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A Duty Not to Become a Victim: Assessing the Plaintiffs Fault in Negligent Security Actions

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A Duty Not to Become a Victim: Assessing the Plaintiff's Fault in Negligent Security Actions

Steven C. Minson*

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I. Introduction

Janis Erichsen went shopping at her neighborhood No-Frills grocery store in Omaha at 6:00 a.m. on a Sunday in July.¹ She locked her car before entering the store.² When Ms. Erichsen returned, she put her groceries in the car, locked it again, and then took her shopping cart back to the store.³ Returning from the store and otherwise alone in the parking lot, she noticed a man walking straight toward her.⁴ Uncomfortable with his approach, she hurried to unlock her car door.⁵

Before she could get in her car, the man sprayed her in the face with mace, took her purse, and walked back to an automobile at the edge of the lot.⁶ He entered the car and placed Erichsen's purse between the two front seats.⁷ Erichsen pursued the man to his car and reached in it to reclaim her purse.⁸ He sprayed her with mace a second time, and then he put the car in gear and drove away.⁹ Erichsen became entangled in the car's seatbelt strap, and her assailant dragged her for 1.6 miles.¹⁰ She lost both kneecaps and underwent at least a dozen surgeries.¹¹

Nicholas DiVincenzo, a real estate broker, rented an office in a seven-story building at a south Florida office complex.¹² The office building was in an area in which the crime rate was "unusually high."¹³ Also, the building management neither locked the doors of the building nor activated the security camera until 7:00 p.m.¹⁴ One day, sometime after 6:00 p.m., DiVincenzo left his office unlocked and unattended and went across the hall to the bathroom.¹⁵

1. See *Erichsen v. No-Frills Supermarkets, Inc.*, 518 N.W.2d 116, 118 (Neb. 1994) (describing facts of attack); *State v. Bennett*, 508 N.W.2d 294, 296 (Neb. Ct. App. 1993) (describing facts of case in resulting criminal trial).

2. *Bennett*, 508 N.W.2d at 296.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* Erichsen eventually tried her case to a jury, and the jury returned a defense verdict. Telephone Interview with Brian Welch, attorney for No-Frills Supermarkets, Cassem, Tierney, Adams, Gotsch & Douglas, Omaha (Feb. 9, 1999).

12. See *Green Cos. v. DiVincenzo*, 432 So. 2d 86, 87 (Fla. Dist. Ct. App. 1983) (describing facts of case).

13. *Id.*

14. *Id.*

15. *Id.*

When DiVincenzo returned to his office, an assailant attacked him, and he suffered substantial permanent injuries.¹⁶

Both of the individuals described in these accounts suffered terribly. Yet, juries found both at least partially responsible for their injuries in suits against the business owners of the property on which the criminal attacks occurred. The plaintiffs based their suits on a cause of action generally referred to as "premises security" or "negligent security."¹⁷ Negligent security actions based on attacks such as those described above became more numerous during the 1970s.¹⁸ Although common carriers and innkeepers have long had a duty to protect passengers and guests from the intentional misconduct of others, in the 1970s states began to impose such a duty on possessors of other kinds of real property.¹⁹ Now, plaintiffs bring such suits against apartment complexes,²⁰ shopping malls,²¹ hospitals,²² grocery stores,²³ schools,²⁴ and other businesses.²⁵ Indeed, with one authority reporting that the average jury award in a negligent security action involving a wrongful death is \$2.1 million,²⁶ it is

16. *Id.* The jury found DiVincenzo's own negligence contributed twenty-five percent to his injuries. *Id.*

17. See ALAN KAMINSKY, *A COMPLETE GUIDE TO PREMISES SECURITY LITIGATION* 3 (1995) (using term "premises security"); JOSEPH A. PAGE, *THE LAW OF PREMISES LIABILITY* § 11.3, at 293 (2d ed. 1988) (using term "negligent-security"). The commentators use the terms interchangeably, but for the sake of clarity, this Note will use the term "negligent security" throughout.

18. See RICHARD S. KUHLMAN, *SAFE PLACES? SECURITY PLANNING AND LITIGATION* § 1-1, at 2 (1989) (describing expansion of tort liability for negligent security as result of increase in and frustration with crime).

19. See PAGE, *supra* note 17, § 11.3, at 291-92 (noting negligent security doctrine developed during 1970s and 1980s and describing current doctrine in states as inconsistent); see also Mark P. Buell, *Liability for Inadequate Security*, 69 FLA. B.J. 58, 58 (1995) (identifying 1975 rape of singer Connie Francis at hotel, with \$2.5 million verdict, as "mother if not grandmother" of all premises security cases); Robert J. Homant & Daniel B. Kennedy, *Landholder Responsibility for Third Party Crimes in Michigan: An Analysis of Underlying Legal Values*, 27 U. TOL. L. REV. 115, 115 (1995) (identifying 1970 action against residential landlord as first successful example of negligent security action).

20. See *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477, 478-80 (D.C. Cir. 1970) (describing criminal assault on tenant in common hallway of apartment building).

21. See *Seibert v. Vic Regnier Builders, Inc.*, 856 P.2d 1332, 1334 (Kan. 1993) (describing shooting in shopping center's subterranean parking garage).

22. See *Isaacs v. Huntington Mem'l Hosp., Inc.*, 695 P.2d 653, 662 (Cal. 1985) (describing shooting in hospital parking lot).

23. See *Clohesy v. Food Circus Supermarkets, Inc.*, 694 A.2d 1017, 1019 (N.J. 1997) (describing abduction from parking lot and subsequent murder of supermarket customer).

24. See *Mullins v. Pine Manor College*, 449 N.E.2d 331, 333-34 (Mass. 1983) (describing rape in college dormitory room).

25. See *Hardee v. Cunningham & Smith, Inc.*, 679 So. 2d 1316, 1317 (Fla. Dist. Ct. App. 1996) (describing stabbing, beating, and robbery of self-service car wash patron).

26. KAMINSKY, *supra* note 17, at 4.

little wonder that such actions are becoming more common across the country. The same authority reports that the average jury award in negligent security actions involving rape is \$1.8 million.²⁷ With more than 4000 rapes reported in American parking lots and garages in 1995,²⁸ it is clear that this theory of recovery exposes business possessors and their insurers to staggering liability.

To recover in a negligent security action, a plaintiff must show that the possessor of the property on which the criminal attack occurred owed a duty of care for the plaintiff's safety, that the possessor breached that duty, and that the breach was the proximate cause of the injuries criminally inflicted on the plaintiff.²⁹ In such actions, one can assign responsibility to any of three actors: the business owner or landlord (possessor), the criminal (intentional tortfeasor), or the victim (plaintiff). Thus, negligent security cases present unusual doctrinal problems. A plaintiff alleges that a possessor is at fault for failing to take sufficient precautions to prevent foreseeable criminal attacks; yet the occurrence of crime is notoriously difficult to predict and prevent. The intentional tortfeasor's fault is obvious. However, because most states prohibit the comparison of negligent and intentional fault, the possessor generally cannot join the intentional tortfeasor in order to reduce the possessor's exposure to liability. Finally, there is the fault of the plaintiff. In the criminal law, of course, any fault on the part of the victim is generally irrelevant to conviction and punishment of the wrongdoer.³⁰ However, because the plaintiff in a negligent security action alleges that the possessor was negligent, no doctrinal bar exists to prevent the possessor from employing the defense of contributory or comparative negligence, requiring a jury to evaluate the reasonableness of the plaintiff's conduct with respect to the attack.

In considering the possessors' duty to protect patrons from the criminal actions of third parties, commentators have focused primarily on the tests used to determine the foreseeability of criminal attacks.³¹ Commentators have also considered whether courts should allow juries to compare the fault of the intentional tortfeasor with that of the negligent tortfeasor when assessing the

27. *Id.*

28. STATISTICAL ABSTRACT OF THE UNITED STATES, nos. 320 & 326 (117th ed. 1997).

29. See KAMINSKY, *supra* note 17, at 7 (describing elements of negligent security action).

30. However, one recent commentator called for the adoption of comparative fault in criminal law. See Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181, 1181 (1994) (arguing that application of comparative fault principle in criminal law, by providing that criminals who acted against careless victims would be exculpated or have their sentences reduced, would promote efficiency and fairness).

31. See generally KUHLMAN, *supra* note 18, § 2-2(B); PAGE, *supra* note 17, § 11.17; JOHN A. TARANTINO & MARK A. DOMBROFF, PREMISES SECURITY: LAW AND PRACTICE § 1.4 (1990).

fault of the possessor.³² However, no published source formally addresses the doctrinal grounding for determinations of whether a plaintiff in a negligent security action might be partially responsible for suffering the attack. This Note undertakes such an examination. It analyzes the possible fault of the plaintiff in a negligent security action in relation to the fault of the possessor and the intentional tortfeasor. This Note concludes that individuals owe a duty to themselves to anticipate and to take precautions against foreseeable criminal attack, and the Note provides a framework to guide assessments of plaintiffs' fault in negligent security actions.

Because any fault on the part of the plaintiff commonly occurs jointly with the fault of the possessor and the fault of the intentional tortfeasor, this Note first examines doctrine governing the fault of these other two actors. Accordingly, Part II of this Note traces the rise of negligent security actions and the development of the various tests to determine the foreseeability of criminal acts by third persons for which plaintiffs can hold a possessor liable.³³ Part III then discusses the comparison of the fault of intentional tortfeasors in negligent security actions and concludes that states should allow the comparison.³⁴ Part IV examines case law relevant to the issue of the plaintiff's fault and asks whether plaintiffs have a duty to avoid suffering an intentional tort. Part IV proposes the adoption of traditional tort doctrine for determining and comparing a plaintiff's fault in negligent security actions.³⁵ Part V calls for states to impose on individuals a duty to anticipate and avoid crime.³⁶ This Note also proposes a model jury instruction to assist juries in

32. See generally Jake Dear & Steven E. Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations*, 24 SANTA CLARA L. REV. 1 (1984) (advocating reforms allowing comparison of intentional and negligent fault in certain cases); Gail D. Hollister, *Using Comparative Fault to Replace the All-or-Nothing Lottery Imposed in Intentional Torts Suits in Which Both Plaintiff and Defendant Are at Fault*, 46 VAND. L. REV. 121 (1993) (same); Theresa L. Fiset, Note, *Comparative Fault as a Tool to Nullify the Duty to Protect: Apportioning Liability to a Non-Party Intentional Tortfeasor in Stellas v. Alamo Rent-A-Car, Inc.*, 27 STETSON L. REV. 699 (1997) (rejecting arguments calling for comparison of negligent and intentional fault).

33. See *infra* Part II (describing tests used to determine foreseeability of crime to possessors).

34. See *infra* Part III (discussing comparison of negligent and intentional fault in negligent security actions).

35. See *infra* Part IV (examining doctrine governing determinations of plaintiff's fault). When addressing apportionment of liability, the forthcoming *Restatement of Torts: Apportionment of Liability* adopts the term "comparative responsibility" instead of "comparative fault" or "comparative causation." RESTATEMENT OF TORTS: APPORTIONMENT OF LIABILITY § 1 cmt. a (Proposed Final Draft (Revised) (March 22, 1999)). This Note maintains use of the more traditional "fault" throughout.

36. See *infra* Part V (concluding that states should impose on individuals duty to anticipate and avoid crime).

properly comparing the fault of the plaintiff with that of the intentional tortfeasor and the possessor in negligent security actions.

II. *The Defendant's Duty in Negligent Security Actions*

The common law imposed no duty on a private party to protect others from criminal acts of unknown third persons.³⁷ Exceptions to that rule have long existed, and they developed with the recognition of special relationships,³⁸ such as those between common carrier and passenger³⁹ and between innkeeper and guest.⁴⁰ In 1965, section 344 of the *Restatement (Second) of*

37. See RESTATEMENT (SECOND) OF TORTS § 315 (1965) (asserting that generally there is no duty to control conduct of third person to prevent that person from causing harm to another); see also WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 33, at 173-74 (4th ed. 1971) (stating that generally one does not owe duty to protect others from criminal acts of third persons). Explanations for longstanding refusal to impose such a duty have varied. Some of the reasons for not imposing such a duty likely stem from the distinction between misfeasance and nonfeasance: "The highly individualistic philosophy of the older common law had no great difficulty in working out restraints upon the commission of affirmative acts of harm, but shrank from converting the courts into an agency for forcing men to help one another." *Id.* § 56, at 339. Commentators have also suggested that courts have refused to impose a duty to protect others from criminal acts because of the following factors: "the criminal act is an intervening cause of harm, the difficulty in foreseeing criminal acts, the vagueness of the standard of care required to meet that duty, the economic consequences, and the fear of conflicting with the policy that the protection of citizens is the duty of the government." Michael J. Yelnosky, Comment, *Business Inviters' Duty to Protect Invitees from Criminal Acts*, 134 U. PA. L. REV. 883, 889 (1986); see *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 897-98 (Tenn. 1996) (discussing various justifications for not imposing duty on business to prevent criminal attacks on their patrons).

38. See RESTATEMENT (SECOND) OF TORTS § 315 (1965) ("There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless . . . a special relationship exists. . .").

39. See, e.g., *Isenberg v. New York, N.H. & H.R. Co.*, 108 N.E. 1046, 1047 (Mass. 1915) (finding carrier breached duty by failing to prevent battery of one passenger by another passenger when its servants knew trouble was brewing); *McWilliams v. Lake Shore & M.S. Ry. Co.*, 109 N.W. 272, 274 (Mich. 1906) (affirming verdict for plaintiff who suffered powder burns to her face as result of drunken man firing blank cartridges from pistol); *Twichell v. Pecos & N.T. Ry. Co.*, 131 S.W. 243, 245 (Tex. Civ. App. 1910) (finding railroad's negligence to be jury question when its servants had notice both of prior trouble between two passengers and viciousness of passenger who battered another passenger); see also RESTATEMENT (SECOND) OF TORTS § 314A (1965) ("A common carrier is under a duty to its passengers to take reasonable action . . . to protect them against unreasonable risk of physical harm. . .").

40. See, e.g., *McFadden v. Bancroft Hotel Corp.*, 46 N.E.2d 573, 576 (Mass. 1943) (affirming verdict against hotel after third party struck patron in restaurant); *Curran v. Olson*, 92 N.W. 1124, 1125 (Minn. 1903) (affirming innkeeper liable when third party poured alcohol on sleeping plaintiff's foot and then set it afire); *Rommel v. Schambacher*, 11 A. 779, 779 (Pa. 1887) (affirming innkeeper liability when drunken guest pinned piece of paper to drunken plaintiff's back and set it and plaintiff afire); see also RESTATEMENT (SECOND) OF TORTS § 314A

Torts (the *Restatement*) recognized a general duty owed by business possessors to provide their guests reasonable protection from foreseeable criminal assaults.⁴¹ Thus, the recent increase in the number of negligent security actions is not the result of a radical new cause of action but rather the expansion of a pre-existing action during a time of high crime rates.

Subsequent to the publication of the *Restatement* with its expanded duty for business possessors, the states have struggled both with whether to impose this duty and with its proper scope.⁴² An abundance of scholarly writings mark

(1965) (stating that innkeeper is under duty to take reasonable action to protect guests); PAGE, *supra* note 17, § 11.2, at 292 n.2 (identifying relationships between school and pupil, jailer and prisoner, and hospital and patient as also giving rise to duty to provide protection).

41. RESTATEMENT (SECOND) OF TORTS § 344 (1965) (imposing on business possessors duty to protect guests from harmful acts of third persons). The section provides as follows:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Id. Furthermore, comment (f) to section 344 speaks directly to the business possessor's duty to police the premises:

Since the possessor is not the insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or the character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Id. § 344 cmt. f.

42. Academic writing traces the increasing frequency of negligent security litigation in the 1980s and 1990s. See generally Michael J. Bazylar, *The Duty to Provide Adequate Protection: Landowners' Liability for Failure to Protect Patrons from Criminal Attack*, 21 ARIZ. L. REV. 727 (1979) (discussing duty of possessor to protect entrants from third party criminal attacks); Homant & Kennedy, *supra* note 19 (same); Martin J. Rooney, *Liability of a Premises Owner for the Provision of Security: The Massachusetts Experience*, 29 SUFFOLK U. L. REV. 51 (1995) (same); Virginia M. Chock & Leslie H. Kondo, Note, *Knodle v. Waikiki Gateway Hotel, Inc.: Imposing a Duty to Protect Against Third Party Criminal Conduct on the Premises*, 11 U. HAW. L. REV. 231 (1989) (same); Suzanne Ciaccio, Comment, *Business Owners' Duty to Protect Patrons from the Criminal Acts of Third Parties in Louisiana*, 53 LA. L. REV. 1847 (1993) (same); William Joseph Flannagan, Comment, *Negligent Security: Is Peter Pan a Merchant's Nightmare? Sharpe v. Peter Pan Bus Lines, Inc.*, 24 NEW ENG. L. REV. 1193

the path of the doctrine as it has progressed through the state courts.⁴³ All states have now recognized that business possessors owe, under circumstances that vary from state to state, a duty to protect their customers from the criminal acts of third parties.⁴⁴ However, recent case law demonstrates that the scope of the duty and the proper test for measuring it are not settled issues.⁴⁵ In general, states have used four different tests to establish foreseeability in negligent security actions: the imminent harm test, the prior criminal incidents test, the totality of the circumstances test, and the balancing test.

A. *The Imminent Harm Test*

A number of jurisdictions have limited the duty of business possessors to instances in which the storeowner knows or has reason to know that crimes against customers are taking place or are about to take place.⁴⁶ In these jurisdictions, upon discovering a customer in peril, possessors can meet their

(1990) (same); Heidi A. Guttan-Fox, Case Note, *No Foreseeability, No Duty, No-Frills! The Nebraska Supreme Court Imposes a Duty in Erichsen v. No-Frills Supermarkets, Inc.*, 29 CREIGHTON L. REV. 439 (1995) (same); David A. Roodman, Note, *Business Owners Duty to Protect Invitees from Third Party Criminal Attacks – or – "Business Owners Beware: Missouri Ups the Ante,"* 54 MO. L. REV. 443 (1989) (same); Donna Lee Welch, Comment, *Ann M. v. Pacific Plaza Shopping Center: The California Supreme Court Retreats from Its Totality of the Circumstances Approach to Premises Liability*, 28 GA. L. REV. 1053 (1994) (same).

43. See *supra* note 42 (providing sources citing examples of analyses of duty to protect others from criminal acts of third parties).

44. See KAMINSKY, *supra* note 17, at 109-78 (providing state-by-state summary of leading negligent security cases and noting very limited duty in Alabama and Michigan); PAGE, *supra* note 17, § 11.3, at 293 (noting support for broad no-duty rule is "virtually non-existent").

45. See, e.g., *Clohesy v. Food Circus Supermarkets, Inc.*, 694 A.2d 1017, 1027-28 (N.J. 1997) (adopting totality of circumstances test and finding supermarket had duty to provide parking lot security); *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 902 (Tenn. 1996) (adopting "balancing test" and rejecting limited rule enunciated in *Cornpropst v. Sloan*, 528 S.W.2d 188, 198 (Tenn. 1975)); *Nivens v. 7-11 Hoagy's Corner*, 943 P.2d 286, 294 (Wash. 1997) (recognizing special relationship between store and customer imposed duty on store to take reasonable steps to protect customer but finding store had no separate duty to provide on-premises security guards).

46. See, e.g., *Henley v. Pizitz Realty Corp.*, 456 So. 2d 272, 277 (Ala. 1984) (finding plaintiff's abduction from parking garage and subsequent rape was not result of defendant's negligent failure to provide security, despite prior instances of serious crime on premises, because no evidence suggested defendant knew or had reason to know of imminent bodily harm to plaintiff); *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 238 S.E.2d 167, 169 (S.C. 1977) (finding defendant store not liable for assault on plaintiff in parking lot because employees had no knowledge attack was occurring or was about to occur); *Burns v. Johnson*, 458 S.E.2d 448, 450 (Va. 1995) (ruling gas station not liable for abduction and rape of customer, who left car at pump for more than one hour just after drunk male customer tried to gain entry to locked store by uttering lewd suggestion to female attendant, because evidence "utterly" failed to show attendant knew criminal assault was about to occur).

duty by warning the customer or by summoning the police.⁴⁷ This approach to defining the duty of a storeowner is advocated by section 344 of the *Restatement*, but few jurisdictions retain it as the sole means of establishing a business owner's liability.⁴⁸

B. The Prior Similar Incidents Test

Under the prior similar incidents test, third party crimes against customers are foreseeable only if the plaintiff can establish that the defendant knew or should have known of prior similar crimes on the premises.⁴⁹ Commentators and courts have criticized the prior similar incidents test because it gives the possessor at least one "free" injury.⁵⁰ Commentators also have criticized the test for removing too many cases from the jury and for generating arbitrary decisions about what kinds of prior crimes are sufficiently similar to establish foreseeability.⁵¹

C. The Totality of the Circumstances Test

At least in part as a reaction to the shortcomings of the prior similar incidents rule, several states have adopted a totality of the circumstances test for determining when a factfinder can deem criminal acts of third parties

47. PAGE, *supra* note 17, §11.3, at 294 (noting variations on *Restatement* approach); see *Ballew v. Southland Corp.*, 482 So. 2d 890, 894 (La. Ct. App. 1986) (finding possessor liable for employee's failure to timely notify police when employee knew or should have known of potential danger to customer).

48. See PAGE, *supra* note 17, §11.3, at 294; see also *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 902 (Tenn. 1996) (adopting "balancing test" and rejecting knowledge of imminent crime rule enunciated in *Cornpropst v. Sloan*, 528 S.W.2d 188, 198 (Tenn. 1975)). But see *Taylor v. Hynson*, 856 P.2d 278, 281 (Okla. 1993) (finding exception to broad no-duty rule exists, stating "[w]hen invitor has knowledge that an invitee is in imminent danger, the invitor must act reasonably to prevent injury").

49. See, e.g., *Mills v. Jack Eckerd Corp.*, 482 S.E.2d 449, 450 (Ga. Ct. App. 1997) (construing prior similar incidents rule narrowly by affirming no liability when shopper injured by fleeing shoplifter because plaintiff failed to present any evidence of prior incidents in which patron was injured by fleeing thief); *Brown v. Schnuck Markets, Inc.*, 973 S.W.2d 530, 533 (Mo. Ct. App. 1998) (finding for defendant store because plaintiff failed to produce evidence of prior similar incidents of violent crimes on premises that were "sufficiently numerous and recent to put a defendant on notice" that parking lot assault was foreseeable); *Lauersdorf v. Supermarket Gen. Corp.*, 657 N.Y.S.2d 732, 733 (App. Div. 1997) (finding property crimes gave no notice that rape of plaintiff was foreseeable).

50. See PAGE, *supra* note 17, § 11.6, at 298-99 (citing *Isaacs v. Huntington Mem'l Hosp., Inc.*, 695 P.2d 653, 665 (Cal. 1985) and discussing limitations of "prior similars" rule).

51. See *id.* (citing criticisms of test); see also *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 900 (Tenn. 1996) (criticizing rule because it improperly removes too many cases from jury).

sufficiently foreseeable to impose liability on possessors.⁵² This test, most notably articulated in the California case *Isaacs v. Huntington Memorial Hospital Inc.*,⁵³ greatly expands the scope of a possessor's duty.⁵⁴ Under the totality of the circumstances test, a plaintiff may introduce evidence of foreseeability that would generally not be admissible in a jurisdiction using a prior similar incidents rule. Such evidence can include the architectural design of the possessor's premises;⁵⁵ any security measures the possessor has

52. See, e.g., *Seibert v. Vic Regnier Builders, Inc.*, 856 P.2d 1332, 1334, 1339 (Kan. 1993) (adopting totality of circumstances approach when plaintiff shot in underground parking garage and no evidence was offered of prior similar crimes in parking garage); *Clohesy v. Food Circus Supermarkets, Inc.*, 694 A.2d 1017, 1027 (N.J. 1997) (rejecting prior similar incidents rule in favor of totality of circumstances rule in case involving abduction from parking lot and subsequent murder); *Reitz v. May Co. Dept. Stores*, 583 N.E.2d 1071, 1074 (Ohio Ct. App. 1990) (adopting totality of circumstances test that allowed consideration of evidence of prior nonviolent crimes when plaintiff was stabbed and automobile stolen in parking lot); see also *Torres v. United States Nat'l Bank*, 670 P.2d 230, 235-36 (Or. App. 1983) (describing totality of circumstances test without naming it as such in case where plaintiff was shot and robbed at bank's night depository).

53. 695 P.2d 653 (1985).

54. *Isaacs v. Huntington Mem'l Hosp. Inc.*, 695 P.2d 653, 665 (Cal. 1985) (stating factfinder should not determine foreseeability by "rigid application of 'prior similars' rule" and instead should determine foreseeability "in light of all the circumstances"). In *Isaacs*, the court considered whether evidence other than the prior similar incidents on its premises could establish the foreseeability necessary to hold a possessor liable for the criminal assault of a third party. *Id.* at 662-63. An unknown assailant shot plaintiff *Isaacs*, a physician, at night while *Isaacs* entered his car in a hospital parking lot across from the emergency room. *Id.* at 662. *Isaacs* appealed the trial court's grant of hospital's motion for nonsuit at the close of plaintiff's case. *Id.* *Isaacs* had failed to introduce any evidence of prior similar incidents on defendant's premises. *Id.* *Isaacs* had, however, introduced evidence that the hospital was located in a high crime area, that thefts and assaults had taken place elsewhere on the hospital's premises, especially near the emergency room, and that the parking lot had no security and was dimly lit at the time of the shooting. *Id.* *Isaacs* also introduced testimony of two experts in security matters who concluded that the hospital's security at the time of the shooting was "totally inadequate." *Id.* The court criticized the prior similar incidents test as "flawed" because it discouraged landowners from implementing security measures, prevented the first victim from recovering, led to arbitrary results because of disputes about when prior crimes are sufficiently similar, and removed too many cases from the jury. *Id.* at 665. Applying its new test for possessors' liability, the court found that a jury could reasonably have concluded that an assault on Dr. *Isaacs* was foreseeable and that the trial court had erred in finding the assault was not foreseeable as a matter of law. *Id.*

55. See *Clohesy*, 694 A.2d at 1021, 1030 (reversing trial court's grant of defendant's motion for summary judgment and citing evidence, including that store permitted parking in area impossible to observe from inside store, as sufficient to present jury question of store's negligence); *Torres*, 670 P.2d at 236 (reversing trial court's grant of motion to dismiss and ruling that plaintiff's assertions, including that bank depository's "hidden location" exposed plaintiff to unreasonable risk of criminal attack, was sufficient to state claim for negligence).

taken, such as cameras or guards;⁵⁶ lighting;⁵⁷ the character of the business itself;⁵⁸ the character of neighboring businesses and the surrounding neighborhood;⁵⁹ and all prior crimes, violent and nonviolent, on or near the premises.⁶⁰ Thus, courts that use the totality of the circumstances test greatly expand the range of circumstances that could constitute notice sufficient to alert a possessor of the need to take measures to protect patrons from criminal attack.

D. The Balancing Test

One commentator called the totality of the circumstances test "pro-plaintiff" and said it marked the culmination of the transition from a strict to a broad interpretation of foreseeability.⁶¹ Scholars and courts have criticized the test for providing too broad a standard for imposing liability and for coming close to imposing strict liability on business possessors for any criminal attacks suffered by customers while on the premises.⁶² Such a rule would violate the maxim that business possessors are not the insurers of their customers' safety.⁶³

In *Ann M. v. Pacific Plaza Shopping Center*,⁶⁴ less than a decade after announcing the totality of the circumstances rule, the California Supreme Court narrowed its approach to foreseeability.⁶⁵ Reexamining its totality of

56. See *Isaacs*, 695 P.2d at 662 (noting evidence of insufficient number of guards and cameras).

57. See *Seibert*, 856 P.2d at 1340 (remanding to determine what role insufficient lighting played in shooting).

58. See *Isaacs*, 695 P.2d at 661 (noting hospital emergency rooms, surrounding areas, and nearby parking lots had high potential for violent acts).

59. See *id.* (noting hospital emergency rooms, surrounding areas, and nearby parking lot had high potential for violent acts); *Clohesy v. Food Circus Supermarkets, Inc.*, 694 A.2d 1017, 1021 (N.J. 1997) (noting evidence that neighboring gas station and liquor store, as gathering places for loiterers, should have alerted grocery store to need for parking lot security).

60. See *Clohesy*, 694 A.2d at 1021 (noting evidence of all prior crimes on or near store's premises for preceding two and one-half years, including shoplifting and driving while intoxicated, and noting increasing number of offenses).

61. See *Welch*, *supra* note 42, at 1061-62 (identifying *Isaacs v. Huntington Mem'l Hosp. Inc.*, 695 P.2d 653, 665 (1985) as "landmark decision").

62. See *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 900 (Tenn. 1996) (noting with approval criticism of totality of circumstances test that it "effectively impos[es] an unqualified duty to protect customers in areas experiencing any significant level of criminal activity" (citations omitted)).

63. See RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965) (providing that "the possessor is not the insurer of the visitor's safety").

64. 863 P.2d 207 (Cal. 1993)

65. *Ann M. v. Pacific Plaza Shopping Ctr.*, 863 P.2d 207, 215 (Cal. 1993) ("revisit[ing]" totality of the circumstances rule and announcing new factors in analysis). At issue in *Ann M.*

the circumstances approach, the court reemphasized that the possessor's duty is "determined by balancing the foreseeability of the harm against the burden of the duty to be imposed."⁶⁶ Thus, because of uncertainty about where and when crime will occur and because of the costs of hiring security guards, the court found that prior violent incidents will quite likely be necessary before a business possessor will be in breach of his duty for failure to hire security guards.⁶⁷ However, even absent prior violent incidents, a possessor might still have a duty, for example, to improve lighting and to cut back shrubbery.⁶⁸ This approach has had some appeal for other courts. Recently, for example, the Tennessee Supreme Court rejected its own imminent harm test in favor of the *Pacific Plaza* analysis, identifying it as a "balancing approach."⁶⁹

III. Comparing the Fault of the Intentional Tortfeasor

Pamela B. was in the underground parking garage of her apartment building – promoted by its management as a "security" building – when a paroled murderer and rapist, Prince Veal, grabbed her from behind, put a knife to her

v. Pacific Plaza Shopping Center was whether Pacific Plaza was negligent for failing to institute security patrols in the common areas of the shopping center. *Id.* at 211. Plaintiff Ann M. sued the possessors after an assailant raped her inside the photograph developing store where she worked. *Id.* at 210. The rape occurred shortly after Ann M., the only employee on duty, opened the store for business at 8:00 a.m. *Id.* Ann M. claimed that the regular presence of transients at the shopping center made the attack foreseeable. *Id.* 211. Acknowledging that Pacific Plaza indeed owed a duty to protect Ann M., the employee of a tenant, the court rejected Ann M.'s claims that the shopping center was in breach of that duty by failing to hire security guards. *Id.* 215. Because the court found it difficult or impossible "to envision any locale open to the public where the occurrence of violent crime seems improbable," the court revisited the totality of the circumstances rule. *Id.* The court then emphasized that the scope of the duty is determined in part by the burden of the duty imposed. *Id.* Cases in which the burden of preventing future harm is great, such as hiring guards, may require a high degree of foreseeability. *Id.* Conversely, cases in which there are strong public policy reasons for preventing harm or in which the harm can be prevented by simple means may require a lesser degree of foreseeability. *Id.* at 215-16. Because of the cost of hiring security guards, then, rarely would a landowner be in breach for failure to hire guards absent prior similar incidents of violent crime. *Id.* at 215. Thus, Because Ann. M. could not show the occurrence of prior crimes on the premises or that Pacific Plaza knew of any such prior crimes, the court affirmed summary judgment for Pacific Plaza. *Id.* at 216.

66. *Id.* at 215 (citation omitted).

67. *Id.*

68. Welch, *supra* note 42, at 107-08 (voicing approval and providing illustrations of impact of balancing test).

69. See McClung v. Delta Square Ltd. Partnership, 937 S.W.2d 891, 901 (Tenn. 1997) (stating that California's "balancing" approach "retains some beneficial features of both the prior incidents and totality of the circumstances tests, but avoids some of the problems associated with each"). The balancing test is a clear expression of the Hand Formula. See *infra* notes 180-83 and accompanying text (describing Hand Formula).

throat, raped and sodomized her, and then locked her naked in a car trunk.⁷⁰ At trial, the jury attributed four percent of the fault for Pamela B.'s injuries to her attacker and one percent to his accomplice.⁷¹ The jury allocated ninety-five percent of the fault to the landlord and to the management company.⁷²

The landlord and management company appealed, arguing that substantial evidence did not support the jury's apportionment of fault.⁷³ The California Court of Appeal emphatically agreed.⁷⁴ Among other things, the court stated that the jury's apportionment of the majority of the fault to the possessor rather than to the rapist was irrational and defied common sense.⁷⁵ Thus, although the court affirmed on the question of defendants' negligence, it reversed and remanded with directions to conduct a new trial on the apportionment of damages.⁷⁶

Pamela B. is relevant not because of any precedential value,⁷⁷ but because the court's assertion that reasonable factfinders would apportion the vast majority of the blame for the plaintiff's injuries to the intentional tortfeasor⁷⁸ is both commonsensical and prohibited by law in a majority of states. When a horribly injured plaintiff such as Pamela B. seeks to lay the blame for her injuries at the feet of a business possessor, no doubt that possessor seeks in turn to point to the intentional tortfeasor as the actor who caused and is responsible for the plaintiff's injuries. Unfortunately for possessors, at the time of this writing only ten states have ruled that when one party seeks to hold another liable for negligently failing to control a third party who acted intentionally, factfinders may compare the fault of all three parties. These

70. See *Pamela B. v. Hayden*, 31 Cal. Rptr. 2d 147, 149-50 (Ct. App. 1994) (describing attack).

71. *Id.* at 149.

72. *Id.* The jury also awarded damages of \$1.2 million. *Id.*

73. *Id.*

74. *Id.* at 158-60.

75. *Id.* The court said "[r]ationally we cannot leave our common sense on the courthouse steps, which is what we would have to do to affirm the allocation made by the jury in this case." *Id.* at 159. Prince Veal caused Pamela B.'s injuries, said the court, and "it is pure sophistry to talk in terms of [the defendants'] comparatively minor negligence as the cause of Pamela's suffering." *Id.* at 158.

76. *Id.* at 160.

77. Review granted by *Pamela B. v. Hayden*, 880 P.2d 112 (Cal. 1994). Review dismissed and cause remanded to the Court of Appeals, *Pamela B. v. Hayden*, 889 P.2d 539 (Cal. 1995). Under California Rules of Court 976, 977, and 979, the *Pamela B.* opinion carries no precedential authority.

78. *Pamela B. v. Hayden*, 31 Cal. Rptr. 2d 147, 160 (Ct. App. 1994) (asserting, before remanding for new trial on apportionment of damages, that "when one defendant's conduct was intentional and another defendant's conduct was negligent, it is reasonable to assume the jury will apportion fault so that the one who acted intentionally should bear most if not all of the blame" (citations and internal quotations omitted)).

states are Arizona,⁷⁹ California,⁸⁰ Colorado,⁸¹ Connecticut,⁸² Hawaii,⁸³ Kentucky,⁸⁴ New Jersey,⁸⁵ New Mexico,⁸⁶ New York,⁸⁷ and Utah.⁸⁸ In addition, Louisiana allows apportionment between negligent and intentional tortfeasors on a case-by-case basis.⁸⁹ Other states do not allow the apportionment of fault

79. *See* *Hutcherson v. City of Phoenix*, 961 P.2d 449, 451-53 (Ariz. 1998) (approving apportionment of fault as twenty-five percent to murderer and seventy-five percent to city for failure of 911 operator properly to dispatch police).

80. *See* *Weidenfeller v. Star and Garter*, 2 Cal. Rptr. 2d 14, 16 (Ct. App. 1991) (affirming apportionment of fault as seventy-five percent to assailant, twenty percent to defendant bar, five percent to plaintiff in unprovoked shooting in parking lot).

81. *See* *Harvey v. Farmers Ins. Exch.*, 938 P.2d 34, 39 (Colo. Ct. App. 1998) (finding, in action resulting from sexual battery by chiropractor, Colorado comparative fault statute intended to apply when one party at fault for negligently failing to use reasonable care to prevent foreseeable harm resulting from intentional tort of another – even if other is designated non-party).

82. *See* *Bhinder v. Sun Co., Inc.*, 717 A.2d 202, 208 (Conn. 1998) (finding that although state statute did not allow apportionment of fault between negligent and intentional tortfeasor, state common law allowed such comparison in murder of convenience store employee).

83. *See* *Ozaki v. Association of Apartment Owners*, 954 P.2d 644, 649 (Haw. 1998) (affirming that Hawaii's modified comparative fault statute does not apply only to actions proceeding entirely in negligence, but also applies when different theories of recovery are advanced against different defendants in case in which murderer was assessed ninety-two percent of fault, victim/tenant five percent of fault, and owner three percent of fault).

84. *See* *Roman Catholic Diocese v. Secter*, 966 S.W.2d 286, 291 (Ky. Ct. App. 1998) (affirming apportionment of fault between negligent and intentional tortfeasors as Diocese seventy-five percent for negligent supervision and teacher twenty-five percent for sexual assault of student).

85. *See* *Blazovic v. Andrich*, 590 A.2d 222, 231 (N.J. 1991) (approving apportionment of fault between restaurant for negligence, patrons for assault of plaintiff, and plaintiff himself for contributory negligence after plaintiff yelled at group of patrons who were throwing rocks at sign and who then attacked him).

86. *See* *Barth v. Coleman*, 878 P.2d 319, 321-22 (N.M. 1994) (reversing trial court and remanding for determination of intentional tortfeasor's fault for punching plaintiff's nose in bar fight).

87. *See* *Siler v. 146 Montague Assocs.*, 652 N.Y.S.2d 315, 321 (App. Div. 1997) (remanding for apportionment of liability between negligent landlord and intentional tortfeasor who assaulted plaintiff in her apartment).

88. *See* *Field v. Boyer Co.*, 952 P.2d 1078, 1080 (Utah 1998) (finding, after plaintiff was assaulted outside her employer's store, that state comparative fault statute encompasses both negligent and intentional conduct but does not allow apportionment of fault to unknown, nonparty assailants).

89. *See* *Veazey v. Elmwood Plantation Assocs., Ltd.*, 650 So. 2d 712, 720 (La. 1994) (denying on public policy grounds request of defendant apartment complex management company to apportion fault to intentional tortfeasor who raped plaintiff tenant, but affirming that trial courts may make decision on whether to allow comparison of fault between intentional and negligent tortfeasors on case by case basis).

between negligent and intentional tortfeasors.⁹⁰

The modern rule barring comparison of fault between intentional and negligent tortfeasors has allowed courts to escape the harsh results of contributory negligence when that doctrine operates as a complete bar to a plaintiff's recovery.⁹¹ The policy of forbidding comparison of intentional and negligent fault originally sought to deter intentional tortfeasors and facilitate the compensation of victims.⁹² One who battered and robbed a plaintiff, then, could not escape liability in a resulting civil trial by offering a contributory negligence defense, asserting that the plaintiff should have been more careful to conceal the amount of cash in his wallet. Another justification for not allowing intentional tortfeasors to assert contributory negligence as a defense is that negligent fault and intentional fault are different in kind; thus, factfinders cannot compare the two.⁹³ However, recent commentators have generally rejected arguments against allowing comparison of intentional and negligent fault.⁹⁴ Instead, at least two commentators have argued for allowing comparative fault in intentional tort cases, at least in limited circumstances.⁹⁵

90. See, e.g., *Whitehead v. Food Max*, 163 F.3d 265, 280 (5th Cir. 1998) (finding Mississippi law did not allow actions of intentional tortfeasors to be allocated as fault in abduction of mother and daughter from parking lot); *Merrill Crossings Assocs. v. McDonald*, 705 So. 2d 560, 562-63 (Fla. 1997) (affirming trial court ruling precluding apportioning fault of intentional tortfeasor who shot plaintiff in parking lot); *Kansas State Bank & Trust Co. v. Specialized Transp. Servs., Inc.*, 819 P.2d 587, 605-06 (Kan. 1991) (affirming that Kansas law did not allow factfinders to compare bus driver's intentional conduct to school district's and transportation company's negligence in failing to protect mentally retarded six-year-old from sexual molestation); *Flood v. Southland Corp.*, 616 N.E.2d 1068, 1071 (Mass. 1993) (finding state comparative fault statute inapplicable to negligent security action resulting from stabbing outside convenience store); *Fulwiler v. Schneider*, 662 N.E.2d 82, 89 (Ohio Ct. App. 1995) (stating that Ohio's comparative negligence statute does not apply to claims involving intentional torts in case of bar bouncer assaulting patron); see also HENRY WOODS & BETH DEERE, *COMPARATIVE FAULT* § 7.1, at 151-56 (3d ed. 1996) (providing somewhat dated state-by-state analysis).

91. Dear & Zipperstein, *supra* note 32, at 6-7 (explaining "uniform rejection" of contributory negligence defense when defendant acted intentionally).

92. See *id.* at 18-20 (same); Hollister, *supra* note 32, at 145-50 (explaining deterrence policy).

93. Dear & Zipperstein, *supra* note 32, at 11-18 (explaining difference in kind distinction); see also Hollister, *supra* note 32, at 135-42 (same).

94. See Dear & Zipperstein, *supra* note 32, at 12-18 (rejecting difference in kind argument); Hollister, *supra* note 32, at 135-42 (same).

95. See Dear & Zipperstein, *supra* note 32, at 32-40 (advocating use of comparative fault in certain intentional nuisance actions); Hollister, *supra* note 32, at 150-59 (describing typology of cases in which comparison is appropriate); see also Reginald R. White, III, *Comparative Responsibility Sometimes: The Louisiana Approach to Comparative Apportionment and Intentional Torts*, 70 TUL. L. REV. 1501, 1533-36 (1996) (proposing reformation of Louisiana's current "comparative responsibility sometimes" system without barring comparison). *But see*

Prohibiting a possessor from defending a negligent security action by comparing its responsibility with the responsibility of the intentional tortfeasor may also work a shocking result. Consider, for example, a hypothetical case in which an automobile driven negligently by a third party customer struck the plaintiff in the possessor's grocery store parking lot. When the plaintiff sues the grocery store for maintaining an unsafe parking lot, the possessor would be able to join the negligent driver, have the jury apportion the driver a share of the fault, and thereby reduce the possessor's liability. However, imagine that the third party driver intentionally ran down, abducted, and murdered the plaintiff. In the resulting negligent security action, the possessor would be unable to compare the responsibility of the murderer. Thus, when the third party's fault becomes unspeakably worse, the share of the responsibility the jury would likely apportion to the possessor becomes much greater.

As noted above, at least ten states do allow juries to compare the fault of an intentional and a negligent tortfeasor, and five of the ten states have done so only in the last two years.⁹⁶ The impact this new doctrine will have on negligent security actions is unclear.⁹⁷ For example, when the state's adoption of a comparative negligence regime has abolished joint and several liability, plaintiffs may be faced with the unhappy prospect of having juries apportion a majority of fault to a party who, if he can be located, is essentially judgment-proof.⁹⁸ Nonetheless, the abolition of contributory fault as a bar to a plaintiff's

Fiset, *supra* note 32, at 737 (arguing apportionment of fault of intentional tortfeasor would "render duty to protect another a nullity").

96. See *supra* notes 79-89 (citing state cases allowing comparison of intentional and negligent fault).

97. See Pamela B. v. Hayden, 31 Cal. Rptr. 2d 147, 160 (Ct. App. 1994) (stating that "when one defendant's conduct was intentional and another defendant's conduct was negligent, it is reasonable to assume the jury will apportion fault so that the one who acted intentionally should bear most if not all of the blame" (citations and internal quotations omitted)); Veazey v. Elmwood Plantation Assocs. Ltd., 650 So. 2d 712, 719 (La. 1994) (explaining that because "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 and an intentional tortfeasor," trial court was correct to preclude jury from apportioning intentional fault and thereby reducing incentive for lessor to protect tenants from attack).

98. See Robert S. Glazier & Barbara Green, *Allocating Fault in Negligent Security Cases*, TRIAL, Jan. 1997, at 54, 55-56 (advising readers of attempts by defense bar to apportion fault of intentional tortfeasors and suggesting strategies for avoiding such apportionment). However, some early cases show results contrary to this 'lion's share' expectation. See, e.g., Hutcherson v. City of Phoenix, 961 P.2d 449, 451-53 (Ariz. 1998) (approving apportionment of fault as twenty-five percent to murderer and seventy-five percent to city for failure of 911 operator properly to dispatch police); Rosh v. Cave Imaging Sys., Inc., 32 Cal. Rptr. 2d 136, 139-40 (Ct. App. 1994) (affirming jury's apportionment of fault as seventy-five percent to security company and twenty-five percent to shooter in case where security guards failed, despite repeated requests, to remove disgruntled former employee from premises); Roman Catholic Diocese v. Selter, 966

recovery and the weakness of the difference in kind argument mean that the justification for forbidding comparison of intentional and negligent fault no longer holds.

IV. Comparing the Plaintiff's Fault

Susan Marisconish was alone and asleep in her room at the Ron-Ric motel near a high-crime neighborhood in Chicago when a knock at the door awakened her at 1:00 a.m.⁹⁹ Marisconish thought her fiancé, whom she planned to see graduate from the Great Lakes Naval Training Station, might be knocking.¹⁰⁰ However, her fiancé had said he was spending the night on base, and she saw no one through the peephole.¹⁰¹ Thinking her fiancé was en route to the innkeeper's apartment to get a key to the room, Marisconish opened the door.¹⁰² The man on the other side was a stranger.¹⁰³

The man asked for a glass of water and entered the room while she went to get him one from the bathroom.¹⁰⁴ Complaining that the water was not cold enough, he went to the bathroom himself, leaving Marisconish between the bathroom and the door of her room.¹⁰⁵ There was no telephone in the room.¹⁰⁶ She hid her purse, and a few minutes passed.¹⁰⁷ She declined the man's invitation to join him in the bathroom.¹⁰⁸ He emerged from the bathroom naked from the waist down.¹⁰⁹ She fled out of the room, whereupon he chased her down, dragged her back to the room, and raped and sodomized her.¹¹⁰

S.W.2d 286, 291 (Ky. Ct. App. 1998) (affirming assessment of seventy-five percent of fault to Diocese for negligent supervision and twenty-five percent of fault to teacher for sexually assaulting student). *But see* Ozake v. Association of Apartment Owners, 954 P.2d 644, 646 (Haw. 1998) (discussing jury apportionment of ninety-two percent of fault to murderer, five percent of fault to victim/tenant, three percent of fault to possessor). Also, the *Restatement of Torts: Apportionment of Liability* addresses the problem and would impose joint and several liability on a person "who is liable to another based on a failure to protect the other from the specific risk of an intentional tort." RESTATEMENT OF TORTS: APPORTIONMENT OF LIABILITY § 24 (Proposed Final Draft (Revised) (March 22, 1999)).

99. *See* Wassell v. Adams, 865 F.2d 849, 850-51 (7th Cir. 1989) (describing facts of case).

100. *Id.* at 851.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

At trial, the court instructed Marisconish's jury to compare the motel's fault with that of the plaintiff, but not with the fault of the intentional tortfeasor.¹¹¹ The defense argued that the plaintiff had been at fault, for example, in failing to flee when the rapist was in the bathroom.¹¹² Marisconish countered that the innkeepers were negligent because they failed to warn her that the hotel was near a high-crime neighborhood and because they failed to provide parking lot security.¹¹³ However, the jury found that Marisconish was ninety-seven percent at fault for the attack and the innkeepers were only three percent at fault. Judge Posner, writing for the Seventh Circuit, upheld this finding.¹¹⁴

Ms. Marisconish's case raises issues central to this Note: (1) What doctrine governs how factfinders determine whether a plaintiff is at least partially at fault when suffering an intentional tort? (2) How should a judge or jury properly compare a plaintiff's fault to the fault of the possessors? (3) In jurisdictions that allow juries to apportion the fault of the intentional tortfeasor, how should juries conduct that comparison?

A. Do Plaintiffs Have a Duty to Avoid Suffering an Intentional Tort?

A century ago, one commentator asserted that there was no duty to act reasonably to avoid being harmed by an intentional tort.¹¹⁵ This position found more recent expression by one court that claimed that "[a] person's obligation to guard himself from injury caused by design is insignificant, if existent at all, compared to his obligation to guard himself from injury caused by another's simple lack of care."¹¹⁶ Prosser also articulated a broad "no duty to anticipate crime" rule.¹¹⁷ The idea that courts should not impose a duty to guard oneself from criminal attack clearly stems from the now almost extinct system in which

111. *Id.* at 852. Illinois, as of the time of this writing, still does not allow the fault of the intentional tortfeasor to be compared under its comparative fault statute. *See supra* notes 79-89 and accompanying text (identifying states that allow comparison of intentional and negligent fault).

112. *Wassell*, 865 F.2d at 853.

113. *Id.* at 853, 855.

114. *Id.* at 852, 855.

115. *See* CHARLES FISK BEACH, JR., A TREATISE ON THE LAW OF CONTRIBUTORY NEGLIGENCE § 65, at 104 (3d ed., Albany, Baker, Voorhis & Co. 1899) (arguing that, because defense of contributory negligence was not available to intentional tortfeasor, individuals had no duty to avoid intentional harm).

116. *Melendres v. Solares*, 306 N.W.2d 399, 403 (Mich. Ct. App. 1981).

117. *See* PROSSER, *supra* note 37, § 33, at 173-74 ("There is normally much less reason to anticipate acts on the part of others which are malicious and intentionally damaging than those which are merely negligent; and this is all the more true where, as is usually the case, such acts are criminal.").

contributory fault was a complete bar to recovery.¹¹⁸ Indeed, a "no duty to avoid an intentional tort" rule would be the mirror image of the rule that bars intentional tortfeasors from asserting the defense of contributory fault.¹¹⁹

At least one commentator has argued that courts should not impose on a plaintiff a duty to avoid becoming a victim of crime. Michael Bazylar, in an article urging courts to impose a duty on businesses to protect patrons, argues that imposing the duty to protect patrons on the landowner would be more efficient than imposing a duty on the patrons to protect themselves.¹²⁰ Patrons, Bazylar argued, have only one way to prevent themselves from becoming victims of crime when on the premises of a business invitor: stay home at night.¹²¹ On the other hand, he argued, possessors have better access to information about crime on the premises and have the ability directly to alter conditions on the premises.¹²² Possessors also have many options available to them to protect their patrons.¹²³ They can provide guard services, fencing, and better lighting, and they can vary their hours of operation.¹²⁴ Thus, the duty to protect patrons from crime should fall not on the patrons, Bazylar argued, but on the possessors.¹²⁵ When the Tennessee Supreme Court recently adopted its balancing test for determining the foreseeability of crime on the premises of business possessors, it noted Bazylar's argument approvingly.¹²⁶

However, as this Note demonstrates below, plaintiffs have a wide variety of precautions available to them short of just staying home. Furthermore, forcing the plaintiff or the possessor to shoulder the entire burden of acting reasonably to prevent harm to plaintiffs is nonsensical.¹²⁷ Finally, because of the rise of negligent security actions in this era of comparative fault, even in

118. See VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 1.1, at 4 (1994) (indicating that Alabama, Maryland, North Carolina, and Virginia are only states to retain contributory negligence as complete bar to recovery).

119. See *supra* notes 77-95 and accompanying text (discussing rule prohibiting intentional tortfeasors from asserting contributory negligence defense).

120. See Bazylar, *supra* note 42, at 747 (arguing, in context of imposing duty on landowners, that imposing duty on plaintiffs would be inefficient).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 747-48.

125. *Id.*

126. See *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 903 n.10 (Tenn. 1997) (citing Bazylar, *supra* note 42, at 747).

127. Both possessors and plaintiffs may bear responsibility in slip and fall cases, for example. See PAGE, *supra* note 17, at 143-44 (describing that although possessors owe duty of care to protect plaintiffs from risk, possessors may assert affirmative defense of contributory fault). Thus, it is unclear what argument might support imposing solely on possessors the duty to prevent third party criminal acts.

states forbidding the comparison of negligent and intentional fault, juries regularly decide how to divide the fault of the plaintiff and the possessor in such actions.

B. Reported Cases

An examination of reported decisions reveals at least four types of cases in which the circumstances under which a criminal attack occurred apparently influenced juries to find plaintiffs partially responsible for their own injuries. First, juries have found a plaintiff at fault when the plaintiff was injured after unwisely resisting criminal aggression. In *Jones v. Tokhi*,¹²⁸ for example, a gunman shot plaintiff Timothy Jones in a restaurant parking lot after Jones attempted to disarm the gunman.¹²⁹ Jones and three friends went to the New York Fried Chicken Restaurant at about 1:45 a.m. where they were greeted by loiterers' taunts.¹³⁰ One man followed the four friends into the restaurant and made threatening comments about robbing them.¹³¹ After the man exited the restaurant, he peered back in at them through a window.¹³² The restaurant's security guard refused to escort the friends out to their car despite their requests that he do so.¹³³ When Jones and his friends walked out of the restaurant, two men confronted them – the one who had followed them inside was armed with a gun, and the other was saying, "Shoot one of the[m]. Shoot one of them. Show them you ain't a punk."¹³⁴ Jones attempted to disarm the man with the gun, and the man then shot Jones in the abdomen.¹³⁵ The jury

128. 535 N.W.2d 46 (Wis. Ct. App. 1995).

129. *Jones v. Tokhi*, 535 N.W.2d 46, 47-48 (Wis. Ct. App. 1995) (describing facts of case in which gunman shot plaintiff in restaurant's parking lot after plaintiff attempted to disarm gunman). In *Tokhi*, the issue was whether to sustain the trial court decision setting aside the jury's finding that plaintiff was twenty percent at fault and restaurant was eighty percent at fault after plaintiff was shot while trying to disarm a gunman outside a restaurant. *Id.* The plaintiff, Jones, went with friends to the restaurant late at night, and the group was confronted in the parking lot by a gunman. *Id.* The trial court ruled that Jones's decision to attempt to disarm the gunman made Jones more negligent than the restaurant as a matter of law. *Id.* at 49. The appellate court reasoned that Jones only tried to take control of the weapon when then gunman's accomplice urged the gunman to shoot. *Id.* Thus, because the trial court could not support its assertion that trying to disarm the gunman was negligent as a matter of law and the appellate court found nothing disproportionate about the jury's apportionment of fault, the appellate court reinstated the original verdict. *Id.* at 50.

130. *Id.* at 47-48 (describing Jones as high school varsity basketball player, but not identifying ages of his friends).

131. *Id.*

132. *Id.* at 48.

133. *Id.*

134. *Id.*

135. *Id.*

found Jones twenty percent at fault for his injuries and the restaurant eighty percent at fault.¹³⁶ Although the trial judge set aside the verdict because he found that Jones's negligence exceeded the restaurant's as a matter of law, the appellate court reinstated the original verdict.¹³⁷

Second, juries have found the plaintiff at least partially to blame when the plaintiff appears to have provoked aggression. In *Gould v. Taco Bell*,¹³⁸ for example, plaintiff, Rosie Gould, and her friend, Theresa Holmberg, went to a restaurant at 11:30 p.m.¹³⁹ The only other patrons in the restaurant, a party of six including Karen Brown, "engaged in loud, crude, and vulgar conversation, designed to be overheard and to shock Gould and Holmberg."¹⁴⁰ Gould and Holmberg made no comment to Brown or to her companions during the unrestrained conversation.¹⁴¹ However, when Brown and her companions got up and started toward the exit, Brown stopped and said, "Those two white bitches over there think they're hot shit."¹⁴² Gould, appar-

136. *Id.*

137. *Id.* at 49 (explaining that Jones tried to disarm gunman only when facing gun's barrel and hearing other assailant urge gunman to fire). Also, exceptionally unwise resistance by plaintiffs may result in defense verdicts. See *Cook v. Safeway Stores, Inc.*, 354 A.2d 507, 507-08 (D.C. Ct. App. 1976) (affirming directed verdict for defense in case where plaintiff grabbed purse-snatcher's arm, yelled at him, then pursued purse-snatcher and his two accomplices in attempt to retrieve missing twenty dollar bill and grabbed thief's arm again, at which point thief then struck plaintiff). Also, recall that in *Erichsen*, a plaintiff attempted to retrieve her purse by reaching into the mugger's car and suffered injuries after she became entangled in a seatbelt strap. See *Erichsen v. No-Frills Supermarket, Inc.*, 518 N.W. 2d 116, 118 (Neb. 1994) (describing plaintiff's injuries); see also *supra* notes 1-11 and accompanying text (describing facts of case). No-Frills Supermarkets eventually won a defense verdict at trial. Telephone Interview with Brian Welch, attorney for No-Frills Supermarkets, Cassem, Tierney, Adams, Gotch & Douglas, Omaha (Feb. 9 1999). But cf. *Seibert v. Vic Regnier Builders, Inc.*, 856 P.2d 1332, 1334 (Kan. 1993) (noting plaintiff's behavior did not bar recovery when armed man confronted plaintiff in underground parking lot and plaintiff screamed and "either dropped or threw the can of cola at her assailant" who then shot her).

138. 722 P.2d 511 (Kan. 1986).

139. *Gould v. Taco Bell*, 722 P.2d 511, 514 (Kan. 1986) (affirming, in case where plaintiff was beaten by another customer, that restaurant owed plaintiff affirmative duty of care including duty to warn plaintiff of danger that might reasonably be anticipated). In *Gould*, the issue was whether a restaurant breached its duty of care after it failed to warn plaintiff of the danger of attack from another customer. *Id.* at 515 A customer, who employees knew had started a fight in the restaurant two weeks before, insulted plaintiff. *Id.* at 513. Plaintiff's response provoked a beating. *Id.* The court reasoned that, because the management knew the customer had started a fight in the restaurant previously, the restaurant had an affirmative duty to warn plaintiff of danger even though plaintiff had not been inside the restaurant very long and the events leading to the beating were fast-paced. *Id.* at 516. Thus, the court held that substantial evidence supported the jury's verdict against the restaurant. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

ently shocked, asked, "Are you talking to us?"¹⁴³ When Brown answered, "Yes," Gould invited her to "please come over here and repeat yourself."¹⁴⁴ Thereupon, Brown rushed over and struck Gould in the face.¹⁴⁵ Gould responded by calling Brown a "nigger."¹⁴⁶ Brown then battered Gould relentlessly.¹⁴⁷ The jury assessed forty-nine percent of the fault to Gould.¹⁴⁸

A third situation in which triers of fact have found the plaintiff at fault in negligent security actions has arisen when the plaintiff has failed to keep a door properly secured. The jury's decision in *Ledbetter v. Concord General Corp.*¹⁴⁹ provides such an example.¹⁵⁰ Plaintiff Lucy Ledbetter was asleep in the motel room she was sharing with her granddaughter when a man awakened Ledbetter by holding his hand over her mouth.¹⁵¹ The man then raped and abducted Ledbetter.¹⁵² As her captor drove Ledbetter out of the motel parking lot, she jumped from the moving car, sustaining additional injuries.¹⁵³ Law

143. *Id.*

144. *Id.*

145. *Id.* at 514.

146. *Id.*

147. *Id.*

148. *Id.* The jury also found Taco Bell fifty-one percent at fault. *Id.* Taco Bell employees declined to intervene in the assault and also declined to call police until Gould's companion threatened to jump over the counter to use the phone when told it was "not for public use." *Id.* Allowing a plaintiff's provocative words or deeds to affect the outcome of his or her case is hardly a recent development, however. A number of states have long allowed factfinders to consider a plaintiff's conduct in reducing that plaintiff's actual or compensatory damages. See *Dear & Zipperstein*, *supra* note 32, at 26-32 (discussing early and modern cases); see also *Wijngaarde v. Parents of Guy*, 720 So. 2d 6, 12 (La. App. 1998) (finding sixteen-year-old female plaintiff with broken jaw ten percent at fault for, among other things, taunting smaller male adversary by calling him "whore" and "coward" for wanting to fight girl); *Comeau v. Currier*, 616 N.E.2d 1091, 1093-94 (Mass. App. Ct. 1993) (remanding for new trial because trial judge failed to give jury instruction that provocation can mitigate damages in assault and battery case); *Blazovic v. Andrich*, 590 A.2d 222, 233 (N.J. 1991) (recognizing jury apportionment of thirty percent of fault to patron of bar who allegedly cursed group of other patrons who were throwing rocks at sign in parking lot and who responded by attacking plaintiff, but remanding for new trial for apportionment of intentional tortfeasors' fault).

149. 665 So. 2d 1166 (La. 1996).

150. *Ledbetter v. Concord Gen. Corp.*, 665 So. 2d 1166, 1168 (La. 1996) (describing case in which plaintiff was raped and abducted from motel room). In *Ledbetter*, the issue was whether the assault and battery exclusion to the motel's insurance policy excluded coverage of plaintiff's injuries. *Id.* at 1168-69. An assailant raped the plaintiff, Ledbetter, and abducted her from a motel room. *Id.* at 1167-68. The court found that because rape necessarily included battery, Ledbetter's damages from the rape were not covered by the insurance policy. *Id.* at 1170. However, because abduction does not necessarily involve battery, the court held that the insurer was liable for damages resulting from the abduction. *Id.*

151. *Id.* at 1168.

152. *Id.*

153. *Id.*

enforcement officers who investigated the crime found no evidence that the man had forced open Ledbetter's motel room door.¹⁵⁴ Ledbetter gave statements to investigators shortly after the attack in which she remembered locking the chain before retiring, but she expressed uncertainty about whether she had locked the door knob.¹⁵⁵ Investigators concluded that Ledbetter indeed had not engaged the door knob lock before she went to sleep.¹⁵⁶ With the door knob unlocked, the rapist easily defeated the chain lock, which the motel had improperly installed.¹⁵⁷ In a bench trial, the judge assessed Ledbetter's fault at thirty-five percent.¹⁵⁸

Finally, juries have found plaintiffs at fault for placing themselves in a location that they knew or should have known was dangerous. Thus, for example, in the Florida case of *Hardee v. Cunningham & Smith, Inc.*,¹⁵⁹ assailants stabbed, beat, and robbed the plaintiff while he washed his car at a self-service car wash.¹⁶⁰ The incident occurred at 8:00 on a March evening.¹⁶¹ Although plaintiff Daniel Hardee disclaimed any actual knowledge of prior crimes at the car wash before the attack, he was a long-time resident of the area

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* Juries have found plaintiffs who have failed to keep doors properly secured at fault in a number of other cases. *See* *Wassell v. Adams*, 865 F.2d 849, 856 (7th Cir. 1989) (affirming jury verdict finding plaintiff rape victim ninety-seven percent at fault for opening motel room door to stranger in middle of night); *Harrison v. Housing Resources Mgmt., Inc.*, 588 So. 2d 64, 65 (Fla. Dist. Ct. App. 1991) (noting jury finding that plaintiff rape victim was twenty-five percent at fault for failure to install her own lock after previous unforced entry into her apartment, but remanding case for new trial on all issues in spite of fact that plaintiff only wanted new trial on damages); *Green Cos. v. DiVincenzo*, 432 So. 2d 86, 87 (Fla. Dist. Ct. App. 1983) (noting jury found plaintiff twenty-five percent at fault for his own injuries for not locking his office door when he stepped across the hall to go to the bathroom after normal working hours, returned to his office, and assailant beat him).

159. 679 So. 2d 1316 (Fla. Dist. Ct. App. 1996).

160. *Hardee v. Cunningham & Smith, Inc.*, 679 So. 2d 1316, 1317 (Fla. Dist. Ct. App. 1996) (affirming jury's apportionment of sixty-eight percent of fault to plaintiff in case where assailants stabbed, beat, and robbed plaintiff who had used car wash in dangerous neighborhood at night). In *Hardee*, the issue was whether substantial evidence supported the jury's finding that plaintiff was sixty-eight percent at fault for his own injuries resulting from a brutal robbery. *Id.* Plaintiff, who had lived in the area of the car wash for twenty years and had visited the car wash approximately thirty times, was stabbed, beaten, and robbed when using the car wash in the evening. *Id.* The court noted that allowing a jury to apportion a majority of the fault of an attack to a plaintiff who went to a location he knew to be dangerous could serve the goal of preventing injuries. *Id.* at 1318. Thus, the court reasoned that because plaintiff either knew or should have known that the area around the car wash was dangerous, knew there would be no employees at the car wash, and went at night, the jury's finding was not contrary to the manifest weight of the evidence. *Id.*

161. *Id.* at 1367.

and had been to the car wash approximately thirty times.¹⁶² At trial, Hardee presented evidence of prior incidents at the car wash including drug trafficking, prostitution, and violent crime, crimes the court suggested the local media would have reported.¹⁶³ The possessor admitted knowledge of three or four previous attacks at the car wash, including a "stabbing/robbery" five days prior to the attack on the plaintiff, knowledge the possessor admitted was sufficient to support a jury finding of the possessor's own negligence.¹⁶⁴ Nonetheless, the jury found Hardee sixty-eight percent at fault for his own injuries.¹⁶⁵

On appeal, the court acknowledged that the jury finding was apparently unprecedented, but it affirmed that a plaintiff could be responsible for the bulk of his injuries merely for placing himself on premises he knew or should have known were dangerous.¹⁶⁶ In explaining its ruling, the court reasoned that although it was concerned with compensating victims, preventing injuries was also a worthy goal.¹⁶⁷ Therefore, because allowing the jury to apportion Hardee a share of the fault for visiting an unattended car wash in a dangerous neighborhood at night could promote greater caution by potential plaintiffs, the court allowed the jury's apportionment of fault to stand.¹⁶⁸

C. *Determining Plaintiff's Fault*

Scholarly discussion of how properly to assess plaintiffs' fault in negligent security actions is virtually nonexistent.¹⁶⁹ This leaves unaddressed important questions of law. For example, it is now unclear what analysis a court should properly employ when responding to a defendant's motion for summary judgment or directed verdict that asserts, as a matter of law, that the plaintiff was responsible for a majority of his own injuries in a negligent security action. The same is also true for courts reviewing a decision at trial to grant a plaintiff's motion for directed verdict on the question of his own comparative fault. Furthermore, judges wishing merely to leave the issue of a plaintiff's comparative fault in the hands of the jury have been unable to call upon any scholarship informing the question of how properly to instruct a jury

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. See KAMINSKY, *supra* note 17, at 23 (seeming to dismiss plaintiff's fault by calling comparative negligence "non-issue"); PAGE, *supra* note 17, § 11, at 291-314 (discussing in some detail possessor's duty to prevent criminal attacks, but neglecting to address issue of comparative fault); Glazier & Green, *supra* note 98, at 55-56 (focusing only on question of avoiding apportionment of intentional tortfeasor's fault).

on the matter. An examination of the relevant case law and how traditional tort doctrines of contributory negligence and comparative fault apply to a plaintiff's conduct in a negligent security action sheds light on these previously unaddressed questions.

Apportioning a plaintiff's fault against that of other parties requires two separate inquiries. A threshold question is whether a plaintiff was at all at fault. If so, the factfinder would then conduct a second inquiry in order to compare the fault of the plaintiff to that of the defendant or defendants.

1. Whether Plaintiff Was at Least Partially at Fault

Under the Uniform Comparative Fault Act (UCFA), "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery."¹⁷⁰ The UCFA defines "fault" to include "acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others" as well as "unreasonable failure to avoid an injury or to mitigate damages."¹⁷¹ Furthermore, the legal requirement of causation applies to contributory fault as it does to negligence.¹⁷² Thus, a determination of a plaintiff's fault in a comparative fault regime employs contributory negligence principles without allowing findings of contributory negligence to operate as a complete bar to recovery.¹⁷³

The *Restatement* directs that contributory negligence inquiries be conducted under the familiar "reasonable man under like circumstances" standard.¹⁷⁴ Significantly, the *Restatement* describes two types of contributory fault.¹⁷⁵ One type is conduct akin to voluntary assumption of the risk.¹⁷⁶ The

170. UNIFORM COMPARATIVE FAULT ACT § 1(a) (1977).

171. *Id.* § 1(b).

172. *Id.*

173. At least in modified comparative fault jurisdictions, contributory negligence that is at least fifty or fifty-one percent of the total fault still operates as a total bar to recovery. See WOODS & DEERE, *supra* note 90, § 4.3, at 84-85 (describing two modified comparative negligence systems).

174. RESTATEMENT (SECOND) OF TORTS § 464 (1965).

175. *Id.* § 466.

The plaintiff's contributory negligence may be either (a) an intentional and unreasonable exposure of himself to danger created by the defendant's negligence, of which danger the plaintiff knows or has reason to know, or (b) conduct which, in respects other than those stated in Clause (a), falls short of the standard to which the reasonable man should conform in order to protect himself from harm.

Id.

176. See *id.* at cmt. d (noting form of contributory negligence frequently called "voluntary assumption of risk").

other type is conduct more like "negligence" in which plaintiffs (1) unreasonably fail to pay attention to discover danger in their surroundings, (2) unreasonably fail to avoid danger once discovered, or (3) unreasonably fail to take precautions to avoid future danger.¹⁷⁷

As described above, the circumstances under which factfinders have held plaintiffs partially at fault in negligent security actions appear to fit neatly into the two species of contributory fault the *Restatement* describes. One who chooses to wash his car at night at an unattended car wash in a neighborhood he knows is dangerous, for example, voluntarily assumes at least part of the risk.¹⁷⁸ One who forgets to lock her motel room door before retiring fails to make preparations a reasonable person would make to avoid possible future danger.¹⁷⁹

What neither the cases nor the *Restatement* provide, however, is a framework for coherently analyzing a plaintiff's fault. For example, the circumstances under which washing one's car at a self-service car wash constitutes improper care for one's own safety are unclear. Is such conduct faulty only at night? Only in a dangerous neighborhood? The circumstances under which failing to lock the door knob of one's motel room door constitutes fault are also unclear. Should the age and sex of the plaintiff contribute to a factfinder's determination of fault? Should the plaintiff's familiarity with the neighborhood? Thus, the circumstances that a jury should properly consider when evaluating a plaintiff's conduct in a negligent security action need clarification.

a. *The Hand Formula*

In *United States v. Carroll Towing Co.*,¹⁸⁰ Judge Learned Hand offered a formula that has long been a familiar method of evaluating a defendant's negligence.¹⁸¹ Hand's formula, briefly, is that one is negligent if the burden

177. The second type of fault described by section 466

usually consists of plaintiff's failure to pay reasonable attention to his surroundings so as to discover the danger created by the defendant's negligence, or to exercise reasonable care, diligence, and skill to avoid the danger when it is perceived, or to make such preparations as a reasonable man would regard as necessary to enable him to avoid a possible future danger.

Id. at cmt. f.

178. See *supra* notes 159-66 and accompanying text (describing case of plaintiff stabbed, beaten, and robbed at car wash).

179. See *supra* notes 149-58 and accompanying text (describing case of plaintiff raped and abducted after she failed properly to lock her motel room door).

180. 159 F.2d 169 (2d Cir. 1947).

181. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (asserting that defendant is liable for negligence when burden of preventing injury is less than loss multiplied by probability of injury). In *Carroll Towing*, the court considered whether the possessor of a barge was negligent for failing to have an employee on board the barge when it was tied to a

of preventing the accident (B) is less than the probability of the accident occurring (P) multiplied by the possible loss (L); thus, a defendant is negligent if $B < PL$.¹⁸² Hand's formula is also useful for evaluating a plaintiff's deviation from the standard of care necessary for his or her own safety.¹⁸³ Thus, in negligent security actions, a plaintiff would be at least partially at fault if the burden on the plaintiff of preventing the injury was less than the probability of the injury multiplied by the potential loss.

(1) Potential Loss

The only one of the three Hand Formula factors that can be gauged with certainty in negligent security actions is that of the potential loss, (L). The viciousness and depravity of the criminal assaults risked by plaintiffs venturing onto the parking lots and into the motel rooms of possessors,¹⁸⁴ for those who survive, result in damages that juries regularly assess at over one million dollars.¹⁸⁵

(2) Probability of Harm

Assessing (P), the probability of a particular plaintiff's suffering a criminal attack, is another matter altogether. As the California Supreme Court said when articulating that state's balancing test for determining when possessors breach a duty of care, violent crime is endemic, and it is almost impossible to imagine any locale open to the public where the occurrence of violent crime seems improbable.¹⁸⁶ Nonetheless, the probability of violent crime varies from place to place.¹⁸⁷ One helpful construct for evaluating the circumstances

pier. *Id.* at 172. Through the negligence of a third party on board a tug, the barge, Anna C., broke loose, drifted into another ship, and was holed near her bottom. *Id.* at 171. Had an employee been aboard the barge, the court found that the damage to the barge would not have caused her to sink. *Id.* Propounding a "formula" for determining negligence, the court found that the burden (B) of having an employee on the barge was less than the possible loss (L) multiplied by the probability of an accident (P) during the daytime in New York harbor, then in the "full tide of war activity." *Id.* at 173-74. Thus, the court held the owners of the barge negligent for failing to have a "bargee" aboard. *Id.* at 174.

182. *Id.* at 173-74.

183. See David C. Sobelsohn, *Comparing Fault*, 60 IND. L.J. 413, 420-21 (1985) (using Hand formula to determine each party's deviation from standard of reasonable care).

184. See *supra* Part IV.B (describing, in some detail, criminal attacks resulting in negligent security actions).

185. See *supra* notes 26-27 and accompanying text (reporting jury awards in negligent security actions).

186. See *Ann M. v. Pacific Plaza Shopping Ctr.*, 863 P.2d 207, 215 (Cal. 1993) (commenting on increasing randomness of violent attacks).

187. See David M. Kennedy, *Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 VAL. U. L. REV. 449, 459 (1997) (discussing year-long Minne-

relevant to probability of injury is through division of those circumstances into two broad categories: external facts and individual attributes.

The "external fact" most useful in predicting the occurrence of future violent crime at a particular location is previous crime at that location.¹⁸⁸ The type of business, the volume of traffic, the dangerousness of the surrounding neighborhood, and the level of security on the premises are also useful in predicting future crime there.¹⁸⁹ Indeed, it seems that any of the "external facts" useful in establishing crime as foreseeable to possessors under a totality of the circumstances test also would be useful in establishing whether, in general, the occurrence of crime should be foreseeable to plaintiffs.¹⁹⁰ Thus, in an unpatrolled parking lot behind a bar in a dangerous neighborhood, a parking lot with a history of prior violent crimes, where drunk men loiter, where overgrown shrubbery blocks the view of passing cars, and where broken glass glitters dimly in the poor lighting, crime should be as foreseeable to any plaintiff familiar with the neighborhood as to the possessor.

The circumstances under which factfinders evaluate an actor's conduct for negligence or for contributory negligence need not be limited, however, to such "external facts."¹⁹¹ As commentators have observed, courts have long allowed a "more or less" subjective standard to guide the inquiry into the reasonableness of the actor's conduct in discreet areas of negligence law.¹⁹² Thus, when asking whether a reasonable person under like circumstances would have acted as did a plaintiff or defendant, factfinders may take into account such individual attributes as that actor's age, sex, and any physical

apolis study in which three percent of city's street addresses produced fifty percent of all calls for police services and Boston study finding area consisting of four percent of city accounted for twelve percent of city's armed robberies and more than quarter of city's youth homicides and other serious crimes).

188. See Robert B. Homant & Daniel B. Kennedy, *Foreseeability of Crime as a Factor in Premises Liability for Negligent Security*, 17 TRIAL DIPL. J. 81, 84 (1994) (describing factors useful in predicting occurrence of crime and describing developing "criminology of place").

189. *Id.*

190. See *supra* notes 52-60 and accompanying text (describing totality of circumstances test). Quite obviously, though, it would generally be more difficult for plaintiffs than for possessors to know of prior criminal incidents on or near the premises. However, as illustrated in *Hardee v. Cunningham & Smith*, a factfinder might reasonably find a plaintiff knew or should have known of such prior crimes. See *supra* notes 159-68 (describing facts of *Hardee v. Cunningham & Smith, Inc.*, 679 So. 2d 1316 (Fla. Dist. Ct. App. 1996)).

191. See PROSSER, *supra* note 37, § 33, at 151 (indicating inquiry often moves beyond mere examination of "external facts").

192. See *id.* (discussing attributes of reasonable man and noting that "circumstances" under which negligence is evaluated, is "in many respects, a more or less subjective standard"); Fleming James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1, 1 (1951) (introducing discussion of attributes of reasonable man by noting "old inquiry" of whether negligence is subjective or objective).

disabilities.¹⁹³ Factfinders may also properly take into account knowledge that a plaintiff possessed or should have possessed, as there are certain facts every adult with minimum intelligence will be presumed to know.¹⁹⁴ The standard for mental capacity, however, remains an objective one, and the law will not excuse those who fall below the minimum standard expected by the community.¹⁹⁵ However, those with superior knowledge or skills will be held to a commensurate standard.¹⁹⁶

Thus, in applying the Hand Formula to a plaintiff in a negligent security action, factfinders might assess the probability of injury by accounting for the physical characteristics of and knowledge possessed by that plaintiff. Although just how specific to the individual the evaluation of conduct should be remains an open question,¹⁹⁷ age, race, sex, and other attributes are predictors of the likelihood of a particular person suffering a criminal attack.¹⁹⁸ Also, factfinders can properly take into consideration what the plaintiff knew about prior crime on the premises and in the adjacent neighborhood.¹⁹⁹ Finally, the common knowledge expected of most experienced adults in the community must include some awareness of crime.²⁰⁰

193. See PROSSER, *supra* note 37, § 32, at 152 (discussing individual attributes that factfinders may consider in evaluating negligence).

194. See *id.* § 32, at 158-59 (noting, for example, that every adult with minimum of intelligence has learned that "fire burns and water will drown").

195. See *id.* § 32, at 152-53 (noting minimum standard). Prosser asserts that:

The fact that the individual is a congenital fool, cursed with inbuilt bad judgment, or that in the particular instance, he did not stop and think, or that he is merely a stupid ox, or of an excitable temperament which causes him to lose his head and get rattled, obviously cannot be allowed to protect him from liability.

Id. (internal quotations and citations omitted).

196. See *id.* § 32, at 161 (noting, for example, "a physician who is possessed of unusual skill or knowledge must use care which is reasonable in the light of his special ability and information, and may be negligent where an ordinary doctor would not").

197. See *id.* § 32, at 151 (discussing attributes of reasonable man and noting that "circumstances" under which negligence is evaluated yields "a more or less subjective standard"); James, *supra* note 192, at 1 (introducing discussion of attributes of reasonable man by noting "old inquiry" of whether negligence is subjective or objective).

198. See Ronald V. Clarke, *Situational Crime Prevention*, 19 CRIME & JUST. 91, 100-01 (1995) (discussing "lifestyle theory" that victimization is possible to predict not only by "socio-demographic" characteristics such as age, race, sex, and place of residence, but by attributes of victim's lifestyle such as consumption of alcohol in public places and use of public transportation).

199. See *Hardee v. Cunningham & Smith, Inc.*, 679 So. 2d 1316, 1328 (Fla. Dist. Ct. App. 1996) (discussing plaintiff's knowledge of surrounding area).

200. See PROSSER, *supra* note 37, § 32, at 159 (asserting every adult will know "the normal habits of human beings, including their propensities toward negligence and *crime*" (emphasis added)).

*DeMyrick v. Guest Quarters Suite Hotels*²⁰¹ provides an example of a court's use of external facts and individual attributes in evaluating the probability of injury.²⁰² In *DeMyrick*, the court denied a possessor's motion for summary judgment on the plaintiff's comparative fault in part by taking into account the plaintiff's physical size and experience in handling confrontations.²⁰³ *DeMyrick* was brought on behalf of decedent Rhoderick Rountree who had worked as road manager for the musical group Boyz II Men, a position that entailed overseeing the group's security.²⁰⁴

In *DeMyrick*, three young men gained access to the guest floors of a hotel in the middle of the night in search of a party connected with the musical group.²⁰⁵ The three awakened Rountree in his hotel room by their laughter and loud talking.²⁰⁶ Rountree, who was approximately six feet, three inches tall and weighed over three hundred pounds, opened his door to investigate and asked the men for identification when one indicated he worked for the hotel.²⁰⁷ When Rountree told the men to wait outside the door while he retrieved something from his room, the three men instead walked down the hall to the elevator.²⁰⁸ Rountree caught up to the men just as the elevator doors were closing.²⁰⁹ Upon entering the elevator, Rountree, then armed, began punching and pistol-whipping the three young men.²¹⁰ Eventually, one of the three then produced his own handgun and killed Rountree.²¹¹

201. 944 F. Supp. 661 (N.D. Ill. 1996).

202. See *DeMyrick v. Guest Quarters Suite Hotels*, 944 F. Supp. 661, 668 (N.D. Ill. 1996) (declining to find on summary judgment that decedent in wrongful death action was more than fifty percent at fault for leaving his hotel room and fighting with three men). In *DeMyrick*, the issue was whether the trial court should grant defendant hotel's summary judgment motion asserting that plaintiff was, as a matter of law, responsible for more than fifty percent of the fault in his own death. *Id.* at 667. Three men in search of a party awakened decedent inside his hotel room in the middle of the night. *Id.* at 663. The decedent, Rountree, who was in charge of security for a musical group staying at the hotel, left his room, pursued the men to an elevator by which they were attempting to leave the floor, and began beating and pistol-whipping them. *Id.* One of the men shot Rountree. *Id.* The court reasoned that because Rountree had been a very large man and had been experienced in dealing with unruly fans, a reasonable jury might find that Rountree had not been fifty percent contributorily negligent in his own death. *Id.* at 668. Therefore, the court denied the hotel's motion for summary judgment. *Id.*

203. *Id.* at 667.

204. *Id.* at 664.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 665.

Sued for negligent security by Rountree's estate, the hotel claimed on summary judgment that Rountree's conduct was sufficiently negligent to warrant removing the question of proximate cause from the jury as a matter of law.²¹² However, the court ruled that, because of Rountree's size and special experience in dealing with unruly fans, a reasonable jury might find that his actions did not make Rountree at least fifty percent responsible for his own injuries and therefore barred from any recovery.²¹³ The court also noted that the hotel in which the incident took place was "a full-service hotel."²¹⁴ Presumably, this meant that a jury could evaluate Rountree's behavior in light of Rountree having had a reasonable expectation that the hotel was providing some security, that the risks he faced by stepping into the hallway were not as great as they otherwise might have been had Rountree been stepping, for example, out of a motel room and into the night air.

(3) *Burdens of Precaution*

One commentator has asserted that the only way a plaintiff could avoid criminal attack was to "stay home at night."²¹⁵ This claim neglects the fact that criminals also attack during the day. The decreasing light as the sun goes down and the increasing absence of people in public as the night wears on are merely the obvious external facts bearing on the probability of criminal attack. However, in some cases the fact that the conduct in question happened at night may have no appreciable impact on the magnitude and probability of loss.²¹⁶ The more relevant point is what precautions against suffering an attack factfinders might reasonably expect of plaintiffs.

Fault lies in engaging in unreasonably risky conduct, not in merely suffering – or causing others to suffer – an injury.²¹⁷ Risk is unreasonable when a precaution that likely would have prevented the injury would have been less burdensome or costly than the probability and magnitude of the loss evident in the circumstances facing the plaintiff.²¹⁸ In assessing the burden of

212. *Id.* at 667.

213. *Id.* at 668.

214. *Id.* The hotel eventually settled with Rountree's estate for \$1.3 million. Telephone Interview with Kathleen McCabe, attorney for Guest Quarters Suite Hotels, Cassidy, Schade & Gloor, Chicago (Jan. 26, 1999).

215. *See* Bazyley, *supra* note 42, at 747 (arguing for imposition of duty on possessor).

216. A trio of young men parking and walking into a grocery store just after dark when the parking lot is busy and well lit and the store is in a small, rural town that has for years been free of any serious crime probably presents as low a risk as the same conduct would were it to happen at noon.

217. *See* RESTATEMENT (SECOND) OF TORTS §§ 291-93 (1965) (asserting that law views reasonableness through risk-utility analysis).

218. *Id.*

precaution, then, whether the plaintiff might have foregone the activity in question – perhaps by "staying home" – is indeed a legitimate inquiry, as is whether plaintiff might have taken any affirmative precautionary acts along with the conduct in question. Also, factfinders may properly consider the social utility of the conduct at issue in evaluating the burden of any precautionary acts or omissions for which the plaintiff might be at fault.²¹⁹

The case law discussed above illustrates four kinds of precautions factfinders have found plaintiffs at fault for not having taken: refraining from futile resistance to crime; refraining from provocation; keeping doors properly secured; and refraining from placing oneself in a dangerous location without sufficient reason.²²⁰ In not offering futile resistance to crime, the plaintiff's burden of precaution might merely be giving up property rather than risking bodily harm. Additionally, in *Tokhi*, a jury found the plaintiff twenty percent at fault for attempting to disarm a gunman who was pointing a gun at the plaintiff.²²¹ Apparently, the jury found the burden of not acting in self-defense would have "cost" less than taking action that would almost certainly result in the plaintiff being shot.²²²

Erichsen, a much easier case, resulted in a defense verdict.²²³ In that case, after a mugger had already maced and robbed Erichsen in a grocery store parking lot, she pursued the mugger to his car and reached through the car window in an attempt to retrieve her purse.²²⁴ While recapturing one's chattels has social utility, the burden to Erichsen of merely allowing the mugger to escape with her purse is rather low. The potential loss for Erichsen consisted primarily of suffering some loss of cash, perhaps, as well as the inconvenience and expense of canceling credit cards and checks. Erichsen would also have had costs from a decreased sense of security associated not only with the attack itself, but also the mugger would know her identity and address. Although these burdens are significant, the magnitude and probability of the harm facing Erichsen as she reached in through the car window was obviously much greater.

219. See PROSSER, *supra* note 37, § 65, at 418-19 (asserting that social utility of conduct in question is appropriate consideration in evaluating actor's conduct).

220. See *supra* Part III.B (categorizing reported cases).

221. See *Jones v. Tokhi*, 535 N.W.2d 46, 49 (Wis. Ct. App. 1995) (affirming jury verdict that plaintiff was twenty percent at fault for his own injuries for attempting to disarm gunman); see also *supra* notes 128-37 and accompanying text (describing facts of case).

222. Because the plaintiff was in the company of three companions and the gunman's associate was only urging the gunman to "shoot one of them," perhaps the jury saw the odds of the plaintiff's being shot as only one in four at worst, whereas plaintiff's act of grabbing for the gun virtually assured that the gunman would shoot him.

223. See *Erichsen v. No-Frills Supermarkets, Inc.*, 518 N.W.2d 116, 118 (Neb. 1994) (describing plaintiff's injuries); see also *supra* notes 1-11 and accompanying text (describing facts of case).

224. *Erichsen*, 518 N.W.2d at 118.

Refraining from uttering words that provoke others who might respond with violence is a low-cost precaution. The plaintiff in *Gould* might have avoided injury merely by not responding when insulted.²²⁵ Similarly, in another case, plaintiff was exiting a bar in the evening when he saw a group of men who had just left the same bar throwing rocks at a sign.²²⁶ Plaintiff, in the company of his wife and some friends, apparently cursed the group of men for their ill behavior, and the men then attacked him.²²⁷ No doubt discouraging vandals is appropriate conduct, but the social utility of his cursing them, as compared with the alternative of ducking back inside the restaurant to alert the management, seems quite low.

Factfinders have also determined plaintiffs to be at fault for failing to keep a hotel or motel room door properly secured. Recall that a jury found the plaintiff in *Ledbetter* thirty-five percent at fault for failing to lock the door-knob after having engaged only the chain lock before going to sleep.²²⁸ Another jury found a guest's reliance on an automatic door knob lock and failure to lock a deadbolt to constitute fifty percent of fault in a rape at a motel.²²⁹ The ease of locking a door is obvious. Although courts likely would not require guests to engage each lock on a room door at all times, the cost to a guest of foregoing the conduct of going to sleep in her room without ensuring that her door is properly locked is difficult to regard as high. Perhaps the cost, in addition to a moment of time, is giving up not worrying about crime.

Finally, the reported cases also demonstrate factfinders' willingness to lay blame on plaintiffs who place themselves in dangerous locations at dangerous times.²³⁰ Such was the case in *Hardee* when the jury found the plaintiff sixty-eight percent at fault for washing his car at night at a self-service car wash that Hardee knew or should have known had been the scene of previous

225. See *Gould v. Taco Bell*, 722 P.2d 511, 513-14 (Kan. 1986) (describing intentional tortfeasor's insult of plaintiff as intentional tortfeasor was leaving restaurant and plaintiff's response); see also *supra* notes 138-48 and accompanying text (describing facts of case).

226. See *Blazovic v. Andrich*, 590 A.2d 222, 233 (N.J. 1991) (noting that jury apportioned thirty percent of fault to patron of restaurant who allegedly cursed group of other patrons throwing rocks at sign in parking lot prior to group's attack on plaintiff, but remanding for new trial for apportionment of fault of intentional tortfeasors).

227. *Id.*

228. See *Ledbetter v. Concord Gen. Corp.*, 665 So. 2d 1166, 1167-68 (La. 1996) (noting that jury found plaintiff thirty-five percent at fault for her own rape after plaintiff failed properly to lock her motel room door).

229. See *Hotel Liable for Negligent Hiring of Carpet Installer Who Raped Guest*, 10 No. 1 VERDICTS, SETTLEMENTS & TACTICS 25 (describing case in which during early morning hours assailant, who told police he pushed on door and it opened, cut, raped, and sodomized motel guest who remembered shutting door that locked automatically but could not remember locking deadbolt).

230. See *supra* notes 159-68 and accompanying text (describing case in which plaintiff was stabbed at night at car wash).

crime.²³¹ The social utility of washing one's vehicle is not nil, but neither is it substantial. Furthermore, Hardee need not have given up the activity entirely but could have selected either a safer location or a safer time to wash his car.

Thus, the case law²³² reveals a few general admonitions juries seem to have sent plaintiffs regarding precautions expected of individuals to keep themselves safe from crime. This case law also reaffirms the contextual nature of determinations of negligence and contributory negligence. As a result, discussions of burdens of precaution divorced from consideration of the magnitude and probability of the loss have limited value in evaluating conduct. Therefore, this Note turns to one additional case, *Zerangue v. Delta Towers, Ltd.*,²³³ to examine a plaintiff's comparative responsibility for her injuries through an evaluation of all factors in the Hand Formula.²³⁴

Plaintiff Susan Zerangue, a young woman who had traveled to New Orleans with family and friends for Mardi Gras, became separated from her party and was denied access to her hotel, the Hilton, because she carried no identification.²³⁵ She then went to a Ramada with an acquaintance who was staying there.²³⁶ Zerangue awoke at 3:00 a.m. and, concerned that her companions were worried about her whereabouts, sought to return to the Hilton.²³⁷ Finding no one in the Ramada lobby to help her find a taxi, Zerangue exited the hotel through a bank of glass doors, after initially finding several of the doors to be locked.²³⁸ Finding no taxi outside but seeing she was alone on the street except for a strange man walking toward her, Zerangue tried to reenter

231. See *Hardee v. Cunningham & Smith, Inc.*, 679 So. 2d 1316, 1318 (Fla. Dist. Ct. App. 1996) (affirming jury verdict apportioning sixty-eight percent of fault to plaintiff whom assailants stabbed, beat, and robbed at self-service car wash).

232. See *supra* Part IV.B (discussing cases in which juries have found plaintiffs at fault for their own injuries).

233. 820 F.2d 130 (5th Cir. 1987).

234. *Zerangue v. Delta Towers, Ltd.*, 820 F.2d 130, 131-32 (5th Cir. 1987) (describing circumstances leading to attack). In *Zerangue*, the issue was whether a jury's finding that a hotel breached a duty of care to the plaintiff, Zerangue, was supported by sufficient evidence. *Id.* at 132. A rapist attacked Zerangue after she exited the hotel at 3:00 a.m. in search of a taxi. *Id.* No employee had been in the lobby to assist Zerangue, and the doors to the hotel were locked from the outside, preventing her reentry to escape attacker. *Id.* The court reasoned that because the evidence showed a security guard was assigned to have been present in the lobby from which Zerangue exited the hotel and that the guard testified he would have stopped Zerangue from exiting the hotel, jury was justified in finding the hotel breached a duty of care to Zerangue. *Id.* at 133. Thus, the court affirmed the jury's apportionment of seventy percent of the fault to the hotel and thirty percent of the fault to Zerangue. *Id.*

235. *Id.* at 131.

236. *Id.*

237. *Id.*

238. *Id.*

the hotel, but all the doors were locked from the outside.²³⁹ The man eventually produced a knife, dragged Zerangue across the street, and raped and sodomized her.²⁴⁰ The jury found Zerangue thirty percent at fault and the Ramada seventy percent at fault for her injuries.²⁴¹

Several precautions were available to Zerangue after she awoke with the concern that her friends and family might be worried about her absence. She could, of course, have merely telephoned the Hilton. If one of her party were in their room, Zerangue could have sent word of her whereabouts and made arrangements to rejoin her family and friends at the Hilton later that day. As it apparently stood when she left her room at the Ramada, Zerangue was not even certain that she would be able to gain access to the Hilton upon her planned arrival because she had earlier been denied entry for not having identification.

Zerangue might also have chosen not to exit the hotel to look for a cab on her own. The bank of doors through which she exited was made primarily of glass. Although the facts of the case do not say, the possibility exists that she might have been able to see that there were no cabs on the street – and that the street was deserted – from inside the hotel. Furthermore, although Zerangue looked without success in the lobby for someone to help her, she did not apparently venture to a second area just beyond the lobby where a clerk was staffing the registration desk.²⁴² Thus, another minute or two spent searching for help inside the hotel might likely have been the difference between a safe cab ride to the Hilton and the nightmarish attack Zerangue found waiting for her on the street.

Yet, although Zerangue had some low-cost precautions available to her, just how should she have assessed the probability and magnitude of injury she risked by exiting the hotel? The court found that Zerangue, who was not from New Orleans, knew nothing about the street to which she exited.²⁴³ If Zerangue did not know the street to which she was exiting was dangerous,²⁴⁴ it seems the jury must have found her unreasonable act was merely in placing herself on a strange street at 3:00 a.m. without sufficient reason. Such a con-

239. *Id.*

240. *Id.*

241. *Id.* at 132.

242. *Id.* at 133. The hotel apparently had two connected lobbies. *Id.* The staffed registration desk, from which an attendant could not observe the lobby from which Zerangue exited the hotel, was located in a second lobby that Zerangue did not enter in her search for assistance. *Id.*

243. *Id.*

244. The supervisor of the hotel's security guards, who testified that a guard had been assigned to have been present in the first lobby at the time Zerangue exited the hotel, also testified that had he seen Zerangue attempt to leave he would have stopped her "because that would be a dangerous thing to do." *Id.*

clusion appears to justify the jury's assignment of some fault to Zerangue. However, finding Zerangue partially responsible for her own injuries because she placed herself in a dangerous situation also leaves unanswered a question about one's duty to protect oneself from crime.

b. A Duty Not to Become a Victim

In contemplating the source of Zerangue's fault, recall that Dean Prosser saw as part of the common knowledge of most every adult an awareness of the propensities of people toward crime.²⁴⁵ However, Prosser also asserted that, "under all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law."²⁴⁶ Perhaps, for Zerangue, 3:00 a.m. in a strange city was not "ordinary and normal circumstances," or perhaps the hour and her *lack* of knowledge about the neighborhood surrounding the hotel should have provided sufficient "reason to expect the contrary." But criminal attacks, said Prosser, "are still so unlikely in any particular instance that the burden of taking continual precautions against them exceeds the apparent risk."²⁴⁷ Yet *Zerangue*, and indeed the cases in which factfinders found plaintiffs at fault for failing to keep a hotel, motel, or office door properly secured, demonstrates something to the contrary: Even in many "ordinary and normal circumstances," for an individual to proceed upon the assumption that others will obey the criminal law is unreasonable.

It seems doubtful that most juries would find that a woman who regularly leaves work from a shopping mall in a large city an hour after the mall closes and walks to her car, parked in the distant and nearly deserted employee section of the mall parking lot, may reasonably proceed upon the assumption that others will obey the criminal law. Forgoing precautions against criminal attack until something or someone provides "reason to the contrary" may be far too late. Similarly, it is doubtful that a man who pulls off the interstate after midnight to check into a motel may reasonably presume, as he pulls around back to his room, that anyone he meets in the parking lot will obey the criminal law. Doubtless many juries would find that he had a duty at least to scan the parking lot for suspicious persons, and that this burden of precaution

245. See RESTATEMENT (SECOND) OF TORTS § 290 (1965) (asserting that for purposes of determining whether actor should recognize that his conduct involves risk, he is required to know "the qualities and habits of human beings"); PROSSER, *supra* note 37, § 32, at 159 (asserting every adult will know "the normal habits of human beings, including their propensities toward negligence and *crime*" (emphasis added)).

246. PROSSER, *supra* note 37, § 33, at 173-74. Although Prosser wrote these lines to describe a defendant's duty, they are just as easily applicable to the conduct of a plaintiff.

247. *Id.*

would hardly "exceed the apparent risk" until he learns that the situation is no longer normal and ordinary.

A duty to anticipate and to take precautions against criminal attack, it seems, would run contrary to Prosser's assertion that because crime is so unlikely in any particular instance "continual precautions" are too burdensome.

However, Zerangue needed no particular knowledge of danger on the street outside her hotel to be at fault for failing to anticipate a criminal attack. Also, for DiVincenzo²⁴⁸ and Hardee,²⁴⁹ apparently only a general knowledge of prior crime on or around the premises, rather than knowledge of an impending criminal assault, for example, was sufficient for juries to hold them partially at fault for the attacks they suffered. Indeed, there is nothing to indicate that the jury found Ledbetter even had knowledge of prior criminal acts on or around her motel before they found her at fault for failing properly to lock the door to her room.²⁵⁰ She simply failed to anticipate an attack and take a low-cost precaution to avoid it. Case law, the traditional tort policy of not imposing unreasonable risks on oneself, the policy of preventing injury, and common sense all seem to dictate that Prosser's nearly thirty-year-old assertion no longer holds true and that generally to proceed as if others will obey the criminal law is unreasonable: People have a duty to anticipate and avoid the criminal acts of third parties, a duty not to become a victim.

No case law seems to articulate a plaintiff's duty to anticipate and to take precautions against the criminal acts of third parties. That courts should impose such a duty now seems clear. As discussed above,²⁵¹ over the past twenty-five years, most American jurisdictions have broadly adopted section 344 of the *Restatement*, which recognizes a business possessor's duty to use reasonable care to anticipate criminal acts of third persons and to take precautions against them.²⁵² It makes sense, then, that if the states are to dispense with the common-law rule that one need not anticipate the criminal acts of third persons as far as possessors are concerned, states should then impose a

248. See *Green Cos. v. DiVincenzo*, 432 So. 2d 86, 87 (Fla. Dist. Ct. App. 1983) (noting that plaintiff was twenty-five percent at fault for his own injuries); see also *supra* notes 12-16 and accompanying text (recounting facts of case).

249. See *Hardee v. Cunningham & Smith, Inc.*, 679 So. 2d 1316, 1317 (Fla. Dist. Ct. App. 1996) (affirming that plaintiff was responsible for majority of fault in case in which assailants stabbed, beat, and robbed plaintiff at car wash); see also *supra* notes 159-68 and accompanying text (recounting facts of case).

250. See *Ledbetter v. Concord Gen. Corp.*, 665 So. 2d 1166, 1168 (La. 1996) (noting that plaintiff was thirty-five percent at fault in case where she was raped at motel); see also *supra* notes 149-58 and accompanying text (recounting facts of case).

251. See *supra* Part II (discussing tests of foreseeability of crime to possessors in different jurisdictions).

252. See *RESTATEMENT (SECOND) OF TORTS* § 344 cmt. f (1965) (discussing scope of duty).

parallel duty on plaintiffs, even under ordinary and normal circumstances, to anticipate and take precautions against criminal assaults.

Further, it would also make sense for the test applied to plaintiffs to be quite similar to the test applied to possessors. Incongruity in the amount of notice²⁵³ required to establish foreseeability would appear unjust. For example, in a "totality of the circumstances" state, such as Kansas,²⁵⁴ where the test of foreseeability for possessors is quite broad, to hold that plaintiffs have a duty only when harm is imminent would be like having slip and fall jurisprudence in which possessors are liable even though plaintiffs elect to walk through the store blindfolded.

One might ask whether the distinction between negligence and contributory negligence should make any difference to a court considering whether to impose a duty on plaintiffs to anticipate and take precautions against criminal attack. After all, negligence is imposing unreasonable risk on others.²⁵⁵ Contributory negligence is imposing unreasonable risk on oneself.²⁵⁶ A recent commentator asserted that the question of what risks we should be able to impose on ourselves is tangential to tort law and that we are free to impose risks on ourselves that would be unreasonable to impose on others.²⁵⁷ Indeed, one can recognize a clear moral difference between imposing risks on others and imposing risks on oneself. However, the argument that tort law should accord individuals much greater freedom to impose risks on themselves than they would be allowed to impose on others must have limits. In the end, greater freedom to impose risks on oneself makes sense only until, when suffering an injury within that greater bundle of risks, the plaintiff seeks to lay blame at the feet of a defendant. Such a plaintiff would then be forcing a defendant to bear the cost of the plaintiff's greater risk taking, imposing those

253. In the reviewed cases in which factfinders held plaintiffs at fault for failing to take the precautions of refraining from futile resistance or refraining from provocation, the plaintiffs had clear notice of danger. In those cases in which juries found plaintiffs at fault for failing to keep a door secure or for placing themselves at a location they knew or should have known was dangerous, notice of danger was less clear. These differences seem to mirror those in the different tests applicable to possessors. See *supra* Part II (describing tests of foreseeability applicable to possessors).

254. See *Seibert v. Vic Regnier Builders, Inc.*, 856 P.2d 1332, 1339 (Kan. 1993) (adopting totality of circumstances test).

255. See PROSSER, *supra* note 37, § 65, at 418 (explaining that negligence is creation of unreasonable risks of harm to others).

256. See *id.* (asserting that contributory negligence is conduct that involves unreasonable risk of harm to oneself).

257. See Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 323, 369 (1996) (asserting "[t]ort law is only tangentially about the risks we should impose on ourselves" and that "we may rationally run some risks that would be unreasonable for us to impose on others. . .").

greater risks on others. Thus, at least as far as negligent security actions are concerned, imposing a duty on plaintiffs that allows them no more freedom to impose risk of injury to themselves without being at fault than they could impose on others without fault is a fairer system.²⁵⁸

2. Comparing Fault

Whether or not states explicitly impose on plaintiffs a duty to anticipate and to take precautions against crime, a number of states have reported cases in which courts find plaintiffs in negligent security actions at least partially at fault.²⁵⁹ No doctrinal or statutory barrier prohibits a possessor from arguing that a plaintiff was contributorily negligent in a negligent security action.²⁶⁰ How, then, once a factfinder determines that both the possessor²⁶¹ and the plaintiff²⁶² are at fault, is the factfinder properly to apportion their relative shares of responsibility?

Judge Posner wrote in *Wassell* that comparing the negligence of a plaintiff and of a defendant constituted a "formless, unguided inquiry, because there is no methodology for comparing the causal contributions of the plaintiff's and of the defendant's negligence to the plaintiff's injury."²⁶³ Several

258. If a state were explicitly to impose a duty on plaintiffs to anticipate and take precautions against crime even in the absence of clear notice of danger, it is doubtful that the case law dealing with keeping doors secure and not placing oneself in a dangerous location without good reason would exhaust the possible requirements juries would impose on plaintiffs to meet that duty. A forecast of common sense precautions that juries could require for an individual's own safety might be seen in a recent pamphlet from the National Crime Prevention Council. See NATIONAL CRIME PREVENTION COUNCIL, *STREET SENSE: IT'S COMMON SENSE* (1998) (offering tips for keeping oneself safe on "the street"). The Council urges the public to "take a bite out of crime" by, among other things, staying alert to one's surroundings when out in public, asking for an escort to one's car when working late, avoiding isolated parking areas and underground garages, and refraining from wearing shoes or clothing that restrict one's movements. *Id.* Although each of the first three of these suggestions seems to have played a role in at least one of the cases mentioned in this Note, in no cases did a jury find a plaintiff at fault for how he or she was dressed.

259. See *supra* Part IV.B (describing cases in which plaintiff found at least partially at fault in negligent security actions under laws of Florida, Illinois, Kansas, Louisiana, New Jersey, and Wisconsin).

260. See generally WOODS & DEERE, *supra* note 90, § 4 (describing existing rules of comparative negligence and their impact on other legal doctrines).

261. See *supra* Part II (describing four tests of foreseeability of third party criminal acts currently used in states).

262. See *supra* Part IV (describing cases in which factfinders have judged plaintiffs at fault in negligent security actions and suggesting framework for conducting analysis of plaintiff's fault).

263. *Wassell v. Adams*, 865 F.2d 849, 854 (7th Cir. 1989) (noting lack of uniform mechanism for comparing fault).

commentators have agreed with Posner that the process of comparing fault is arbitrary.²⁶⁴ Disagreement, however, comes with such basic aspects of the undertaking as whether the factfinders are to compare causation or culpability of conduct. In *Wassell*, Judge Posner advocated comparing causation.²⁶⁵ Others, including Dean Prosser, have asserted that factfinders should assess only the relative culpability of the parties' conduct.²⁶⁶ Furthermore, commentators disagree over whether the application of the Hand Formula should promote wealth maximization through utilitarian cost-benefit analysis or should promote social contract aspirations of equal freedom and mutual benefit.²⁶⁷ Thus, attempting a comprehensive theory of comparative negligence writ large is beyond the scope of this Note.²⁶⁸

Despite scholarly disagreement over what social goals properly provide the intellectual moorings for determinations of negligence and what methods properly guide comparisons of negligence, however, the Hand Formula's interpretation of negligence is black letter law.²⁶⁹ Indeed, one recent commentator remarked that he knew of no modern decision to reject the Hand Formula.²⁷⁰ Furthermore, as noted above, the Hand Formula also is applicable to

264. See GLANVILLE L. WILLIAMS, *JOINT TORTS AND CONTRIBUTORY NEGLIGENCE* § 44, at 158 (photo. reprint 1998) (1951) (asserting that "in attempting to assess degrees of negligence the judge is trying to measure the immeasurable . . . we should recognize that the action is arbitrary. . ."); Ray J. Aiken, *Proportioning Comparative Negligence: Problems of Theory and Special Verdict Formulation*, 53 MARQ. L. REV. 293, 295 (1970) (arguing "no rational or objective legal standard or definition is possible" (emphasis omitted)).

265. See *Wassell v. Adams*, 865 F.2d 849, 854 (7th Cir. 1989) (containing Judge Posner's observation that comparative negligence necessitates comparing causation).

266. See William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 481 (1953) (arguing that, after proof of actual and proximate cause established, factfinder should only assess relative culpability of parties' conduct).

267. See generally Keating, *supra* note 257 (asserting social contract conception of due care serves purposes of tort law better than does economic conception due care).

268. The *Restatement of Torts: Apportionment of Liability* offers a comprehensive treatment of comparative liability. As written at the time of this Note's publication, it instructs factfinders assigning comparative percentages of responsibility to consider factors including: "(a) factors necessary to determine whether a person is liable; (b) the character and nature of each person's risk-creating behavior; (c) the causal connection between the risk-creating conduct and the harm; and (d) each person's actual awareness, intent, or indifference with respect to the risks created by the conduct." *RESTATEMENT OF TORTS: APPORTIONMENT OF LIABILITY* § 8 (Proposed Final Draft (Revised) (March 22, 1999)). Nonetheless, of course, "[i]t is not possible to articulate an algorithm by which a factfinder can determine percentages of responsibility." *Id.* at reporters' note cmt c.

269. See *RESTATEMENT (SECOND) OF TORTS* §§ 291-93 (1965) (analyzing reasonableness through risk-utility analysis).

270. See Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1015-16 (1994) (remarking on widespread acceptance of Hand Formula).

determinations of contributory fault.²⁷¹ Factfinders, then, can apportion fault between a plaintiff and a defendant by comparing the extent to which each party deviated from the applicable standard of conduct.²⁷² Thus, as a party is at fault when the burden of precaution is less than the possible gravity of the injury multiplied by the probability of its occurrence ($B < PL$), then the greater the difference between the burden of precaution and the probability and magnitude of the loss, the greater the party's fault.²⁷³

Judge Posner conducted this type of comparison between the respective costs of avoiding the injury in *Wassel*.²⁷⁴ Although Posner clearly disagreed with the jury's apportionment of ninety-seven percent of the fault to Marisconish, he calculated that the motel's cost of a security guard for one year would have been twenty thousand dollars, and that twenty thousand dollars was at least thirty-two times the "monetary equivalent" of greater caution on Marisconish's part.²⁷⁵ Such a calculation, said Posner, represented a sufficiently rational apportionment of fault that the trial judge's decision to deny the plaintiff's motion notwithstanding the verdict was not an abuse of discretion.²⁷⁶

Although the Hand Formula has clear utility for comparing a plaintiff's and a defendant's fault, jury instructions rarely embody the Hand Formula.²⁷⁷ Instead of being told to balance the costs and benefits of greater care, juries are apparently more often told to determine whether an actor behaved as would a reasonably prudent person under the circumstances but are left without a definition of how the law determines reasonableness.²⁷⁸ Therefore,

271. See Sobelsohn, *supra* note 183, at 420-21 (using Hand Formula to determine each party's deviation from standard of care).

272. See *id.* at 419 (introducing proposed system for comparing fault).

273. *Id.* Sobelsohn also suggests a second calculation by the jury. *Id.* at 420. If a jury determined that B was less than PL , the jury would then divide PL by B , producing a "fault quotient." *Id.* Sobelsohn rejected as too likely to confuse the jury yet a third calculation: having the jury then discount the fault quotient by the jury's assessment of either cause-in-fact or proximate cause. *Id.* Factfinders should compare the relative culpability of each party's conduct, but even asking the jury to calculate separate values for B and for PL and then to divide PL by B is probably too confusing.

274. See *Wassell v. Adams*, 865 F.2d 849, 854-56 (7th Cir. 1989) (describing comparison of fault); see also *supra* notes 99-114 and accompanying text (describing facts of case). Although Posner's opinion spoke of comparing causation, his comparison of the relative costs to each party of avoiding the injury seems clearly to be a comparison of relative culpability. *Wassell*, 865 F.2d at 856.

275. *Id.*

276. *Id.*

277. See Gilles, *supra* note 270, at 1015-17 (commenting on how infrequently jury instructions embody Hand Formula despite its widespread acceptance).

278. *Id.* at 1017-19.

this Note offers for consideration the appended model jury instructions to courts trying negligent security cases in which possessors assert comparative fault as a defense.²⁷⁹

The appended model jury instructions seek to allow for the apportionment of the responsibility for a criminal attack that takes place on the property of one who has a duty to prevent such attacks to three actors: the intentional tortfeasor, the possessor, and the plaintiff. As a threshold question for imposing liability on any party, questions one through four ask the jury whether the intentional tortfeasor battered the plaintiff.²⁸⁰ If the jury finds that an intentional tort has been committed, it then is to assess the blameworthiness of the intentional tortfeasor's conduct.²⁸¹ Next, the jury is to assess the fault of the possessor, if any, by balancing the burdensomeness of additional security precautions against the risks of not doing so that the possessor would reasonably have perceived under the circumstances.²⁸² The jury then assesses the fault of the plaintiff, if any, again by balancing the burdensomeness of additional security precautions against the risk one would reasonably perceive under the circumstances.²⁸³ Having derived numerical values from one to ten representing the fault of each party, the jury adds the numbers to find the "total fault" and divides each party's fault by this denominator to generate each party's percentage of fault.²⁸⁴ Thus, juries would appropriately retain a great deal of freedom in assigning fault. However, by using jury instructions requiring assessment of negligent fault through the Hand Formula, courts

279. See *infra* Appendix (containing jury instruction). Because the balancing test utilized by California and Tennessee most closely follows the Hand Formula's conception of negligence, the jury instructions offered by this Note are written for such jurisdictions. Furthermore, because an increasing number of states are allowing juries to compare the fault of the intentional tortfeasor, and because such a comparison is proper, an instruction on the fault of the intentional tortfeasor is also included.

280. See *infra* Appendix, questions 1-4 (asking jury whether intentional tortfeasor battered plaintiff and, if so, to assess as blameworthy intentional tortfeasor's conduct). One could construct similar instructions in the unlikely event that the intentional tort plaintiff complains of is, say, assault.

281. *Infra* Appendix, questions 1-4.

282. See *infra* Appendix, questions 5-12 (asking jury to assess fault of possessor).

283. See *infra* Appendix, questions 12-19 (asking jury to assess fault of plaintiff).

284. See *infra* Appendix, questions 20-21 (asking jury to determine each party's percentage of fault). Thus, in *Zerangue*, a jury might have judged the fault of the intentional tortfeasor to be ten, the fault of the hotel to be six, and the fault of the *Zerangue* to be seven. See *Zerangue v. Delta Towers, Ltd.*, 820 F.2d 130, 131-132 (La. 1987) (describing facts of case in which plaintiff was abducted and raped after exiting hotel in middle of night). The "total fault," then was twenty-three. Thus, the jury would have apportioned to the intentional tortfeasor roughly forty-four percent of the fault, the possessor twenty-six percent of the fault, and *Zerangue* thirty percent of the fault.

could lead juries to evaluate the parties' conduct in a manner more consistent with the law's understanding of reasonableness.

V. Conclusion

Over the past twenty-five years, all states have imposed a duty on business possessors to anticipate and to take precautions against foreseeable criminal conduct that might injure their patrons. The states have not expressly imposed on plaintiffs a parallel duty to anticipate and take precautions against crime for their own safety. Although the doctrine of contributory negligence, when it served as a complete defense to a plaintiff's recovery, provided sufficient justification for not imposing such a duty on plaintiffs, the advent of comparative fault both has removed the need to bar comparison of intentional and negligent fault and has removed the justification for refraining from imposing a duty on plaintiffs to avoid suffering an intentional tort. Now that comparative fault systems can apportion to multiple parties the responsibility for a single injury, states should continue to adopt policies allowing for comparison of intentional and negligent fault. Furthermore, states should impose on plaintiffs a duty reasonably to anticipate and to avoid suffering intentional torts, a duty to avoid becoming a victim. Finally, the Hand Formula provides the proper framework for an analysis of the reasonableness of precautions taken both by the possessor and by the plaintiff to anticipate and avoid crime.

*Appendix***Verdict Form****Intentional Tortfeasor's Fault²⁸⁵**

1. Every person owes a duty not to harm others intentionally.

2. Intentional Tortfeasor breached his duty not to harm Plaintiff intentionally only if it is more likely than not that he: 1. acted, 2. with intent to cause harmful or offensive bodily contact, 3. there was bodily contact, and 4. the contact resulted in harm or offense.

3. If Intentional Tortfeasor breached his duty not to harm Plaintiff intentionally, he is at least partially at fault for her injuries. Did Intentional Tortfeasor breach his duty not to harm Plaintiff intentionally?

Yes _____ No _____

If no, then neither Intentional Tortfeasor nor Possessor is at fault. Please sign the verdict form and notify my clerk that you have reached a verdict.

If yes, proceed to question 4.

4. On a scale of one to ten, with ten being the greatest, circle how blameworthy was Intentional Tortfeasor's conduct in causing Plaintiff's injuries.

1 2 3 4 5 6 7 8 9 10

Go to question 5.

Possessor's Fault

5. Possessors of business property are not insurers of their patrons' safety. However, business possessors owe a duty to use reasonable care to anticipate and take precautions against criminal conduct by third parties which is likely to endanger the safety of their patrons.

6. The amount of caution required of a business possessor in the exercise of reasonable care depends upon balancing the costs of taking security precau-

285. The terms "intentional tortfeasor," "possessor," and "plaintiff" are capitalized in these instructions to indicate where parties' names would be substituted.

tions against the magnitude of the risk of harmful criminal conduct apparent to the business owner, or the magnitude of the risk that should have been apparent to a reasonably prudent business owner under the same or similar circumstances.

7. Therefore, Possessor breached its duty of care only if it failed to take the additional precautions a reasonably prudent business possessor would have taken under the same or similar circumstances. The circumstances you may consider in your evaluation of Possessor's conduct include, but are not limited to, the burdens and likely effectiveness of additional security precautions; the type and character of the business and the character of the surrounding neighborhood; and any previous crime on the premises of which Possessor knew or should have known.

8. Did Possessor breach the duty of care it owed to its patrons?

Yes ____ No ____

If no, Possessor is not at fault for Plaintiff's injuries. Please proceed to question 13.

If yes, proceed to question 9.

9. Is it more likely than not that Plaintiff would not have been injured if Possessor would have taken the additional precaution(s).

Yes ____ No ____

If no, Possessor is not at fault for Plaintiff's injuries. Please proceed to question 13.

If yes, proceed to question 10.

10. Is it more likely than not that the injuries suffered by Plaintiff are the kind that are reasonably expected by Possessor's failure to take additional precautions?

Yes ____ No ____

If no, Possessor is not at fault for Plaintiff's injuries. Please proceed to question 12.

If yes, proceed to question 11.

11. On a scale of one to ten, how much did the risks of not taking the additional precautions outweigh the costs of taking the precautions Possessor

should have taken. Circling "1" means the risks only slightly outweighed the costs, and circling "10" means the risks greatly outweighed the costs.

1 2 3 4 5 6 7 8 9 10

Proceed to question 12.

Plaintiff's Fault

12. Individuals owe to themselves a duty to use reasonable care to anticipate and take precautions against criminal conduct by third parties.

13. The amount of care required by a person in the exercise of reasonable care depends upon balancing the burdens of taking precautions against the magnitude of the risk apparent to the individual, or the magnitude of the risk that should have been apparent to a reasonably prudent person under the same or similar circumstances.

14. Therefore, Plaintiff breached the duty of care she owed herself only if she failed to take precautions a reasonably prudent person would have taken under the same or similar circumstances. The circumstances you may consider in your evaluation of Plaintiff's conduct include, but are not limited to, the burdens and likely effectiveness of additional precautions; the type, character, and location of the business and her purpose for being on the premises; the character of the surrounding neighborhood; and any previous crime on the premises of which Plaintiff knew or should have known.

15. Did Plaintiff breach the duty of care she owed to herself?

Yes _____ No _____

If no, plaintiff is not partially at fault for her own injuries. Proceed to question 19.

If yes, proceed to question 16.

16. Is it more likely than not that Plaintiff would not have been injured if she had taken the additional precautions?

Yes _____ No _____

If no, plaintiff is not partially at fault for her own injuries. Proceed to question 19.

If yes, proceed to question 17.

17. Is it more likely than not that the injuries suffered by Plaintiff are the kind that are reasonably expected by her failure to take the additional precautions?

Yes _____ No _____

If no, the plaintiff is not partially at fault for her own injuries. Proceed to question 19.

If yes, proceed to question 18.

18. On a scale of one to ten, how much did the risks of not taking the additional precautions outweigh the costs of taking the precautions Plaintiff should have taken. Circling "1" means the risks only slightly outweighed the costs, and circling "10" means the risks greatly out weighed the costs.

1 2 3 4 5 6 7 8 9 10

Proceed to question 19.

Apportioning Fault

19. Indicate below the number representing the fault you have found in each party, if any, in questions 4, 11, and 18 above. Then total the numbers.

Intentional Tortfeasor	_____
Possessor	_____
Plaintiff	_____
Total	_____

20. Divide each party's fault by the total fault above to determine each party's percentage of fault.

Intentional Tortfeasor	_____ %
Possessor	_____ %
Plaintiff	_____ %
Total	<u>100</u> %

SYMPOSIUM
