”); Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 MEM. ST. U. L. REV. 45, 63 (1992) (recognizing that one of the primary criticisms of joint and several liability is that minimally negligent “deep pockets” pay the bulk of damages). See also *Walt Disney World Co. v. Wood*, 515 So.2d 198 (Fla. 1987) (negligent corporate defendant was liable for 86% of the plaintiff’s damages even though the jury found it only 1% at fault because other negligent party was immune from suit).

150. See Keeton, *supra* note 10, § 33, at 201-02. See also RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 14 (1999).

151. 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, 33 (1992). Although jurisdictions like Wyoming have adopted several liability, courts have made exceptions to several liability in the past. See *Feltner v. Casey Family Program*, 902 P.2d 206, 208-09 (Wyo. 1995) (disallowing the comparison between a plaintiff who acted intentionally and a defendant who allegedly acted negligently because the plaintiff had been injured in the course of committing the intentional act). While the policy reasons disallowing the application of several liability in the foregoing case are different from the policies for not applying it in duty-to-protect cases, the case illustrates that there are situations in which the application of several liability is improper.

*C. Restatement (Third) of Torts: Apportionment of Liability*

Section 14 of the Restatement (Third) of Torts: Apportionment of Liability addresses the duty-to-protect problem with respect to comparative fault.<sup>152</sup> Section 14 allows the inclusion of intentional tortfeasors in the allocation of fault but makes the negligent tortfeasor jointly and severally liable for the intentional tortfeasor's portion of the fault.<sup>153</sup> When applied, the negligent defendant is responsible for the intentional tortfeasor's percentage of fault and must compensate the plaintiff for his loss (assuming the plaintiff is not also at fault). The negligent defendant may, however, seek contribution from the intentional tortfeasor.<sup>154</sup> Section 14 applies *only* when the risk of the intentional tort is the *specific risk* the negligent defendant had a duty to protect the plaintiff against.<sup>155</sup> This supports the proposition that a person who fails to protect against a specific risk of an intentional tort should bear the risk that the intentional tortfeasor cannot be found or is insolvent.<sup>156</sup>

The position taken by the Restatement drafters is a compromise between those several liability states that do not allow the comparison of intentional and negligent conduct and those several liability states that do allow such a comparison. Currently, in those several liability states that do allow the comparison, the negligent defendant will be responsible only for his amount of apportioned fault.<sup>157</sup> In those several liability

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152. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14 (1999) ("A person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to the person."). *Accord* *Battenfeld of Am. Holding Co., Inc. v. Baird, Kurtz & Dobson*, 60 F.Supp.2d 1189, 1207 (D. Kan. 1999) ("the intentional acts of a third party cannot be compared with the negligent acts of a defendant whose duty it is to protect the plaintiff from the intentional acts committed by the third party."); *Cortez v. Univ. Mall Shopping Center*, 941 F.Supp. 1096, 1099 (D. Utah. 1996) ("To require comparison distorts the protections a plaintiff should be able to claim from a defendant's duty to protect."); *McAvey v. Lee*, 58 F.Supp.2d 724, 729 (E.D. La. 1998) ("If the intentional tortfeasor's conduct is within the ambit of protection encompassed by the duty owed by the negligent tortfeasor, it is inappropriate to instruct the jury to quantify the fault of the intentional tortfeasor.").

153. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14 (1999).

154. *Id.* at cmt. b ("The negligent person may assert a contribution claim against the intentional tortfeasor . . .").

155. *Id.*

156. *Id.* Moreover, it avoids the unfairness of holding a defendant whose negligence is unrelated to the intentional tortfeasor's conduct liable for the intentional tortfeasor's share of comparative fault. *Id.* The rule does this by requiring that the risk of the intentional party's actions and the failure to protect against them are what makes the defendant negligent.

157. *See, e.g., Bd. of County Comm'rs of Teton County v. Bassett*, 8 P.3d 1079

states where the comparison is not allowed, the negligent defendant will always be liable for the entire amount of the injury unless the plaintiff chooses to bring a separate action against the intentional tortfeasor.<sup>158</sup> Section 14 compromises by allowing comparison of the two types of conduct but makes the negligent defendant jointly and severally liable for the damages and gives him an opportunity to recover the intentional actor's portion of liability through contribution.<sup>159</sup>

The Restatement position is the fairest solution in duty-to-protect cases. It provides incentive for the negligent defendant to uphold his duty to protect the plaintiff by placing the risk of an insolvent or unknown intentional tortfeasor on him. This position also increases the plaintiff's chances at recovery by holding the negligent and intentional tortfeasors jointly and severally liable.<sup>160</sup> While the Restatement position compensates the plaintiff and provides an incentive to uphold the duty to protect, it also provides the negligent defendant a mechanism that mitigates his loss. Therefore, this compromise is the fairest, considering the policies that jurisdictions intended to advance with the adoption of comparative fault and the duty to protect.<sup>161</sup>

#### *D. Problems with the Wyoming Supreme Court's Analysis in Bassett*

In *Board of County Commissioners of Teton County v. Bassett*, the Wyoming Supreme Court applied section 1-1-109 in a duty-to-protect case. The court held that section 1-1-109 allows the comparison of an intentional and negligent tortfeasors' conduct.<sup>162</sup> However, flaws in the court's analysis could have led to this erroneous interpretation.

##### 1. Plain and Ordinary Meaning of the Statutory Language

In *Bassett*, the Wyoming Supreme Court did not properly ascertain legislative intent by looking first at the plain and ordinary meaning of the language used in section 1-1-109.<sup>163</sup> The court has previously held

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(Wyo. 2000).

158. See *supra* note 65 and accompanying text. This statement assumes that the plaintiff is not also at fault.

159. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14 cmt. b (1999) ("The negligent person may assert a contribution claim against the intentional tortfeasor . . .").

160. See *supra* note 61 and accompanying text.

161. See *supra* notes 18-21 and 31 and accompanying text.

162. Bd. of County Comm'rs of Teton County v. Bassett, 8 P.3d 1079, 1084 (Wyo. 2000).

163. Olheiser v. State ex rel. Worker's Comp. Div., 866 P.2d 768, 770 (Wyo. 1994); Parker Land & Cattle Co. v. Game & Fish Comm'n, 845 P.2d 1040, 1042-43 (Wyo.

that the rules of statutory interpretation are well established.<sup>164</sup> When interpreting a statute, the court looks to the intent of the legislature.<sup>165</sup> This intent must be determined initially and primarily from the words used in the statute.<sup>166</sup> When those words are clear, the court has held that “a court risks an impermissible substitution of its own views, or those of others, for the intent of the legislature if any effort is made to interpret or construe statutes on any basis other than the language invoked by the legislature.”<sup>167</sup> If the language selected by the Legislature is sufficiently definitive, that language establishes the rule of law and does not allow the judicial branch discretion or latitude.<sup>168</sup>

The plain language of section 1-1-109(a), states that “fault” includes:

acts or omissions, determined to be a proximate cause of death or injury to person or property, that are *in any measure negligent*, or that subject an actor to strict tort or strict products liability, and includes breach of warranty, assumption of risk and misuse or alteration of a product.<sup>169</sup>

It is these express words that the Wyoming Supreme Court should have used first to determine the meaning and scope of section 1-1-109, and more specifically, in its interpretation of the phrase “in any measure negligent.”

The interpretation of the phrase “in any measure negligent” was a crucial factor in the *Bassett* court’s analysis.<sup>170</sup> The court in *Bassett*

1993) (stating that the court must first determine if a statute is ambiguous by looking at the plain and ordinary meaning of the words contained in the statute.).

164. Wyoming Dep’t. of Trans. v. Haglund, 982 P.2d 699, 701 (Wyo. 1999) (stating the rules of statutory interpretation are well established).

165. Allied-Signal, Inc. v. State Bd. of Equalization, 813 P.2d 214, 219 (Wyo. 1991). See also Wyoming Comty. Coll. Comm’n v. Casper Cmty. Coll. Dist., 31 P.3d 1242, 1249 (Wyo. 2001); Fontaine v. Bd. of County Comm’rs, 4 P.3d 890, 894 (Wyo. 2000); State ex rel. Motor Vehicle Div. v. Holtz, 674 P.2d 732, 736 (Wyo. 1983).

166. *Allied-Signal*, 813 P.2d at 219 (Wyo. 1991); Phillips v. Duro-Last Roofing, Inc., 806 P.2d 834, 837 (Wyo. 1991).

167. *Allied-Signal*, 813 P.2d at 219.

168. *Id.*

169. WYO. STAT. ANN. § 1-1-109(a) (Lexis 2001) (emphasis added).

170. Bd. of County Comm’rs of Teton County v. Bassett, 8 P.3d 1079, 1083 (Wyo. 2000) (stating section 1-1-109’s “present iteration introduces the more inclusive term ‘fault’ and defines it as including conduct that is ‘in any measure negligent’ eliminating degrees or varieties of negligence consistent with one of the purposes of the statute, that is to ameliorate the harshness of the doctrine of contributory negligence”).

held that the phrase was broad enough to encompass intentional conduct.<sup>171</sup> In so holding, the court departed from what had been one of its maxims of statutory construction. The Wyoming Supreme Court had previously held that if a statute contains a term which has a standard meaning, that term will be given its ordinary and plain definition.<sup>172</sup> If this precedent were followed in *Bassett*, a plain and ordinary reading of the words used by the Legislature would indicate that fault is attributable only to those acts or omissions that are to some degree negligent. This plain and ordinary reading of the phrase "in any measure negligent" was embraced by the Washington Supreme Court in *Welch v. Southland Corporation*.<sup>173</sup> In that case, the court found that the Washington comparative fault statute, which defined fault as "acts or omissions . . . that are in any measure negligent or reckless" was not ambiguous.<sup>174</sup> Rather, it determined that intentional and negligent conduct could not be compared under the comparative fault statute.<sup>175</sup> Absent Wyoming, no state that has adopted the phrase "in any measure negligent" has interpreted it to allow the comparison of intentional and negligent conduct.<sup>176</sup>

Additionally, the vast majority of jurisdictions, including the United States Supreme Court, have drawn a distinction between negli-

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171. *Id.* at 1083.

172. *Newberry v. Bd. of County Comm'rs of Fremont County*, 919 P.2d 141, 145 (Wyo. 1996) (holding that if a statute employs a term which has a standard meaning, that term is presumably used in its ordinary and usual sense); *Vigil v. Ruettggers*, 887 P.2d 521, 524 (stating legislature is assumed to have attached ordinary meaning to terms used in the statute); *DiVenere v. Univ. of Wyoming*, 811 P.2d 273, 275 (Wyo. 1991) (holding that if a statute employs terms which have a standard meaning, the term is presumably used in its ordinary and usual sense).

173. *Welch v. Southland Corp.*, 952 P.2d 162 (Wash. 1998).

174. *Id.* at 165.

175. *Id.*

176. Alaska, Minnesota, and Washington have specifically held that the term fault and the inclusion of the phrase "in any measure negligent" did not include intentional conduct. *See Borg-Warner Corp. v. Avco Corp.*, 850 P.2d 628, 633 (Alaska 1993) (holding that the language of the statute "clearly contemplates a relative allocation of fault between all unintentional tortfeasors, whether negligent, grossly negligent or willful and wanton," but does not include intentional tortfeasors); *Farmer's State Bank v. Swisher*, 631 N.W.2d 796, 801 (Minn. 2001) (holding that acts or omissions that are in any measure negligent or reckless does not include intentional torts); *Welch v. Southland Corp.* 952 P.2d 162, 165 (Wash. 1998) (holding the plain language of the statute demonstrates a legislative intent that liability not be apportioned to intentional tortfeasors because the statutory definition of fault does not include intentional acts or omissions). North Dakota and Iowa have not interpreted the scope of the "in any measure negligent" language of their statutes. *But see, Champagne v. United States*, 513 N.W. 2d 75, 79 (N.D. 1994) (interpreting North Dakota statute § 32-03.2-02, which provides that "fault includes negligence, malpractice, absolute liability, dram shop liability, failure to warn, reckless or willful conduct, . . . and product liability," to allow the comparison).

gent and intentional conduct.<sup>177</sup> Courts have held that intentional and negligent conduct differs for two reasons. First, the intentional tortfeasor is at least “substantially certain” that particular consequences will follow his actions, whereas the negligent tortfeasor merely created an unreasonable risk.<sup>178</sup> Second, the intentional tortfeasor subjectively intends the consequence by acting to achieve the desired result, whereas the negligent tortfeasor’s actions failed to protect another by an objective, reasonable-person standard.<sup>179</sup> Prosser explained that

[t]he mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong.<sup>180</sup>

Therefore, negligent conduct is done without the requisite intent, however, it falls below the standard established by law for the protection of others.<sup>181</sup>

In interpreting the words “in any measure negligent,” the Wyoming Supreme Court should have recognized that the majority of jurisdictions have held that negligent acts are fundamentally different from

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177. *Florida Prepaid v. College of Savings*, 527 U.S. 627, 653 (1999) (stating that the Court has drawn a constitutional distinction between negligent and intentional conduct). *See also*, *Allen v. Sundean*, 186 Cal. Rptr. 863, 868-69 (Cal. Ct. App. 1982) (recognizing that willful and wanton misconduct falls short of being intentional); *McLain v. Training & Dev. Corp.*, 572 A.2d 494, 497 (Me. 1990) (recognizing willful and wanton misconduct falls short of intentional); *Draney v. Backman*, 351 A.2d 409, 415 (N.J. 1976) (holding that willful, wanton, and reckless misconduct were different in kind from negligence); *Mills v. Reynolds*, 807 P.2d 383, 403 (Wyo. 1991) (Urbigkit, J., dissenting) (stating intentional conduct is “different in kind” from negligent conduct, not just a difference in degree).

178. *Garratt v. Dailey*, 279 P.2d 1091, 1094 (Wash. 1955). *See also* *Gibbard v. Cursan*, 196 N.W. 398, 401-02 (Mich. 1923).

179. *See Garratt*, 279 P.2d at 1094 (Wash. 1955). *Compare* RESTATEMENT (SECOND) OF TORTS § 8A (1965) (describing intentional conduct as arising when the actor “desires to cause [the] consequence of his act, or believes that the consequences are substantially certain to result from it.”) *and* RESTATEMENT (SECOND) OF TORTS § 282 (1965) (stating negligent conduct “falls below the standard established by law for the protection of others against unreasonable risk of harm.”).

180. Keeton, *supra* note 10, § 8, at 36. *Accord* RESTATEMENT (SECOND) OF TORTS § 8A (1965) (providing that an actor “intends to injure or harm another if he intends the consequences of his act, or believes that they are substantially certain to follow.”).

181. RESTATEMENT (SECOND) OF TORTS § 8A (1965).

intentional acts; therefore, the term negligence does not encompass intentional acts. The two actions are separate and distinct, and a statute expressly limited to negligent acts should not be expanded to include intentional acts. If the court in *Bassett* had applied a plain-and-ordinary-meaning analysis to the words used in section 1-1-109, the statute would be applied to only those acts that were traditionally considered negligent.

Another flaw in the *Bassett* court's analysis was its interpretation of the word "includes," as used in section 1-1-109. The court held that the word is significant because "includes" generally signifies an intent to enlarge, rather than limit, a statute's application.<sup>182</sup> The court cited numerous other courts in support of this proposition; however, the Wyoming Supreme Court never followed this interpretation prior to *Bassett*.<sup>183</sup>

Wyoming case law has previously dealt with the interpretation of a statute which, like section 1-1-109, contains the word "includes" enumerating a list of subjects or things. In those cases, the Wyoming Supreme Court determined that when a statute provides an enumerated list, those things not included in the list are presumed excluded.<sup>184</sup> The court prior to *Bassett* had not focused on the word "includes," but on the words contained in the list.<sup>185</sup> In *Lo Sasso v. Brown*, the Wyoming Supreme Court noted that the Legislature had the opportunity to include the words or phrases within the list and therefore the court "will not enlarge, stretch, expand, or extend a statute to matters not falling within its ex-

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182. *Bd. of County Comm'rs of Teton County v. Bassett*, 8 P.3d 1079, 1083 (Wyo. 2000); *see also* *RT Communication Inc. v. State Bd. of Equalization*, 11 P.3d 915, 922 (Wyo. 2000).

183. *Bassett*, 8 P.3d at 1083 (citing *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941); *Paramount Gen. Hosp. Co. v. Nat'l Med. Enters., Inc.*, 117 Cal. Rptr. 42, 47 (Cal. Ct. App. 1974); *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1154 (Colo. App. 1998); *Schwab v. Ariyoshi*, 564 P.2d 135, 141 (Haw. 1977); *Janssen v. Janssen*, 331 N.W.2d 752, 755-56 (Minn. 1983); *Zorba Contractors, Inc. v. Housing Auth. of City of Newark*, 660 A.2d 550, 551 (N.J. 1995); *Matter of Estate of Corwin*, 742 P.2d 528, 529 (N.M. Ct. App. 1987); *North Carolina Turnpike Auth. v. Pine Island, Inc.*, 143 S.E.2d 319, 327 (N.C. 1965); *Lucke v. Lucke*, 300 N.W.2d 231, 234 (N.D. 1980); *Bradshaw v. Joseph*, 666 A.2d 1175, 1176 (Vt. 1995)).

184. This is the doctrine of *expressio unius est exclusio alterius*. *See* *Cheyenne v. Huitt*, 844 P.2d 1102, 1104 (Wyo. 1993).

185. *See Id.* at 1104 (holding that statute which applied to, "public utilities and services including gas, electricity, water, solid or liquid waste collection or disposal, heating and ground transportation" did not include firefighters) (emphasis added); *Felix v. State*, 986 P.2d 161, 164 (Wyo. 1999) (holding that statute which read, "[e]mployee means any person engaged in any extra hazardous employment . . . and includes legally employed minors and aliens," does not include those people who are unauthorized to work in the United States) (emphasis added).

press provisions.”<sup>186</sup> In *Bassett* the court deviated from this precedent and now allows itself to expand statutes that contain the word “includes” to matters outside the expressed provisions.

## 2. Legislative Intent

The Wyoming Supreme Court expanded section 1-1-109 to include intentional tortfeasors without showing that the inclusion was intended by the Legislature. Wyoming law has shown a reluctance to expand a statute to incorporate words or meanings not expressly stated in the absence of any legislative intent indicating otherwise.<sup>187</sup> In *Bassett*, the Wyoming Supreme Court held that the Legislature’s intention to include intentional conduct was demonstrated by two actions. The first was the fact that the Legislature amended the statute, which indicated that some change in the existing state of the law was intended by the amendment.<sup>188</sup> Second, the Legislature expanded the statute from “negligence to fault, which includes conduct in any measure negligent,” and by doing so, it was the Legislature’s intent to broaden the statute.<sup>189</sup>

The Wyoming Supreme Court’s first rationale, that the legislature’s demonstrated intent to broaden section 1-1-109 mandated the inclusion of intentional conduct, is unpersuasive. This rationale ignores the other substantial revisions instituted by the amendment.<sup>190</sup> In addition to defining fault, the 1994 amendment’s definitional section also defines actor, claimant, defendant, injury to person or property, and wrongful death. None of these terms were defined in the previous statute.<sup>191</sup> Further, the definition of fault, even without an interpretation that it includes intentional acts, significantly changed the 1986 version. The definition of fault in the 1994 amendment broadened the scope of the statute to include conduct that would subject an actor to strict liability, strict products liability, breach of warranty, assumption of risk and misuse or alteration of a product. Wyoming law demonstrated that prior to this

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186. *Lo Sasso v. Braun*, 386 P.2d 630, 632 (Wyo. 1963). *See also*, *Pine Bluffs v. Bd. of Equalization*, 333 P.2d 700, 708 (Wyo. 1958) (holding that electric light plants, which were not specifically mentioned in the statute were excluded even though other utilities, like water and sewage, were enumerated); *Flores v. Flores*, 979 P.2d 944, 947 (Wyo. 1999) (holding a statute that specifically names the persons affected is to be construed as excluding from its effect all those not expressly mentioned).

187. *See Lo Sasso*, 386 P.2d at 632.

188. *Bassett*, 8 P.3d at 1083 (stating that the court will begin “with the proposition that when the legislature amends a statute, some change in the existing state of the law was intended and the court should endeavor to make such amendment effective.”).

189. *Id.* (internal quotations omitted).

190. *See supra* notes 118-120 and accompanying text.

191. *See supra* note 119 and accompanying text.

1994 amendment, strict liability and strict product liability were not considered in comparison of fault.<sup>192</sup> There is no legislative history that would indicate the Legislature intended the statute to encompass more than just the expressed "strict tort or strict product liability."<sup>193</sup>

The Wyoming Supreme Court's second rationale, that the Legislature expanded the statute from comparative negligence to comparative fault, is equally unpersuasive. The court had, prior to *Bassett*, held that the omission of specific words or phrases should indicate that the Legislature rejected a broader application of the statute.<sup>194</sup> The legislative history available for section 1-1-109 shows that during the drafting, the legislature deleted the words "reckless," "wanton," "culpable" and "intentional" from the definition of "fault."<sup>195</sup> Therefore, the legislative history of section 1-1-109 indicates a desire to exclude intentional conduct from the definition of fault. The *Bassett* court recognized this argument, but was unpersuaded.<sup>196</sup>

Moreover, the Legislature's intent to exclude intentional acts from its definition of fault may be ascertained by looking at the source of the language and at other states which have adopted the same language. The definition of fault and its corresponding inclusion of the words "in any measure negligent" as used by the Wyoming Legislature in section 1-1-109 is nearly identical to the Uniform Comparative Fault Act's (UCFA) definition of fault.<sup>197</sup> The comments to the UCFA provide that the phrase "in any measure negligent" is intended to cover all degrees and kinds of negligent conduct that had traditionally been held as negligent conduct, without listing them specifically.<sup>198</sup> However, the

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192. See *infra* note 201 and accompanying text.

193. See *infra* note 195 and accompanying text.

194. *Matter of Voss' Adoption*, 550 P.2d 481, 485 (Wyo. 1976) (holding the Wyoming Supreme Court will not read into laws that which was not stated in the statute); *Parker v. Artery*, 889 P.2d 520, 528 (Wyo. 1995) (holding when legislature omits language from a statute, courts must consider the omission intentional). See also 2A NORMAN J. SINGER, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION § 48.04, at 22 (1992) (where specific language is omitted by the legislature, this is an indication that the legislature rejected this language).

195. See JOURNAL OF THE SENATE OF THE FIFTY-SECOND STATE LEGISLATURE OF WYOMING, Senate File No. 35 (1994).

196. *Bassett*, 8 P.3d at 1083 (stating that the argument that the words "reckless," "wanton," "culpable," or "intentional" were stricken in an attempt to exclude that type of conduct, "reads more into the deletion than we think justified.").

197. Compare WYO. STAT. ANN. § 1-1-109(a)(iv) (Lexis 2001) with UNIF. COMPARATIVE FAULT ACT § 1(b), 12 U.L.A. 44 (Supp. 1977) (defining "Fault" to include acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability.").

198. UNIF. COMPARATIVE FAULT ACT, Comment, 12 U.L.A. 44 (Supp. 1979).

comments specifically state that the phrase "in any measure negligent" was not designed to incorporate intentional torts.<sup>199</sup>

Another factor the Wyoming Supreme Court considers important in its determination of legislative intent is the purpose behind the enactment of the statute. Specifically, the court has previously recognized a need to look at the "mischief the act was intended to cure" in ascertaining legislative intent.<sup>200</sup> Rather than allow for the consideration of intentional conduct as asserted by the Wyoming Supreme Court in *Bassett*, the Legislature's intent in enacting the 1994 amendments was to include conduct characteristic of strict liability actions. The mischief the 1994 amendments were intended to cure was probably that created in *Phillips v. Duro-Last Roofing, Inc.*, which held that the breach of warranty and strict liability did not fall under the scope of the comparative fault statute.<sup>201</sup> Although the legislative history does not indicate that the 1994 amendments were enacted to remedy this decision, the express language of the amendment indicates that the Legislature wanted to change the approach taken by the court in *Phillips*.<sup>202</sup>

In ascertaining the legislative intent behind the 1994 amendments to section 1-1-109, it cannot be argued that the mischief the act was intended to cure was the exclusion of intentional conduct in fault allocations. In *Danculovich*,<sup>203</sup> the Wyoming Supreme Court held that the 1973 version of section 1-1-109 did not mandate a reduction of the plaintiff's damages on the basis of comparative fault if the defendant's conduct was willful and wanton.<sup>204</sup> However, the *Danculovich* court established that willful and wanton conduct was a form of negligence because it was done without the intent to cause harm or injury, and that another category existed for those acts that were done with the intent to cause harm or injury.<sup>205</sup> Although not expressly labeling intentional con-

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199. *Id.* (stating "this Act does not include intentional torts.").

200. *Parker Land & Cattle Co. v. Game & Fish Comm'n*, 845 P.2d 1040, 1044 (Wyo.1993). See also *Carter v. Thompson Realty Co.*, 131 P.2d 297, 299 (Wyo. 1942) (stating a court must look to the mischief the statute was intended to cure).

201. 806 P.2d 834, 836-37 (Wyo. 1991) (holding legislature did not intend to allow the consideration of breach of warranty and strict liability in fault allocation.).

202. See John M. Burman, *Wyoming's New Comparative Fault Statute*, 31 LAND & WATER L. REV. 509, 529-30 (1996). See also WYO. STAT. ANN. § 1-1-109(a) (Lexis 2001) (providing that "fault includes acts or omissions . . . that subject an actor to strict tort or strict products liability, and includes breach of warranty, assumption of risk and misuse or alteration of a product.").

203. *Danculovich v. Brown*, 593 P.2d 187 (Wyo. 1979).

204. *Id.* at 194.

205. *Id.* at 191. In *Danculovich*, the court determined that negligence included willful and wanton misconduct. The court stated willful and wanton misconduct included

duct as being separate and distinct from negligent conduct, the court acknowledged that conduct intending harm is different than negligent conduct.<sup>206</sup> There is no indication that the Legislature wanted to correct the court's holding in *Danculovich*. If the Legislature wanted to correct the mischief created in *Danculovich*, the Legislature could have done so in its 1986 amendments. Further, the 1994 amendments could have expressly included language identifying conduct with the requisite intent to cause harm. Presently, section 1-1-109 does not indicate that the Legislature intended to include intentional conduct within the definition of fault.

In interpreting section 1-1-109, the Wyoming Supreme Court failed to give proper weight to the plain meaning of the statutory language and ascertain the legislative intent behind the 1994 amendments. As a result, the Wyoming Supreme Court in *Bassett* did what it stated was unconstitutional in *Allied-Signal*—it impermissibly substituted its own views for the intent of the Legislature.<sup>207</sup>

#### E. Potential Solutions for Plaintiffs

##### 1. Informing the Jury

A potential solution to the duty-to-protect problem in Wyoming may be to inform the jury about the consequences of its decision. Section 1-1-109 requires the court to inform the jury of the consequences of its determination of the percentage of fault.<sup>208</sup> Exactly how, and to what extent the Wyoming Supreme Court will allow the jury to be informed in duty-to-protect cases is unknown. The Wyoming Supreme Court, however, has provided some guidance on the issue. The court has held that section 1-1-109 allows the jury to be informed that: (1) the plaintiff will be barred from recovery if he is over fifty-percent negligent; (2) the court will reduce the award by the plaintiff's percentage of fault; (3) each defendant is liable only to the extent of his percentage of fault; and (4) the plaintiff will not recover for negligence attributed to a non-party.<sup>209</sup> The jury may not, however, be informed of the plaintiff's in-

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“that which tends to take on the aspect of highly unreasonable conduct, or an extreme departure from ordinary care, in a situation where a high degree of danger is apparent. It is *not* with the intent to cause injury or damage . . . .” *Id.* at 191. Thus, the court drew a distinction between conduct which was negligent, and done without the intent to cause harm, and conduct which was intentional, and done with the requisite intent. *Id.*

206. *Id.* at 193.

207. *Allied-Signal, Inc. v. State Bd. of Equalization*, 813 P.2d 214, 219 (Wyo. 1991).

208. WYO. STAT. ANN. § 1-1-109(c)(i)(B) (LexisNexis 2001) (requiring the court to “inform the jury of the consequences of its determination of the percentage of fault.”).

209. John M. Burman, *Wyoming's New Comparative Fault Statute*, 31 LAND &

ability to recover from insolvent or judgment-proof defendants because a defendant's financial status is not a consequence of the jury's allocation of fault.<sup>210</sup>

Wyoming courts should allow special jury instructions explaining the duty to protect. At least one state follows this approach and has allowed a specific instruction informing the jury of a negligent tortfeasor's duty to protect others and how this duty relates to the actions of intentional tortfeasors.<sup>211</sup> This instruction allows the jury to consider the importance of the negligent tortfeasor's "duty to protect others and to weigh the failure to perform that duty with the intentional conduct of the third party."<sup>212</sup>

The instruction approach is preferable to relying on the jury becoming informed of the consequences of its decision through statements made during the presentation of the case. Although statements made during some trials have led to plaintiffs receiving comprehensive recovery for their injuries, inherent problems with this approach remain.<sup>213</sup> One problem is that even if the jury is informed of the consequences, it is probable that, "any rational juror will apportion the lion's share of the fault to the intentional tortfeasor when instructed to compare the fault of

WATER L. REV. 509, 529-30 (1996).

210. *Burton v. Fisher Controls Co.*, 723 P.2d 1214, 1222 (Wyo. 1994).

211. *Reichert v. Adler*, 875 P.2d 379, 382 (N.M. 1994). The jury instruction suggested by the court reads as follows:

If you find that the [negligent tortfeasor] breached . . . [its] duty . . . , you may compare this breach of duty with the conduct of the third person(s) who actually caused the injury to the plaintiff(s) and apportion fault accordingly. In apportioning this fault, you should consider that the [negligent tortfeasor's] duty . . . arises from the likelihood that a third party will injure a visitor and, as the risk of danger increases, the amount of care to be exercised by the [negligent tortfeasor] also increases. Therefore, the proportionate fault of the [negligent tortfeasor] is not necessarily reduced by the increasingly wrongful conduct of the third party.

*Id.*

212. *Id.* at 382.

213. *See, e.g., Scott v. County of Los Angeles*, 32 Cal.Rptr.2d 643 (Cal. Ct. App. 1994) (jury assigned one percent fault to grandmother who caused permanent damage to seven year-old victim's legs, 75% fault to County of Los Angeles, and 24% fault to social worker employed by County for failing to protect child from grandmother based on earlier warnings that grandmother was abusing child); *Hutcherson v. City of Phoenix*, 961 P.2d 449 (Ariz. 1998) (affirming judgment in which jury assigned 25% fault to murderer and 75% responsibility to City for negligence of 911 operator in handling emergency call prior to murders); *Rosh v. Cave Imaging Sys., Inc.*, 32 Cal.Rptr.2d 136 (Cal. Ct. App. 1994) (holding former employee who shot manager 25% fault, and security firm 75% fault for failing to protect the manager.).

a negligent tortfeasor and an intentional tortfeasor.”<sup>214</sup> This would have the effect of diminishing the negligent defendant’s duty to protect.<sup>215</sup> Moreover, because some courts believe rational juries will apportion the majority of fault to intentional tortfeasors, in those few cases where the majority of fault is apportioned to the negligent tortfeasor, the courts have remanded the apportionments as being unsupported by the evidence.<sup>216</sup> With the guidance of appropriate jury instructions, these anomalous results may be avoided.

## 2. Legislative Intervention

Some courts, including the Wyoming Supreme Court, have concluded that the language of their comparative fault statute precludes them from omitting intentional tortfeasors from the allocation of fault.<sup>217</sup> In addition, some courts have held that the decision is in the province of the legislature and not one properly made by the courts.<sup>218</sup> In response, legislatures should amend their statutory language to exclude the allocation of fault to intentional tortfeasors in duty-to-protect cases or statutorily provide that the negligent defendant be held jointly and severally liable.

At least two states have already adopted statutory language that precludes the comparison.<sup>219</sup> Under these statutes, parties who have engaged in intentional conduct are not included in the apportionment of fault.<sup>220</sup> While these statutes provide incentive for the negligent defen-

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214. *Veazey v. Elmwood Plantation Assocs., Ltd.*, 650 So. 2d 712, 719 (La. 1994). See also, *Turner v. Jordan*, 957 S.W.2d 815, 823 (Tenn. 1997); *Brandon v. County of Richardson*, 624 N.W.2d 604, 620 (Neb. 2001).

215. See *supra* notes 145-46 accompanying text.

216. *Pamela B. v. Hayden*, 31 Cal.Rptr.2d 147 (Cal. Ct. App. 1994) (holding apportioning 95% of the fault to the negligent apartment owner, four percent to the rapist, and one percent to the rapist accomplice, was irrational and defied common sense); *Scott v. County of Los Angeles*, 32 Cal.Rptr.2d 643 (Cal. Ct. App. 1994) (holding apportioning one percent of fault to an insolvent intentional tortfeasor was improper as a matter of law).

217. *Bd. of County Comm’rs of Teton County v. Bassett*, 8 P.3d 1079 (Wyo. 2000); *Rodenburg v. Fargo-Moorhead Young Men’s Christian Ass’n.*, 632 N.W.2d 407, 418 (N.D. 2001); *Slack v. Farmer’s Ins. Exchange*, 5 P.3d 280 (Colo. 2000).

218. See *Rodenburg*, 632 N.W.2d at 418.

219. MISS. CODE ANN. § 85-5-7(1) (2001); (““Fault” shall not include any tort which results from an act or omission committed with a specific wrongful intent.”); CONN. GEN. STAT. § 52-572h(o) (2001) (“there shall be no apportionment of liability or damages between parties liable for negligence and parties liable on any basis other than negligence including, but not limited to, intentional, wanton or reckless misconduct . . .”).

220. *Id.* In duty-to-protect cases in Mississippi and Connecticut, the intentional tortfeasor is excluded from the comparison and the negligent defendant will be liable for

dant to protect the plaintiff, and the plaintiff is compensated for his injuries, it is probably not the best compromise in several liability jurisdictions because the negligent defendant is liable for the intentional tortfeasor's actions without any recourse.

The Restatement approach provides a better compromise for those jurisdictions, like Wyoming, which follow several liability.<sup>221</sup> Under the Restatement approach, the conduct of the intentional tortfeasor is included in the allocation of fault. The compromise is that although the negligent defendant is jointly and severally liable for the plaintiff's injuries, he is allowed to seek contribution from the intentional tortfeasor.<sup>222</sup> The compromise promotes the policies underlying the duty to protect by shifting the risk of an unknown or insolvent intentional tortfeasor to the negligent defendant. It also recognizes the several liability policy of holding defendants responsible only for their portion of fault by allowing the defendant contribution from the intentional tortfeasor.

#### IV. CONCLUSION

Defendants who have failed to protect against the intentional harm it was their specific duty to prevent should be held responsible for the entire amount of harm suffered when the intentional tortfeasor is unknown or insolvent. This result is required to achieve the policies underlying the purpose of comparative fault and the duty to protect. Jurisdictions that provide otherwise can nullify a party's duty to protect another from a specific intentional harm. If legislatures have not decided whether to compare intentional and negligent conduct by adopting explicit statutory language, courts are left to balance competing policies when reaching a decision. When deciding, courts should not ignore the

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all of the fault (assuming the plaintiff is not also negligent). *Id.*

221. In Wyoming, for example, in order to adopt the Restatement approach the legislature could include within section 1-1-109 the following:

(f) A person who is liable to another based on failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of contributory fault assigned to the intentional tortfeasor in addition to the share of contributory fault assigned to the person.

(g) Contribution:

(i) When two or more persons are or may be liable for the same harm and one of them discharges the liability of another by settlement or discharge of judgment as stated in subsection (f), the person discharging the liability is entitled to recover contribution from the other.

(ii) A person entitled to recover contribution under subsection (i) may recover no more than the amount paid to the plaintiff in excess of the person's comparative share of responsibility.

222. See *supra* note 159 and accompanying text.

policies of promoting a duty to protect and compensating innocent victims by rigid adherence to several liability. Protecting innocent victims from intentional tortfeasors, and encouraging the duty to do so, substantially outweighs the purposes of several liability in duty-to-protect cases. Legislatures that address the problem should adopt the compromise provided in the Restatement (Third) of Torts that promotes the duty to protect, compensates the innocent victim, and provides the negligent defendant with recourse against the intentional tortfeasor.

Wyoming, and jurisdictions like it, have wrongfully decided to place the risk of loss on innocent plaintiffs as well as diminish incentives that prevent intentional harm in duty-to-protect cases. State legislatures or the courts themselves should revisit this problem and resolve it in favor of protecting the public by requiring that those with a duty to protect carry out that duty, or pay for the breach.

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