ACCIDENT LIABILITY: SOME WARTIME DEVELOPMENTS

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PERHAPS the biggest problem of tort law today is the adjustment of losses which are the more or less accidental by-product of legitimate activities not aimed at hurting people or property. It is one phase of the nation's accident problem which in itself and in its bearing upon the professional activity of lawyers is of no mean proportions.[1] Before the industrial revolution, liability was imposed in this field, without much regard to fault, upon the person whose act directly produced the harm.[2] The development of industry and business saw the rise of laissez-faire as the dominant economic philosophy and fault as the dominant principle of liability for the casualties of enterprise,[3] each being a manifestation in its sphere of the individualism of the age. Fault is still the dominant principle though the crest of its dominance is past. There is a growing belief that in this mechanical age the victims of accidents can, as a class, ill afford to bear their loss; that the social consequences of uncompensated loss are dire and far exceed the amount of the loss itself; and that more good will come from distributing these losses among all the beneficiaries of mechanical progress than by letting compensation turn upon an inquiry into fault.[4] The ultimate

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1. The word "accident" is used here in the lay sense and not in the technical legal sense which would exclude cases where fault caused the injury.

The size of the accident problem is widely publicized. Figures from the latest (1945) edition of ACCIDENT FACTS, the annual publication of the National Safety Council, show that during 1944 there were in this country 95,000 accidental deaths, 24,300 of them caused by motor vehicles. Some 850,000 persons were injured in motor vehicle accidents, and the direct economic loss from 1944 traffic accidents, including wage loss, medical expenses, overhead costs of insurance and property damage is estimated at $1,250,000,000. The comparable figures for the years just before the war were (for motor vehicles) even higher.

The lifting of rationing restrictions and the high average age of cars on the road pose a threat for the near future which has been much played up in the press and popular magazines. See, *e.g.*, LIFE, Dec. 17, 1945, p. 43.

Some indication of the high proportion of tort cases on court dockets in pre-war years is given by the findings of the New York State Constitutional Convention Committee, in PROBLEMS RELATING TO BILL OF RIGHTS AND GENERAL WELFARE (1938) 609–10. Similar observations with regard to litigation in various parts of the country appear in COLUMBIA UNIVERSITY RESEARCH COUNCIL, REPORT OF THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932) 35–9.

2. Ames, *Law & Morals* (1908) 22 HARV. L. REV. 97; Isaacs, *Fault and Liability* (1918) 31 HARV. L. REV. 954; 1 STREET, FOUNDATIONS OF LEGAL LIABILITY (1906) c.6; SHULMAN AND JAMES, CASES AND MATERIALS ON TORTS (1942) c. 1, §2.

3. Bohlen, *The Rule in Rylands v. Fletcher* (1911) 59 U. OF PA. L. REV. 298, 373, 423.

4. Pound, *The End of Law as Developed in Legal Rules and Doctrines* (1914) 27 HARV. L. REV. 195, 233; NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, *op. cit. supra*, note 7, at 602. See President & Dir. of Georgetown College v. Hughes, 130 F. (2d) 810, 814 (App. D. C., 1942), per Rutledge, J.; *cf.* concurring opinion of Traynor, J. in Escola v. Coca Cola Bottling Co., 24 Cal. (2d) 453, 461, 150 P. (2d) 436, 440 (1944).

outcome of this belief would be some form of social insurance. Workmen's compensation statutes have carried this approach into practice in what used to be a large area of tort law,[5] but in the rest of the field we are considering things have not gone nearly so far. The newer ideas are making themselves felt, however, and as a result a process of limitation, corrosion, and change of the fault principle is taking place. This was the most pronounced trend in tort law during the years before the war and it has apparently continued despite many cross-currents and recessions.

I

THE IMPOSING OR WITHHOLDING OF LIABILITY ON BASES OTHER THAN FAULT

Even as it came to prevail, the principle of fault never quite swept away older notions of absolute liability, though it came nearer to doing so in this country than in England.[6] Liability without fault persisted, with more or less vitality in the fields of trespass to land, in nuisance cases, and where injury was caused by the escape of dangerous substances artificially collected on land (the doctrine of *Rylands v. Fletcher* [7]). There have been, too, occasional statutes imposing absolute liability on specific enterprises for losses due to particular kinds of hazards they present. We shall survey some recent developments in each of these fields and seek to evaluate them in the light of the current trends regarding distribution of accident losses.

Trespass.

Where direct injury to real property is concerned,[8] the older principles of trespass lingered on though they had been displaced in cases concerning damages to persons or chattels. In a few recent cases attempts have been made to rest liability on a similar basis. In *United Electric Light Company v. Deliso Construction Company*,[9] plaintiff had a system of underground wires beneath the highways by permits from the city. Defendant was constructing a sewer tunnel beneath these wires, under contract with the city. To reinforce the top of the tunnel,

5. Consistently with constitutional principles New York Cent. R. Co. v. White, 243 U. S. 188 (1917); Mountain States Timber Co., 243 U. S. 219 (1917).

6. Bohlen, *The Rule in Rylands v. Fletcher* (1911) 59 U. PA. L. REV. 298, 373, 423.

7. L. R. 3 H. L. 300 (1868).

8. Hay v. Cohoes Co., 2 N. Y. 159 (1849) (blasting); Rochester Gas & Electric Corp. v. Dunlop, 148 Misc. 849, 266 N. Y. Supp. 469 (Munroe County Ct., 1933) (damage by airplane). RESTATEMENT, TORTS (1934) § 166. As a matter of fact the *Hay* case, which was brought before the Code, was in the form of trespass on the case, and the opinion did not rest upon the physical invasion. But the case has come to stand for the proposition that liability for blasting damage is absolute only where there is a technical trespass. Booth v. Rome, W. & O. T. R. R., 140 N. Y. 267, 35 N. E. 592 (1893); Smith, *Liability for Damage to Land by Blasting* (1920) 33 HARV. L. REV. 542, 667.

9. 315 Mass. 313, 52 N. E. (2d) 553 (1943).

the defendant forced concrete through holes in the top. Some concrete thus reached the plaintiff's system of wires and damaged them. Plaintiff sued with counts in negligence, trespass, nuisance, and under the theory of *Rylands v. Fletcher*. The trial court directed a verdict for defendant on the last three counts, and the jury found for defendant on the first, thus ruling negligence out of the case. The Supreme Judicial Court of Massachusetts sustained exceptions to the direction of a verdict on the trespass and nuisance counts. Plaintiff was found to have no property interest in the land, but "defendant had no more right to injure this underground system because it was personal property than it would have if it had become a part of the realty." [10] There was here, the court thought, an affirmative act producing physical invasion of plaintiff's property, and the act was intended though the results were not. So the trespass count was upheld. If the opinion is to be taken at full face value, it is indeed a landmark in torts for it reverses the whole course of American decisions for the past hundred years, so far as injuries to person or personal property go. The court's reasoning is exactly that which Chief Justice Shaw rejected in that bell-wether of nineteenth century personal injury cases, *Brown v. Kendall*.[11] The defendant's act there (raising a stick to part fighting dogs) was just as much "intended" as was the defendant's act here;[12] but the court in 1850 refused to impose liability for the unintended consequences of lawful acts carefully done, a ruling which is the very essence of the fault principle. Probably the *Deliso* case was not intended as a radical departure from precedent. Perhaps it will end up as nothing but a minor extension of the cases involving trespass to land, and will be confined to personal property which would be treated as a fixture except for some peculiar circumstance of the case in question. The court says, however, that the nature of the property has nothing to do with the decision. And if that is so, it is hard to see any rational basis for limiting a principle whose sweeping implications will surely not be accepted by the court.[13]

In any event, the prospects do not appear favorable to any great

10. 315 Mass., 313, 319, 52 N. E. (2d) 553, 557 (1943).

11. 60 Mass. 292 (1850).

12. The court in the earlier decision was unwilling to call the conduct "intentional" because the harm was not intended. That reasoning would, of course, be fully as applicable here.

13. In Sullivan v. Dunham, 161 N. Y. 290, 55 N. E. 923 (1900), the New York court applied the trespass principle—of absolute liability for injury directly caused by voluntary conduct—in the field of injuries to persons. It was quite consistent with the earlier common law but as we have seen this had been superseded by the fault principle in injuries to persons and chattels. As the course of decision in New York has made clear, the retention of the earlier basis of liability was confined to cases of extra-hazardous conduct (e.g., blasting). In the *Deliso* case the court found that the activity involved was not particularly dangerous, so the decision cannot be limited on that ground.

development of trespass in the general field of accident compensation. The learning and the limits of trespass were technical and tricky.[14] In the light of present-day needs they are capricious and irrelevant.[15] It is neither surprising nor unfortunate, therefore, that the courts have made no widespread attempt to use the vehicle of trespass to extend absolute liability.[16]

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14. Consider for instance the requirement of directness or immediacy, as illustrated by the case of Mawson v. Vess Beverage Co., 173 S. W. (2d) 606 (Mo. App. 1943). Here defendant had put advertising signs on the front of a vacant house owned by Mawson, without his permission. Plaintiff, the five-and-a-half-year old Mawson child, was injured in trying to take down the signs. There was nothing careless or improper in the way the signs were attached to the property, or in their condition, so the plaintiff's only hope of recovery lay in trespass. But his voluntary intervening act, though not negligent, came between the wrong and the injury. So the relationship between the two was not direct enough to satisfy the requirements for trespass. Scott v. Shepherd, 8 Wils. 403 (C. P. 1773), the famous squib case, went as far as any in finding directness or immediacy, and there the intervening acts were spontaneous, and—as the court viewed it—practically reflex actions. But *cf.* Guille v. Swan, 19 John. 381 (N. Y. 1822). The decision in the *Mawson* case seems accurate enough in terms of the concepts invoked by the plaintiff himself though the question on which it turns would scarcely deserve a place in any rational scheme for accident compensation.

15. Witness New York's ill-starred attempt in blasting cases, to measure liability by reference to the ancient distinctions between trespass and case. Where blasting operations cast debris and so cause injury to property, Hay v. Cohoes Co., 2 N. Y. 159 (1849), or person, Sullivan v. Dunham, 161 N. Y. 290, 55 N. E. 923 (1900), liability is absolute. For damages caused by concussion from blasting, liability is imposed only if there is negligence. Booth v. Rome W. & O. T. R. R., 140 N. Y. 267, 35 N. E. 592 (1893). But surely if there is any special reason for absolute liability here it is because of the extra-hazardous character of the operation, and not because the operation happens to cause injury in one way rather than in another. Smith, *Liability for Damage to Land by Blasting* (1920) 33 HARV. L. REV. 542, 667. Such operations often cause physical injury without any trespass. And conduct which is not extra hazardous often causes trespass, so it makes little sense to carve out an area for special treatment along the lines of the old distinctions. New York, however, persists in making the distinction to this very day. Coley v. Cohen, 289 N. Y. 365, 45 N. E. (2d) 913 (1942); Nordone v. Mondo, 269 App. Div. 896, 56 N. Y. Supp. (2d) 606 (4th Dep't 1945). And a few other recent decisions have followed it. Indian T. Ill. Oil Co. v. Rainwater, 140 S. W. (2d) 491 (Tex. Civ. App. 1940), 19 TEX. L. REV. 89; Note (1942) 31 KY. L. REV. 78 (collecting Kentucky cases). *Contra:* Richard v. Kaufman, 47 F. Supp. 337 (E. D. Pa. 1942); Jones v. Oman, 184 S. W. (2d) 568 (Tenn. App. 1944).

16. Trespass is however occasionally useful in bringing about a sensible decision, especially in the face of some arbitrary limitation on liability. For instance, in Bouillon v. Laclede Gaslight Co., 148 Mo. App. 462, 129 S. W. 401 (1910), *distinguished in* Mawson v. Vess Beverage Co., 173 S. W. (2d) 606 (Mo. App. 1943), the court allowed recovery for physical consequences of fright where it resulted from a trespass to land. (But *cf.* Morgan v. Hightower's Adm'r, 291 Ky. 58, 163 S. W. (2d) 21 (1942) where the court refused to hold liable for similar damages the estate of a man who came to plaintiff's home ostensibly to pay a call but actually to commit suicide). In Schloendorff v. Society of the New York Hospital, 211 N. Y. 125, 105 N. E. 92 (1914) the notion of trespass was invoked to defeat limitations on the vicarious liability of a charity. See *infra* p. 371.

Nuisance.

Absolute liability was also imposed at common law for nuisance, and the basis for an action on this score makes far better sense in terms of present-day problems than is the case in trespass.[17] But the idea of nuisance finds more significant application in adjusting conflicts between more or less permanent uses of different pieces of land than it does in the solution of the accident problem.[18] In that sphere liability for nuisance is largely confined to cases where there has been either a substantial interference with the interest of an individual in the use or enjoyment of land (private nuisance), or a condition which has injured him while in the exercise of a public right (public nuisance).[19] Still a further limitation has sometimes been put on the concept, namely, that conduct or a condition must be continuing before it can constitute a nuisance.[20] Recent cases indicate a tendency to reject this requirement [21] or to emasculate it. Thus where a street sweeper was being operated on a dark night against the current of traffic, with insufficient lighting, the danger was found continuous enough to be a nuisance.[22] But in its recent applications, the nuisance theory as a principle of liability for accidental physical harm has not operated so much to extend the sphere of absolute liability as to avoid some barrier to recovery (such as governmental immunity, or contributory negligence) where the nuisance is grounded on fault.[23]

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17. For example, the reasonableness of defendant's use of his land under all the circumstances may be a factor in determining whether there is a nuisance at all and, if there is, (under one rule) whether it should be enjoined. Smith, *Reasonable Use of One's Own Property as a Justification for Damage to a Neighbor* (1917) 17 COL. L. REV. 383; McClintock, *Discretion to Deny Injunction Against Trespass and Nuisance* (1928) 12 MINN. L. REV. 565.

18. In this aspect, the law of nuisance has aptly been called a "process of judicial zoning." PROSSER, TORTS (1941) 585.

19. Clark v. Pierce & Norton Co., 131 Conn. 499, 40 A. (2d) 752 (1945) (dangerous condition in private amusement park cannot be nuisance); Higgins v. Connecticut Light and Power Co., 129 Conn. 606, 30 A. (2d) 388 (1943); see PROSSER, TORTS (1941) c. 13.

20. It is easy to see how this requirement of continuity fits into the "process of judicial zoning," for without it there would often be no such unreasonable interference with the enjoyment of land as to deserve redress (*e.g.*, smoke, smell, etc.). But the requirement has also been applied where undoubted physical injury has been caused. Booth v. Rome, W. & O. T. R. R., 140 N. Y. 267, 35 N. E. 592 (1893). See Bohlen, *The Rule in Rylands v. Fletcher* (1911) 59 U. OF PA. L. REV. 298, 313–4.

21. United Electric Light Co. v. Deliso Construction Co., 315 Mass. 313, 52 N. E. (2d) 553 (1943) discussed *supra*, p. 366; Prosser, *Nuisance Without Fault* (1942) 20 TEX. L. REV. 399, 402, n. 8.

22. Warren v. Bridgeport, 129 Conn. 355, 28 A. (2d) 1 (1942). In Jones v. Hayden, 310 Mass. 90, 37 N. E. (2d) 243 (1941), where defendant's truck obstructed the sidewalk a few minutes longer than an ordinance allowed, it was held that a pedestrian who fell while walking around the truck in the icy street was entitled to go to the jury on the theory of nuisance even though (as the verdict on another count established) there was no negligence.

23. In Warren v. Bridgeport, 129 Conn. 355, 28 A. (2d) 1 (1942), for example, the city was held liable on nuisance grounds when, because of governmental immunity, it would have escaped liability for negligence. See *infra* p. 373.

The doctrine of Rylands v. Fletcher.

In England the decision in *Rylands v. Fletcher*[24] was probably little more than a corollary of principles of absolute liability generally applied to damages to land.[25] In this country where there had been wider departure from the trespass notion, the corollary at first found little favor.[26] Since then, however, the doctrine of *Rylands v. Fletcher* has had considerable development as a rational judicial attempt to select ultra-hazardous use of land for special treatment so far as the obligation goes to compensate some of those who may be injured if the hazards should be realized. No important decision has marked this development since the war but the course of decision over a somewhat longer period indicates pretty clearly that it is unsafe to put too much reliance on earlier dicta or decisions repudiating the doctrine.[27]

Statutes.

Absolute liability has often been imposed by statute upon some kinds of activity. The Uniform Aeronautics Act, for example, makes operators and owners of planes liable without fault for injuries to persons or property on land caused by the vicissitudes of aviation.[28] This provision has been adopted without substantial change by eighteen states and Hawaii, Minnesota doing so since the war.[29] The same act adopts the rule of fault for injury to one who has voluntarily exposed himself to the risks of aviation.[30]

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24. L. R. 3 H. L. (1868).

25. Bohlen, *The Rule in Rylands v. Fletcher* (1911) 59 U. OF PA. L. REV. 298, 373, 423.

26. Bohlen, *supra* note 25; Thayer, *Liability Without Fault* (1916) 29 HARV. L. REV. 801.

27. Burke, *Rylands v. Fletcher in Illinois* (1944) 22 CHI-KENT REV. 103. In United Electric Light Co. v. Deliso Construction Co., 315 Mass. 313, 52 N. E. (2d) 553 (1943) the court found the doctrine inapplicable to the situation presented.

28. UNIFORM AERONAUTICS ACT § 5, 11 U. L. A. (1938) 161. The current supplements to 11 U. L. A. (1938) list the states which have adopted the act and show any modifications made in the terms of the uniform law. Twenty-two states and Hawaii have now adopted the Uniform Aeronautics Act, but Arizona, Idaho, Maryland, and Pennsylvania have substituted the rule of negligence for that of absolute liability in the section under consideration. Legis. (1945) 30 IOWA L. REV. 232.

There is nothing novel in imposing on a new enterprise the burden of compensating those who may become victims of one or more of its peculiar hazards. Early legislation in England created absolute liability for the escape of canal water, 34 GEO. III, c. 26, § 15 (1794), in terms so sweeping that it could not be avoided even by showing the interposition of an act of God. Makin, Ltd. v. London and North Eastern Ry. [1943] 1 K. B. 467. A familiar example of the same sort of thing is found in statutes making railroads absolutely liable for damage by fire caused by locomotive sparks. See, *e.g.*, CONN. GEN. STAT. (1930), § 3735.

29. Minnesota Laws 1943, c. 653. The same year, the Uniform Aeronautics Act was withdrawn from the active list of Uniform Acts recommended for adoption by the states. 11 U. L. A. (Supp. 1944) 172.

30. UNIFORM AERONAUTICS ACT § 6. 11 U. L. A. (1938) 163.

Those who voluntarily come to the airport and are injured on the ground there may

THE WITHHOLDING OF LIABILITY BECAUSE OF A POLICY OF EXEMPTION NOT GROUNDED ON FAULT

Charitable institutions on one hand, the state and its political subdivisions on the other, have in the past been more or less exempted from liability where, but for traditional reasons of policy, they would have had to answer for the negligence of their agents and employees. Recent developments in this field are significant not because they work any extension in the substantive grounds of liability, but rather because they indicate a trend towards curtailing or even eliminating the exemptions which were based on considerations other than fault.

Charitable Institutions.

In the case of charitable institutions there has been a truly outstanding opinion. In *President and Directors of Georgetown College v. Hughes*,[31] three of the six judges of the Court of Appeals for the District of Columbia who sat on the case would have swept away entirely all immunity on this score. The opinion, by Rutledge, J., contains an excellent account of the history and development of the rule of exemption. Like the mule, and many another rule of law, it is without pride of ancestry or hope of posterity.[32] Besides collecting the authorities and summarizing the present state of American law, this opinion contains trenchant analysis both of the reasons for the rule and of the shortcomings of the half-way measures to get away from it which are found in so many states.

On the eve of the war New York had repudiated the rule of exemption [33] but later decisions have made it clear that her courts will not hold a hospital for negligence of a nurse or doctor in carrying out his professional functions. He is then said to be acting as an independent contractor, not a servant of the hospital.[34]

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well be thought not to come within the policy behind the absolute liability imposed by § 5. *Cf.* Prokop v. Becker, 345 Pa. 607, 29 A. (2d) 23 (1942); Deojay v. Lyford, 139 Me. 234, 29 A. (2d) 111 (1942). Maine has not adopted the Uniform Act.

31. 130 F. (2d) 810 (App. D. C. 1942).

32. It was based on an English decision which was overruled in England before it was followed in America. Recent law review treatment of the subject may be found in Notes (1944) 29 IOWA L. REV. 624; (1943) 10 U. OF CHI. L. REV. 211; Comment (1943) 17 TULANE L. REV. 621.

33. Sheehan v. North Country Community Hospital, 273 N. Y. 163, 7 N. E. (2d) 28 (1937).

34. Lee v. Glens Falls Hospital, 265 App. Div. 607, 42 N. Y. S. (2d) 169 (3d Dep't 1943), *aff'd without op.*, 291 N. Y. 526, 50 N. E. (2d) 651 (1943). Here the hospital was held not liable for the head nurse's decision to leave a delirious patient unattended for a few minutes. The majority opinion in the Appellate Division suggested there may have been no negligence but rested on the rule stated in the text. Two judges dissented on the ground that there should be vicarious liability. Although there was no opinion in the Court of Appeals, the statement of facts stressed the suggestion that there had been no negligence. *Cf.* Dillon v. Rockaway Beach Hospital, 284 N. Y. 176, 30 N. E. (2d) 373 (1940) which

A number of recent cases also deal with the situation presented where the charitable institution is insured against liability. Since one of the main functions of the exemption was that of preventing the diversion of trust funds away from the donor's purposes, some courts have concluded that it shields only the trust funds and does not bar the entry of judgment against the charitable institutions at least if the judgment can be satisfied in any other way, as will be the case if there is liability insurance.[35] This ground of liability, however, has not been extended since the war, and several decisions have held that a charitable institution's exemption is not affected by the fact that it is insured. The most careful of these is one by the Illinois Appellate Court.[36] In an earlier case that court had said that the fact of insurance could not be considered, because it would prejudice the jury.[37] But the court now rejects that reasoning as untenable since here the fact of insurance is claimed to affect substantive liability. Liability is not imposed, however, because it would be reflected in increased premiums which would have to be met out of the trust funds.[38] If the policy to protect trust funds from bearing the share of the social cost of accident caused by the administration of the trust were a valid policy, the court's conclusion would follow. As it is, the existence of insurance only serves to point up the fact that instead of spelling ruinous loss to individual defendants, liability may mean only the payment of a reasonable and calculable sum.[39]

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implies that defendant would not be liable for errors in medical treatment by doctors and nurses. But there seems to be a disposition to construe the limitation narrowly, and the hospital will be held for errors of nurses or doctors unless they occur in matters calling for the exercise of professional judgment. Ranelli v. Society of N. Y. Hosp. 49 N. Y. S. (2d) 898 (Tr. T. Q. Co., 1944), *aff'd on reduction of verdict*, 269 App. Div. 906, 56 N. Y. S. (2d) 481 (2d Dep't 1945) (nurse had decided to put sideboards on patient's bed, then forgotten to get them; hospital held).

Apparently the rule in England and Canada is very much like that in New York. MacLeod, *Hospital's Liability for Acts of Nurses* (1940) 18 CAN. B. REV. 776.

35. Vanderbilt University v. Henderson, 23 Tenn. App. 135, 127 S. W. (2d) 284 (1938); O'Connor v. Boulder Colo. Sanitarium Ass'n, 105 Colo. 259, 96 P. (2d) 835 (1939); *cf.* Fordyce & McKee v. Women's Chris. Nat. Libr. Ass'n, 79 Ark. 550, 96 S. W. 155 (1906). In Louisiana the immunity of a charitable institution is purely personal, and unavailable to the insurance carrier who may be sued directly. Messina v. Société Française, 170 So. 801 (La. App. 1936); Lusk v. U. S. Fid. & Guar. Co., 199 So. 666 (La. App. 1941).

36. Piper v. Epstein, 326 Ill. App. 400, 62 N. E. (2d) 139 (1945).

37. Myers v. Y.M.C.A. of Quincy, 316 Ill. App. 177, 44 N. E. (2d) 755 (1942). See adverse comments in Note (1943) 10 U. OF CHI. L. REV. 211; Note (1943) 21 CHI-KENT REV. 256.

38. *Accord*: Schau v. Morgan, 241 Wis. 334, 6 N. W. (2d) 212 (1942); Stedem v. Jewish Mem. Hosp. Ass'n, 187 S. W. (2d) 469 (Mo. App. 1945).

39. See comments of Rutledge, J., in President & Director of Georgetown Hospital v. Hughes, 130 F. (2d) 810, at 820 (App. D. C. 1942).

The State and Its Political Subdivisions.

The other great field of immunity from tort is that which shields the sovereign and its political agencies.[40] The New York legislature had before the war broadly waived the immunity of the State and assumed liability to the same extent as an individual.[41] In *Holmes v. County of Erie*,[42] it has been held that this legislation also deprived a county of immunity in tort, since the only source of the county's immunity is the immunity of the State, whose governmental functions are simply delegated to its civil divisions. The grounds of this decision are broad enough to sweep away the immunity of any political subdivision of the State, including municipalities, a matter which the course of legislation and other decisions had left in some doubt.[43]

As in the case of charitable institutions, the question has arisen whether the existence of liability insurance lifts the immunity attaching to the performance of a governmental function. But here the problem is more complex. In the absence of statute it has generally been ruled that a governmental unit is without authority to use public funds to buy insurance to cover a non-existent liability.[44] And the unauthorized purchase of insurance does not bring liability into being.[45] There are, however, many statutes providing that insurance may be procured to cover specified activities—often the operation of school

40. The classic treatment of the subject is Borchard, *Government Liability in Tort* (1924) 34 YALE L. J. 1, 129, 229, (1926) 36 *id.* 1, 757, 1039, (1928) 28 COL. L. REV. 577, 734. See also Blachly and Oatman, *Approaches to Governmental Liability in Tort: A Comparative Survey* (1942) 9 LAW & CONTEMP. PROB. 181.

41. N. Y. COURT OF CLAIMS ACT § 8.

42. 291 N. Y. 798, 53 N. E. (2d) 369 (1944). Lower court opinions appear in 178 Misc. 46, 32 N. Y. S. (2d) 960 (Sup. Ct. 1942), and 266 App. Div. 220, 42 N. Y. S. (2d) 243 (4th Dep't 1943).

43. Since the act originally waiving immunity for the state, the legislature had passed several acts imposing liability upon political subdivisions of the state in specific situations. An example was N. Y. GENERAL MUNICIPAL LAW § 50-a, making municipalities liable for negligence on the operation of their motor vehicles. From this course of legislation it could certainly have been inferred that the legislature did not believe it had swept away immunity in all situations, and lower courts had sometimes proceeded on this assumption. Bernardine v. City of New York, 182 Misc. 609, 44 N. Y. S. (2d) 881 (Sup. Ct. 1943).

As to what is a governmental, what a proprietary function, decisions continue to follow the lines of development charted before the war. See, for example, cases collected in Notes, (1945) 156 A. L. R. 692 (cleaning and sprinkling of streets); (1945) 156 A. L. R. 714 (collection and disposal of garbage); (1942) 138 A. L. R. 126 (airports); Note (1943) 28 CORN. L. Q. 372 (parks).

44. See collection of opinions of state Attorneys General in Borchard, *Recent Statutory Developments in Municipal Tort Liability* (1936) 2 LEGAL NOTES ON LOCAL GOVERNMENT 89, 94.

45. Lambert v. City of New Haven, 129 Conn. 647, 30 A. (2d) 923 (1943); Wallace v. Laurel County Board of Education, 287 Ky. 454, 153 S. W. (2d) 915 (1941); Keeman v. Fallowfield Township School District, 345 Pa. 457, 29 A. (2d) 17 (1942).

buses.[46] And under such a statute the benefits of the insurance may be reached by appropriate action.[47]

II

Modifications of Liability Based on Fault

Except for workmen's compensation and an occasional other forward looking statute, the main assault on the citadel of fault has not been a frontal attack but rather a boring from within. The major trends have been concerned with the enlargement of duties; the liberalization of standards of proof; the increasing concern of society to provide a financially responsible defendant and the erosion of contributory negligence, imputation of negligence to the plaintiff, and other doctrines which impede recovery. We shall next examine recent developments in connection with each of the elements of a negligence case, not only to see any manifestations of these trends but also to see what forces are at work and where there have been areas of relative stability.

The Negligence Issue

Duty.

(a) *The Standards of care.* An account of developments in this field calls for appreciation of some relevant practical facts. Plaintiffs win between two thirds and three quarters of the negligence cases tried to the jury.[48] Any rule, therefore, which will help to get the case to the jury on any issue will by and large help plaintiffs, while any rule that will bring about directed verdicts will help defendants. The standard of conduct in negligence cases is generally so formulated as to call upon the exercise of the jury's function. The parties must act as reasonably prudent persons would under the circumstances, and it is for the jury to tell whether they have or not. But occasionally, specific standards of conduct have been worked out in detail by the law.

It was Holmes' view that progress should be made in that direction and that courts should declare whenever possible whether a given form

46. For a collection of such statutes, see Borchard, *Recent Statutory Developments in Municipal Liability in Tort* (1936) 2 Legal Notes on Loc. Gov. 89, 95-97.

47. Earl W. Baker & Co. v. Lagaly, 144 F. (2d) 344 (C. C. A. 10th, 1944), (under Oklahoma statute; suit directly against the insurer); Taylor v. Knox County Bd. of Ed., 292 Ky. 767, 167 S. W. (2d) 700 (1942) (action may be pursued to judgment against board of education so as to fix measure of insurer's liability, but judgment may not be satisfied out of public funds).

48. Judicial Statistics of the Work of the Supreme Court of New York, 1st. Judicial Department (1930–1935); Clark and Shulman, Law Administration in Connecticut (1937), 74, 213; Nixon, *Changing Rules of Liability in Automobile Accident Litigation* (1936) 3 Law & Contemp. Prob. 476, note 1. The proportion becomes even more significant when it is realized that defendants try especially hard to settle cases where liability is clear.

of conduct is negligent or not as a matter of law.[49] A variation on this theme was the view that those engaged in a trade or industry should be held to no higher standard of conduct than that which was formulated in the practices and customs of that industry.[50]

From whatever source they are derived, specific standards of conduct tend to restrict liability. Sometimes they have been applied as maximum standards, so that one who has taken certain defined precautions cannot be found negligent. But even when they operate as minimum standards, so that a party who has not met them is negligent as a matter of law, they generally work in favor of defendants, by taking the issue of contributory negligence away from the jury. As Nixon says,

> "for plaintiff's counsel, already enjoying the favor of the jury, the need to obtain a directed verdict based upon a proved deviation from a specific standard is less important than for a defendant's counsel who will strive to wrest the case from the jury by seeking a directed verdict based on the plaintiff's failure to observe such a standard." [51]

The trend has been definitely away from fixed standards derived either from judicial notions of what is proper or from trade practice. Examples of recession in recent decades from judge-made standards were the overruling of *Baltimore & Ohio Railroad v. Goodman*,[52] and the movement away from the rigid range-of-vision rule for motor-

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49. HOLMES, THE COMMON LAW (1881) 111; Lorenzo v. Wirth, 170 Mass. 596, 49 N. E. 1010 (1898). The high watermark of this notion was probably reached in Baltimore & O. R. Co. v. Goodman, 275 U. S. 66 (1927).

Of course courts always set the outer limits of what a jury may reasonably characterize as reasonable conduct. But Holmes' view would call upon the courts to play a much more active part in formulating standards than that.

50. Lehigh & Wilkesbarre Coal Co. v. Hayes, 128 Pa. 294, 18 Atl. 387 (1889); Kilbride v. Carbon Dioxide & M. Co., 201 Pa. 552, 51 Atl. 347 (1902); *cf.* Baltimore & O. R. R. v. Groeger, 266 U. S. 521 (1925). Holmes apparently did not approve of the rule in the *Hayes* and *Kilbride* cases, and this is indicated by Texas & Pacific Ry. v. Behymer, 189 U. S. 468, 470 (1903).

51. Nixon, *supra* note 48, at 476.

52. 275 U. S. 66 (1927). At least the extreme statements in the opinion in that case which had made it famous, were overruled in Pokora v. Wabash R. R., 292 U. S. 98 (1934). The treatment which had been received by the *Goodman* case from other courts before its demise is told in Note (1930) 43 HARV. L. REV. 926. Of course where plaintiff drives on to a grade crossing to collide with a train which he could readily have seen, had he looked while driving towards the crossing, most courts will hold him negligent as matter of law. And the facts in any given case may demonstrate that a party could not have been careful, quite apart from the application of fixed rules of conduct in situations where men might differ as to the wiser course. An example is McLeod v. Kjos, 150 Wash. 637, 274 P. 180 (1929), where a pedestrian ran into the left rear fender of a slowly moving auto. But these situations are relatively rare outside of the stereotyped grade-crossing case. Leclair v. Boudreau, 101 Vt. 270, 143 Atl. 401 (1928); see Boscarello v. N. Y., N. H. & H. Ry., 112 Conn. 279, 284, 152 Atl. 61, 62 (1930).

ists.[53] There have been no striking developments here since the war. Apart from a retrogressive decision in Louisiana on the range-of-vision rule,[54] no reversal is indicated of the prevailing trend to formulate the standard in general terms so that the jury will apply it.[55]

So far as custom and trade practices go, the victory of the jury has been well-nigh complete. The Pennsylvania court which, in another generation had virtually permitted industry to set its own standards of care[56] now declares in ringing tones: "Other manufacturers . . . are not authorized to prescribe the standards of care by which the respective rights and liabilities of persons subject to the jurisdiction of Pennsylvania courts are determined." [57] Other recent decisions are to the same effect.[58] One Missouri decision,[59] to be sure, was at least equivocal but later Missouri decisions do not apply the older rule and suggest that custom is a surer guide to what is care in master and servant cases than in others.[60] In one field alone, the restrictive view

53. Moss v. Christensen-Gardner, Inc. 98 Utah 253, 98 P. (2d) 363 (1940). Morehouse v. City of Everett, 141 Wash. 399, 252 Pac. 157, (1926). See (1938) 22 MINN. L. REV. 877; (1938) 13 NOTRE DAME LAWYER 324; (1935) 23 CALIF. L. REV. 498; Nixon, *supra* note 48; Notes (1926) A. L. R. 1403; (1929) 58 A. L. R. 1493; (1933) 87 A. L. R. 900; (1935) A. L. R. 546. Hart v. Stence, 219 Iowa 55, 257 N. W. 434, (1934).

54. Hogue v. Akin Truck Line, 16 So. (2d) 366 (La. App. 1944). In an able note(1944) 18 TULANE L. REV. 648, it is shown that by a series of statutes the legislature had clearly evinced the intention to put primary responsibility for collisions of this kind on the vehicle parked unlawfully without lights. The decision, however, probably marks no departure from former Louisiana case law.

55. What is said in the text is not meant to apply to the statutory standard cases, treated *infra*, p. 366 *et seq.*

56. See note 50, *supra*. In Schell v. Miller N. B. Storage Co., 157 Pa. Super. 101, 42 A. (2d) 180 (1945), this rule is again relied on, but in view of the Pennsylvania cases cited in notes 57 and 58, *infra*, this decision can scarcely be regarded as authoritative.

57. Maize v. Atlantic Ref. Co., 352 Pa. 51, 41 A. (2d) 850 (1945). The court held that neither the custom of other manufacturers nor the approval of the Surgeon General of United States would prevent a jury from finding inadequate the warning of danger on the label of a cleaning fluid which it might be deadly to inhale.

58. Conformity to custom was held not to preclude a finding of negligence in Polk v. Los Angeles, 159 P. (2d) 931 (Cal. 1945) (custom to insulate high tension wires only so as to prevent loss of current); Cassanova v. Paramount-Richards Theatres, 204 La. 813, 16 So. (2d) 444 (1943), (1944) 18 TULANE L. REV. 646 (1945), 6 LA. L. REV. 204, 210 (custom as to arrangement of steps, etc., in theatre); Hudson v. Grace, 348 Pa. 175, 34 A. (2d) 498 (1943) (custom of manufacturers to have steam vents at certain heights); *cf.* Calley v. Boston & Maine Ry., 93 N. H. 359, 42 A. (2d) 329 (1945) (standards of American Association of State Highway Officers, and of federal government, as to guardrails on bridge). In Polk v. Los Angeles, *supra*, the court held that deviation from a custom of tree trimmers to wear rubber gloves when working near electric wires, was not necessarily negligent.

59. McClaren v. G. S. Robins & Co., 349 Mo. 653, 162 S. W. (2d) 856 (1942). This case involved facts somewhat like those in Maize v. Atlantic Ref. Co., 352 Pa. 51, 41 A. (2d) 850 (1945), cited *supra* note 57, in which the Pennsylvania court expressed its disagreement with this decision of the Missouri court. *Cf.* also Wommack v. Orr, 352 Mo. 113, 176 S. W. (2d) 477 (1943) (under Federal Employers' Liability Act).

60. Cameron v. Small, 182 S. W. (2d) 565 (Mo. 1944); Zesch v. Abrasive Co. of Phila.,

still prevails; in mal-practice cases there has been no relaxation of the requirement that plaintiff must show a deviation from the standards of the profession.[61]

The rule just discussed should be distinguished from that which allows evidence of custom, practice, and the like, to be admitted as *tending to show* what is careful conduct. By giving plaintiffs an additional source of evidence to show negligence, it increases their chances of getting to the jury, and therefore the likelihood of a recovery.[62] Moreover, in terms of the fault principle it is analytically sound to allow such evidence because it has a logical bearing on the issue.[63] The trend of decisions both before and since the war has been quite uniform in allowing such evidence.[64]

Before the war the movement away from specific standards had met two major counter-currents, in the form of statutory standards of conduct, and the "guest" statutes. A majority of American courts had adopted the rule that where a statute or ordinance prescribed a standard of conduct for the protection of individuals against some type of danger, the violation of that statute or ordinance constituted negligence *per se* towards those individuals with reference to danger of that type; this even where the statute provided criminal sanctions only and made no reference to civil liability.[65] Because of the extensive adoption of detailed traffic regulations by statute and ordinance, this rule gave fixed standards of conduct a new lease on life and operated to *restrict* liability as the application of fixed standards usually does. An alternative rule adopted in a minority of states regarded the provisions of criminal statutes and ordinances as evidence of what due care required, to be considered by the jury much as custom or practice would

183 S. W. (2d) 140 (Mo. 1944). The retention of the rule for master and servant cases has little significance in an age of workmen's compensation statutes.

61. For recent treatment of the rule applied in these cases see Swan, *California Law of Malpractice* (1945) 33 CALIF. L. REV. 248; Arthur, *Some Liabilities of the Physician in the Use of Drugs* (1945) 17 ROCKY MT. L. REV. 131.

62. Of course techniques for showing negligence are equally available to show contributory negligence. But practically they do not do defendants as much good because of the tendency of juries to resolve doubts in favor of the plaintiffs. *Cf.* note 48, *supra*.

63. 2 WIGMORE, EVIDENCE (3d ed. 1940) § 461. An excellent recent analysis of the problem is to be found in Morris, *Custom and Negligence* (1942) 42 COL. L. REV. 1147. Of course in any given case a particular custom may so obviously represent all that can reasonably be required in the way of precautions that its observance should not be characterized as negligence. *Cf.* note 52, *supra*. On the other hand a custom may be so clearly dangerous as to be entitled to no weight. Witiak v. Delaware & H. R. R., 59 F. Supp. 1009 (M. D. Pa. 1945).

64. The cases cited in note 58, *supra*, permit evidence of custom. *Accord*, Higgins v. Conn. L. & P. Co., 129 Conn. 606, 30 A. (2d) 388 (1943); Smith v. Thompson, 349 Mo. 396, 161 S. W. (2d) 232 (1942). Note (1943) 8 Mo. L. REV. 227, 297.

65. An analysis which has had great influence is that in Thayer, *Public Wrong and Private Action* (1914) 27 HARV. L. REV. 317. See also HARPER, LAW OF TORTS (1933) § 78; PROSSER, TORTS (1941) § 39.

be.[66] The majority rule was not absolutely rigid. Under it the violator of a statute could resist the imputation of negligence by showing that he did all one reasonably could to obey the statute, or that he acted in an emergency.[67] Still the rule was often employed mechanically [68] and it was subjected to some fairly searching criticism.[69] After all, the legislature did not expressly provide civil liability for breach of the statute, and it may well have supposed that undue harshness from its literal application as a criminal statute would be taken care of as such matters generally are in the criminal law, through the use of common sense discretion by the enforcement officers. It seems more in keeping with legislative intent, therefore, and more reasonable for the court to rely upon a legislative standard in a civil case only where it finds that standard appropriate. Moreover a court might find appropriate a legislative standard which is not actually enforceable as a matter of criminal law in the precise situation presented. One writer who espouses this point of view feels that the court should apply as fixed standards all rules of this nature which it thus adopts.[70] But this does not necessarily follow unless one agrees with Holmes' purpose of promoting legal standards.[71] If the standard is not one to be applied inflexibly in the civil case, there seems to be no reason why the court should not do any one of three things: reject the statutory standard

66. Landry v. Hubert, 101 Vt. 111, 141 Atl. 593 (1928); Wynn v. Sullivan, 294 Mass. 562, 3 N. E. (2d) 236 (1936). Any benefit which might otherwise accrue from this rule for plaintiffs in Massachusetts is more than offset by as quaintly reactionary a rule as may be found in tort law today. A plaintiff will be barred of recovery if his injury is a direct result of conduct which violates a statute, even though that conduct amounts to the exercise of due care. Newcomb v. Boston Protective Dept., 146 Mass. 596 (1888); Patrican v. Garvey, 287 Mass. 62, 190 N. E. 9 (1934) (plaintiff, aged eleven, expressly found to be in exercise of due care). The notion is that a lawbreaker has no standing to ask for relief at the hands of the court, even though his violation be so innocent and technical that he would not have to pay damages to one who was injured by it. In the nature of things this rule works only *against* accident victims. It is a barbarous relic of all the worst there was in Puritanism. Contrast Rapee v. Beacon Hotel Corp., 293 N. Y. 196, 56 N. E. (2d) 548 (1944).

67. Evers v. Davis, 86 N. J. L. 196, 90 Atl. 677 (1914). Cases collected in (notes) 24 A. L. R. 1304; 63 A. L. R. 277. *Cf.* Notes (1939) 14 WASH. L. R. 232; (1940) 38 MICH. L. R. 801.

68. This might happen in either of two ways. Sometimes a statutory precaution would be insisted on though it was practically impossible of reasonable fulfillment. Andrew v. White Line Bus Corp., 115 Conn. 464, 161 Atl. 792 (1932); Conrad v. Springfield Consol. Ry. Co., 240 Ill. 12, 88 N. E. 180 (1909) (defendant not allowed to show that statutory precaution would render condition more dangerous). At other times a statutory precaution would not even be considered because for some technical reason the statute did not apply to the precise situation before the court. Moore v. Dering Coal Co., 242 Ill. 84, 89 N. E. 674 (1909).

69. Lowndes, *Civil Liability Created by Criminal Legislation* (1932) 16 MINN. L. R. 361; Morris, *The Relation of Criminal Statutes to Tort Liability* (1933) 46 HARV. L. R. 453.

70. Morris, *op. cit. supra*, note 69.

71. See note 49, *supra*.

as inappropriate; adopt the statutory standard as a matter of law;[72] or else leave the statutory standard to the jury for their consideration when reasonable men might differ as to its appropriateness under all the circumstances.[73] This may well be the long way round to the view that breach of statute is merely evidence of negligence. I have dwelt on it at length because it may well represent what the majority rule will actually come to. Developments in three important jurisdictions which formerly espoused the negligence *per se* theory suggest this. In two thoughtful opinions the California Supreme Court has adopted at least part of the foregoing analysis. In *Clinkscales v. Carver*,[74] defendant went through a stop sign posted under an ordinance which was invalid for defective publication. The court held that even if there could be no criminal punishment, "the legislative standard may nevertheless apply if it is an appropriate measure for the defendant's conduct." [75] The court adopted the standard and applied it here as a fixed one, for "otherwise a stop-sign would become a trap to innocent persons who rely upon it." Two judges dissented because they felt the whole issue should be left to the jury. It is not entirely clear whether the majority thought the appropriateness of the standard should be left to the jury when it is in doubt, but a later decision suggests that this may be the rule.[76]

In many jurisdictions, of course, no such developments as those described have taken place, and the former rules are still applied.[77]

72. In Minnesota, a statute has reversed the negligence *per se* rule so far as statutory rules of the road for traffic are concerned. Minn. Laws 1937, c. 464, § 141; Laws 1939, c. 430, § 30. This makes violation of traffic laws "prima facie evidence of negligence only." The unexplained and unexcused breach of a statutory rule of conduct is still negligence as matter of law, Wojtowicz v. Belden, 211 Minn. 461, 1 N. W. (2d) 409 (1942), but presumably any evidence making it doubtful whether the statute should be applied would go to the jury.

73. The New York Court of Appeals, on the eve of the war, allowed a jury to say whether it was negligent for a pedestrian, in violation of statute, to walk with the current of traffic on a divided highway at a time when virtually all the traffic was using the other lane. Tedla v. Ellman, 280 N. Y. 124, 19 N. E. (2d) 987 (1939), 34 ILL. L. REV. 229; (1939) 17 N. Y. U. L. Q. REV. 143; (1939) 18 TEX. L. REV. 102. Two judges dissented on the authority of Martin v. Herzog, 228 N. Y. 164, 126 N. E. 814 (1920). Thus the court decided that the statutory standard might be appropriate in the civil case, but because there were factors tending to explain or excuse its violation the jury was allowed to determine whether the statutory standard was actually appropriate.

74. 22 Cal. (2d) 72, 136. P. (2d) 777 (1943), (1944) 32 CALIF. L. REV. 80; contrast Rodenkirch v. Nemnick, 168 S. W. (2d) 977 (Mo. App. 1943), 8 Mo. L. REV. 216, where a similar question was left to the jury. Contrast also DuBois v. Johnson, 238 Wis. 161, 293 N. W. 590 (1941) where the court held that a "rolling stop" rather than a complete stop, though a violation of criminal law could not be a cause of collision.

75. Compare Black v. Stith, 164 Ore. 117, 100 P. (2d) 485 (1940).

76. In Polk v. Los Angeles, 159 P. (2d) 931 (Cal. 1945) it was held proper to have called to the jury's attention safety rules promulgated by the Railroad Commission. Even if these rules were technically inapplicable (the court did not think they were) the court saw no reason why they should not be applied to a publicly owned as well as to a private utility.

77. Thus in Bushnell v. Telluride Power Co., 145 F. (2d) 950 (C. C. A. 10th, 1944) a directed verdict for plaintiff was upheld where damage was caused by a fire kindled without

As to guest statutes, they too cut across the stream of expanding liability, by relaxing the duty owed by one class of defendants to one class of personal injury plaintiffs. About half the states had already adopted guest statutes before the war and of these only Connecticut, the first state to adopt one has since repealed it.[78] Two states have extended their guest statutes to airplanes.[79] The general character of the duty owed to guests, already pretty well defined, has not undergone any important modification.[80] Some questions were presented as to who is a guest, in connection with ride-sharing agreements. On the whole these were worked out along conventional lines, the ride-sharer under a regular arrangement to pay ratably towards expenses, being held a passenger rather than a guest, and so outside the scope of the statute.[81] These holdings will be of less practical use after the war because insurance policies do not ordinarily cover the carrying of persons for a charge; these clauses being suspended at the government's request for the emergency only.[82]

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the required written permit, in spite of evidence that all reasonable precautions were taken, that defendant had the warden's oral permission, etc., and in Alpine Tel. Corp. v. McCall, 143 Tex. 335, 184 S. W. (2d) 830 (1944) violation of an ordinance was held negligence *per se*. But *cf.* Taber v. Smith 26 S. W. (2d) 722 (Tex. Civ. App. 1930) where factors of excuse were shown.

In spite of some earlier cases to the contrary it is now generally held that conformity to the statutory standard does not establish due care as a matter of law. Kientz v. Charles Dennery, Inc., 17 So. (2d) 506 (La. App., 1944), 19 TULANE L. REV. 300; Pratt, Read & Co. v. New York N. H. & H. R. R., 102 Conn. 735, 130 Atl. 102 (1925).

A case involving intelligent application of the evidence of negligence rule is Harsha v. Bowles, 51 N. E. (2d) 454 (Mass. 1943).

78. CONN. GEN. STAT. (Supp. 1939) § 540e, passed in 1937. The statutes are collected in Weber, *Guest Statutes* (1937) 11 U. OF CIN. L. REV. 24, which also contains a good treatment of the kind of showing required in these cases. A recent change in the wording of the Indiana statute, Acts, 1937, c. 259, § 1, seems to have wrought no change in substance. Bedwell v. DeBolt, 221 Ind. 600, 50 N. E. (2d) 875 (1943), (1944) 19 IND. L. J. 145.

79. California and South Carolina. Note (1945) 30 IOWA L. REV. 442; Whittemore v. Lockheed Aircraft Corp., 51 Cal. App. (2d) 605, 125 P. (2d) 531 (1942), (1943) 16 So. CALIF. L. REV. 358.

80. Gordon, *Tort Liability in Ride-Sharing Arrangements* (1944) 38 ILL. L. REV. 293; Spikes, *Gross Negligence Under the Guest Statute* (1943) 22 NEB. L. REV. 264; Campbell, *Host-Guest Rules in Wisconsin* (1943) WIS. L. REV. 180.

81. Miller v. Fairley, 141 Ohio St. 327, 48 N. E. (2d) 217 (1943), 29 CORN. L. Q. 87, 23 B. U. L. REV. 513; Gordon, *Tort Liability in Ride-Sharing Arrangements* (1944) 38 ILL. L. REV. 293. *Cf.* Thuente v. Hart Motors, 234 Iowa 1294, 15 N. W. (2d) 622 (1944), (1945) 30 IOWA L. REV. 283 (where owner of car and passengers were both engaged in Scrap drive *held* latter not a guest). In Poutre v. Saunders, 19 Wash. (2d) 561, 143 P. (2d) 554 (1943), (1944) 19 WASH. L. REV. 42, the court held that the sharing of expenses of a trip under an informal agreement to do so did not make the parties joint-venturers. The passenger here asked to be taken on the trip. The purpose of each party was a separate social one. The court overruled Manos v. James, 7 Wash. (2d) 695, 110 P. (2d) 887 (1941), but left open the question whether plaintiff was a passenger for hire.

82. Note (1943) 29 CORN. L. Q. 87; Gordon, *supra* note 81. But *cf.* Bonham v. Zurich Ins. Co. (1945) 1 ALL ENG. R. 427 (holding a share-the-rider who paid the amount of rail-

(b) *Scope of duty.* One of the most obvious ways in which to broaden tort liability has been through the extension of the scope of duty. The duty to use care in the performance of affirmative conduct has long been measured by the test of foreseeability of harm. Developments in this field have not involved an abandonment or modification of this test but rather a fuller recognition of what is reasonably foreseeable in an age of mechanical advancement and a slowly spreading social conscience,[83] and a progressive repudiation of some older and rather arbitrary limitations on the principle.[84]

In a well-reasoned opinion the Michigan Supreme Court has decided that a defendant who by his negligence puts himself in peril has breached a duty to his rescuer who is injured while taking reasonable steps to save him.[85] This seems to be the first decision of its kind. Older authority had denied recovery because the defendant was thought to owe no duty to himself.[86] But that is not the issue. The rescuer's right is not derivative. The reasonable impulse to rescue is one of the things an actor is bound to take into account. He must not by substandard conduct bring this impulse into play, and this duty is owed directly to the potential rescuer. It should be of no consequence that as one step in the process defendant puts himself in peril rather than someone else, or some personal property.[87]

It is now generally recognized that the actor may be required to foresee the actions of third persons even where they are negligent or criminal if a reasonable man would do so under the circumstances.[88]

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road fare to the owner not to be carried for "hire or reward" within the terms of a policy). Restrictions on insurance coverage are particularly important in this field because the relationship between passenger and driver is often of a kind which discourages the willingness to satisfy liability out of personal assets, even where there are any.

83. Typical of modern cases which require a man in a trade or business to acquire a special knowledge about the things he handles or the techniques he uses from which he may foresee harm that would be concealed from one without such knowledge, are Cornbrooks v. Terminal Barber Shops, 282 N. Y. 217, 26 N. E. (2d) 25 (1940) and Noone v. Fred Perlberg, 268 App. Div. 149, 49 N. Y. S. (2d) 460 (1st Dep't 1944), *aff'd* 294 N. Y. 680, 60 N. E. (2d) 839 (1945). In the former a barber was held bound to know that using a vibrator over the closed eye might cause detachment of the retina. In the latter a manufacturer was held bound to know that sizing he used for dresses was highly inflammable so that it flared up when touched by a live cigarette.

84. HARPER, LAW OF TORTS (1933) c. 6; PROSSER, TORTS (1941) c. 6.

85. Brugh v. Bigelow, 310 Mich. 74, 16 N. W. (2d) 668 (1944), (1945) 43 MICH. L. REV. 980.

86. Saylor v. Parsons, 122 Iowa 670, 98 N. W. 500 (1904).

87. PROSSER, TORTS (1941) 360; Morgan v. Aylen (1942) 1 ALL ENG. R. 489, (1942) 58 L. Q. REV. 298; Steel v. Glasgow Iron & Steel Co. (1944) 237 Sess. Cas., (1945) 61 L. Q. REV. 27.

88. Thus a truck driver who had the green light in his favor was held negligent in not seeing an automobile negligently speeding towards the intersection. Kientz v. Charles Dennery, 17 So. (2d) 506 (La. App. 1944). And in Cusatis v. Lehigh Valley R. R., 152 Pa. Super. 193, 31 A. (2d) 572 (1943) defendant was held liable for spotting a car without setting

Indeed there is nothing new in this [89] and it would scarcely be worth noting if it were not for a competing notion that in such a situation only the last wrongdoer may be held.[90] The last-wrongdoer rule has never prevailed generally as a limitation on duty, but it keeps cropping up to this day, often in the guise of a transparent statement that certain wrongful conduct which every prudent man actually guards against is not "foreseeable." [91] When it does prevail, the last wrongdoer rule limits the number of persons whom plaintiff can hold liable for an injury, often insulating from liability the only financially responsible wrongdoer in the case. In this respect the older, more restrictive rule has a practical effect something like that which follows from a refusal to impose vicarious liability. And the abandonment of the restriction gives to accident victims a wider choice of defendants, therefore a greater chance of finding a financially responsible one, just as an extension of vicarious liability does.

This competition between the last wrongdoer limitation and the rule which holds a defendant to anticipate all that is reasonably foreseeable is also seen in cases where because of contract, calling, or other relationship, a defendant has come under a duty to take affirmative precautions towards some class of people. These precautions may include those necessary to protect plaintiff from the foreseeable wrongful acts of third persons for whose conduct defendant is not otherwise responsible. Thus officers of a corporation have been held under a duty to take care to prevent one of their number who was belligerently drunk from shooting a union representative who was an invitee on the premises.[92] And a railroad in whose station hoboes were accustomed to loiter was found negligent for failing to provide guards to

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the derail which would have prevented the car from rolling onto a crossing when handled negligently by the consignee's workmen. And it may be negligent to furnish young children with gasoline, Yachuk v. Oliver Blais Co., (1944) 3 D. L. R. 615, or a BB gun, Mazzocchi v. Seay, 126 W. Va. 490, 29 S. E. (2d) 12 (1944), 22 N. C. L. REV. 333, though the harm comes only when the children misbehave. *Cf.* also Ross v. Hartman, 139 F. (2d) 14 (App. D. C. 1943).

89. It was accepted, for instance, in Illidge v. Goodwin, 5 C. & P. 190, 172 Eng. Rep. R. 934 (C. P. 1831).

90. Vicars v. Wilcocks, 8 East 1, 103 Eng. Rep. R. 244 (K. B. 1806); Bohlen, *Contributory Negligence* (1908) 21 HARV. L. REV. 233; SHULMAN AND JAMES, CASES AND MATERIALS ON TORTS (1942) 297.

91. Slater v. T. C. Baker Co., 261 Mass. 424, 158 N. E. 778 (1927); Noll v. Marian, 347 Pa. 213, 32 A. (2d) 18 (1943). Pennsylvania has adopted the rule that if the later of two wrongdoers becomes aware of the danger created to the first, and is thereafter negligent, the later wrongdoer alone is liable. Venorick v. Revetta, 152 Pa. Super. 455, 33 A. (2d) 655 (1943), (1944) 42 MICH. L. REV. 709, 48 DICK. L. REV. 114; Eldredge, *Culpable Intervention as Superseding Cause* (1937) 86 U. OF PA. L. REV. 121. This rule is really concerned with liability for breach of duty rather than with the question whether a duty has been breached. It is a matter of "proximate cause."

92. In re Sabbatino & Co., 150 F. (2d) 101 (C. C. A. 2d, 1945), 31 VA. L. REV. 937.

prevent assault on women passengers.[93] But in *Noll v. Marian*[94] the Pennsylvania court thought that a bank holdup was not the sort of thing that was sufficiently foreseeable to warrant a jury in concluding that the bank should train its tellers to meet the exigency.

As we have seen, statutes have come to play an important part as the basis of duties. The scope of a statutory provision and its relevance to the grounds of civil liability depend upon a judicial interpretation of the statute's purpose. Thus the New York State War Emergency Act which (among other things) forbade lights showing during a blackout was held to create no duty towards the air raid warden who was injured while climbing to put them out.[95] But even where a statute creates a duty to individuals there is usually room for construing the duty broadly or narrowly. Some recent cases illustrate this. The defendant leaves his car in a public street unlocked, in violation of statute or ordinance; the car is stolen, and while being operated as a stolen car negligently injures the plaintiff within a few hours of the theft. In *Ross v. Hartman*,[96] the District of Columbia court noted that the requirement to lock cars was found among provisions for safety devices such as horns, brakes, lights, and the like for vehicles generally (including bicycles). But the provision for locks applied only to motor vehicles. It concluded that the provision was not to prevent theft for the sake of owners or the police "but to promote safety of the public in the streets. An unlocked motor vehicle

93. Neering v. Illinois Cent. R. R., 383 Ill. 366, 50 N. E. (2d) 497 (1943), 38 ILL. L. REV. 213, (1944) 22 CHI-KENT L. REV. 152. Other recent cases illustrate anew the conventional extent of this basis of liability. Thus if there is no reason to anticipate the wrongful act of another, there is no duty to guard against it or take it into account. Pennsylvania R. R. v. Cook, 26 A. (2d) 384 (Md. App. 1942), (1943) 6 MD. L. REV. 332 (passenger pulled signal to start train); Shepard v. Kansas City Pub. Serv. Co., 236 Mo. App. 1118, 162 S. W. (2d) 318 (1942); Frace v. Long Beach City High School Dist., 58 Cal. App. (2d) 566, 137 P. (2d) 60 (1943) (janitor gave key of place where chemicals were stored to student who stole some which exploded). And of course the evidence may show all reasonable precautions were taken. Duner v. Hudson & Man. R. R., 264 App. Div. 229, 35 N. Y. S. (2d) 191 (1st Dep't 1942) (assault on passenger at station; but 28 policemen then on guard there); *cf.* Brodie v. Miller, 24 Tenn. App. 316, 143 S. W. (2d) 1042 (1940). In Rose v. City of Chicago, 317 Ill. App. 1, 45 N. E. (2d) 717 (1942), a taxi company was held liable for injuries inflicted on a passenger by strikers where it had reason to anticipate violence and had taken no steps to warn passengers of this fact. In Hansen v. Henrici's, 319 Ill. App. 458, 49 N. E. (2d) 737 (1943), (1944) 22 CHI.-KENT L. REV. 164, a restaurateur was held when young men in a hurry pushed too hard a revolving door which hurt plaintiff.

94. 347 Pa. 213, 32 A. (2d) 18 (1943).

95. Klein v. Herlim Realty Corp., 184 Misc. 852, 54 N. Y. S. (2d) 144 (Sup. Ct. 1945). In Picou v. J. B. Luke's Sons, 204 La. 881, 16 So. (2d) 466 (1943) a child labor statute was found intended only to prevent interference with education and not to promote safety. In Picking v. Pennsylvania R. R., 151 F. (2d) 240 (C. C. A. 3d, 1945), the Uniform Criminal Extradition Act was found to create no civil rights for wrongful arrest.

96. 139 F. (2d) 14 (App. D. C. 1943).

creates little more risk of theft than an unlocked bicycle, or for that matter, an unlocked house, but it creates much more risk that meddling by children, thieves, or others will result in injuries to the public." In *Slater v. T. C. Baker & Company*,[97] under a similar provision and a similar state of facts, the Massachusetts court instead had exonerated the defendant as a matter of law because "the larceny of the automobile and its use by the thief were intervening independent acts which the defendant was not bound to anticipate and to guard against." The rule of the *Slater* case has recently been reaffirmed.[98]

The rule that no one is legally bound to be a good Samaritan is familiar enough. Familiar, too, are the exceptions to it. Typical of these is *Szabo v. Pennsylvania Railroad* [99] where an employee had a sun stroke on the job and the foreman simply ordered him to be taken home without seeing that he got first aid or was put into the hands of his family. His family was out and he was left home to die for want of attention. Liability was imposed. The decision in *L. S. Ayres & Company v. Hicks* [100] perhaps goes a little farther. A child who went with his mother to the store got his hand caught in the comb-plate where the steps of an escalator meet the floor. While the jury found the

97. 261 Mass. 424, 158 N. E. 778 (1927).

98. Sullivan v. Griffin, 318 Mass. —, 61 N. E. (2d) 330 (1945). Malloy v. Newman, 310 Mass. 269, 37 N. E. (2d) 1001 (1941), (1942) 22 B. U. L. REV. 331, deals with a similar situation but in addition the auto was not properly registered. Here the Massachusetts court held that violation of the registration statutes put defendant "outside the pale of travellers," and rendered the car a trespasser on the highway so that all the conduct of its owner-operator was permeated with unlawfulness. This was felt to provide the sound basis of liability that breach of the lock statute did not, and defendant was held for the death caused when a thief (not eluding pursuers) was driving the car at 80 miles an hour. The *Slater* case was distinguished on the ground that here the owner was shown to know the danger of thefts in the neighborhood. The opinion is confusing, and if it stood alone it might be taken to have effectually overruled the *Slater* case, *supra*, note 97; see Note (1944) 92 U. OF PA. L. REV. 467. But any doubt on this score is set at rest by Sullivan v. Griffin, *supra*, which leaves nothing to the *Malloy* case but the point about registration.

99. 132 N. J. L. 331, 40 A. (2d) 562 (1945), 19 ST. JOHN'S L. REV. 161. The decision may stand for the duty of an employer to give emergency first aid, or for the proposition that he who undertakes to give voluntary aid comes under the duty to use care not to leave the injured person worse off than he would have been if left alone.

100. 220 Ind. 86, 40 N. E. (2d) 334 (1942), (1943) 8 MO. L. REV. 205. Compare Connelly v. Kaufmann & Baer Co., 349 Pa. 261, 37 A. (2d) 125 (1944) where the facts were almost the same. The court rejects the moral considerations which appealed to the Indiana court, but holds there could be liability because the duty owed to invitees includes the duty of proper operation of escalators, and "The proper management of such operation necessarily involved stopping the machine if emergency required." *Id.* at 265, 37A. (2d) 125, 127. In Zickefoose v. Thompson, 347 Mo. 579, 148 S. W. (2d) 784 (1941), *on retrial* 237 Mo. App. 690, 157 S. W. (2d) 259 (1941), defendant whose train blocked the crossing was held for failure of a brakeman to shout a warning to an approaching motorist seen to be unaware of danger. Recovery was put on the humanitarian rule, and there was evidence of failure to give signals before the train occupied the crossing but the reasoning of the court seems to minimize the importance of this "primary negligence."

condition was not negligent defendant was held for its failure to stop the escalator within a reasonable time after the injury. The court thought there was an affirmative duty to rescue because plaintiff was defendant's invitee and because the injury resulted from the use of an instrumentality under its control. Authorities resting the duty on such a basis have been equivocal, though commentators are united in thinking it should be imposed.[101]

Where a defendant is in business and prepares a part of his premises for the accommodation of those members of the public who come there for a purpose connected with that business, it is becoming increasingly doubtful whether defendant can discharge his duty to such invitees by simply making a dangerous condition of the premises perfectly obvious. It is true that an ordinary arrangement of the premises such as a step, a revolving door, or a ramp,[102] is not of itself negligent even though it may ocassionally cause injury. But if there is something about the arrangement or the condition of it which may be thought unreasonably dangerous, courts are likely to find negligence even though the condition is perfectly obvious.[103]

The duty owed by a landowner, to a policeman, fireman, or other officer, entering the premises in the course of his duty has been the subject of divergent attitudes in two cases. The Minnesota court insists that a fire inspector is a licensee only and may not recover for injuries caused by the defective nosing on the step of a stairway not used by or maintained for the public but only for employees to bring goods from the basement storeroom to the ground floor.[104]

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101. See PROSSER, TORTS (1941) 193 and note 30.

102. Cameron v. Small, 182 S. W. (2d) 565 (Mo. 1944); Weidanz v. May Dep't Stores Co., 156 S. W. (2d) 44 (Mo. App. 1941); Connelly v. Kaufmann & Baer Co., 349 Pa. 261, 37 A. (2d) 125 (1944) (escalator).

103. Walgreen-Texas Co. v. Shivers, 137 Tex. 493, 154 S. W. (2d) 625 (1941) (defendant had placed its counter stools on a raised platform instead of on the floor); Weingarten v. Brockman, 134 Tex. 451, 135 S. W. (2d) 698 (Comm. App. 1940) (place adjoining sidewalk a little raised); Delmore v. Polinsky, 132 Conn. 28, 42 A. (2d) 349 (1945) (stairs leading from main floor to basement protected only by newel posts). See Malone, *Contributory Negligence and the Landowner Cases* (1945) 29 MINN. L. REV. 61, 83, 87. *Cf.* Safeway Stores v. Whitehead, 190 Okla. 464, 125 P. (2d) 194 (1942). But *cf.* Weidanz v. May Dep't Stores Co., 156 S. W. (2d) 44 (Mo. App. 1941).

Of course the obvious nature of a defect may have a bearing on contributory negligence, but in the cases cited above the plaintiff's conduct seems to be evaluated just about as is that of a user of the highway where the duty of the municipality extends to even the most obvious dangerous conditions. Particularly helpful analysis of the contributory negligence factor in landowner cases and its interrelationship with the duties of the defendants is found in Malone, *supra.*

In Cassanova v. Paramount-Richards Theatres, 204 La. 813, 16 So. (2d) 444 (1943), there is a well-considered treatment of the duties of movie theatre owners to their patrons. See also Malone, *supra*, at 84. Recent trends in Texas landowner cases are outlined in Comment (1944) 22 TEX. L. REV. 489.

104. Mulcrone v. Wagner, 212 Minn. 478, 4 N. W. (2d) 97 (1942). While, as the court

The Appellate Court of Illinois, on the other hand, has handed down a progressively reasoned opinion allowing recovery for the death of a policeman who was run down while on tracks in a passenger station yard by a train backed at negligent speed without lights or lookout. The decedent had just apprehended a thief after chasing him onto railroad property, and was taking the thief under arrest to the police station. While the court was willing to let a jury find defendant's conduct wilful or wanton, it ruled that deceased was not a trespasser or mere licensee but was on defendant's premises as of right and that defendant was therefore obligated to the use of reasonable care towards him.[105]

A similar divergence of view is found in two cases where the so-called "attractive nuisance" doctrine was invoked. In *Thompson v. Reading Company*,[106] a turntable case, the Pennsylvania court in a thoughtful opinion concludes that the bases of the doctrine are likelihood of presence and of harm, and the value of a child's life to the community. The court rejects "allurement" as a mechanical test, though it recognizes that it may properly be a factor in determining the likelihood that children will come and be hurt. The Kentucky court, on the other hand, apparently still insists on "allurement." [107]

(c) *Proof of the breach.* Where there is direct evidence of what the parties did, any questions of credibility are usually for the jury. In certain situations, however, artificial rules have developed, which require something more in the way of proof than would be enough to satisfy the ordinary process of logical reasoning. Some jurisdictions even today, for instance, have a special rule where a passenger is injured by the unusual jerk or jolt of the car in which he is riding. The plaintiff who can only describe the jerk by using adjectives and by testifying that it broke his hand grip on a seat and threw him from a standing position to the floor cannot even get to the jury.[108] There

points out, the facts of the case made it clearly distinguishable from Meiers v. Fred Koch Brewery, 229 N. Y. 10, 127 N. E. 491 (1920), yet the reasoning of the *Meiers* case is also rejected as deviating from the dominant rule.

105. Ryan v. Chicago & N. W. Ry., 315 Ill. App. 65, 42 N. E. (2d) 128 (1942). The court adopts the analysis presented by the opinion in Meiers v. Fred Koch Brewery, 229 N. Y. 10, 127 N. E. 491 (1920), and by Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right* (1921) 69 U. OF PA. L. REV. 142, 237, 340. In the *Meiers* case a fireman entering on premises to extinguish a fire was injured by falling into an unlighted and unguarded coal hole extending half way across a driveway, upon business premises, "prepared for the use of those who had business with the defendant." Defendant was held bound to use care to keep such parts of such premises reasonably safe, and this duty was owed to the fireman.

106. 343 Pa. 585, 23 A. (2d) 729 (1942). The court relies on and quotes at length some very excellent passages from the PENNSYLVANIA ANNOTATIONS TO THE RESTATEMENT OF THE LAW OF TORTS (1938).

107. Jones v. Louisville & Nash. R. R., 297 Ky. 197, 179 S. W. (2d) 874 (1944).

108. Coyle v. Pittsburgh Ry., 149 Pa. Super. 281, 27 A. (2d) 533 (1942); Monahan v. Pittsburgh Ry., 149 Pa. Super. 283, 27 A. (2d) 534 (1942); Hawkins v. Pittsburgh Ry., 146 Pa. Super. 185, 22 A. (2d) 73 (1941).

must be corroboration, such as a showing that other passengers, too, were thrown, and it is not enough corroboration to state that the plaintiff's own injury must have been caused "by a lot of force," and that all the passengers "sort of crumpled." [109] It will be enough, however, if the plaintiff can link the unusual jerk with some other specific negligence in operating the car, such as excessive speed around a curve.[110] The policy behind such a rule is protection against false claims too easily fabricated.[111] But the danger of such a policy is that meritorious claims will be penalized through mistrust in the ability of judges and juries to find the truth, and some courts have thought this the greater evil.[112]

Where proof of what occurred is supplied circumstantially, the governing rule is easy enough to formulate. It is stated in terms of mathematical precision. "If the plaintiff cannot show the possibility of a conclusion of defendant's negligence supported by a clear preponderance of its likelihood . . . and excluding other probabilities just as reasonable . . . the plaintiff should not be permitted to go to the jury."[113] Difficulty comes from the fact that anything even remotely adumbrating accurate statistical knowledge about the relative probabilities in even the most commonly recurring situations is completely lacking. Of course some generalizations would command wide, even universal, acceptance. These are the judgments of "common sense."

109. Hawkins v. Pittsburgh Ry., 146 Pa. Super. 185, 22 A. (2d) 73 (1941).

110. Tucker v. Pittsburgh Ry., 153 Pa. Super. 63, 33 A. (2d) 441 (1943).

111. See Cardozo, Ch. J., in Murphy v. Steeplechase Amusement Co., 250 N. Y. 479, 482, 166 N. E. 173, 174 (1929) ("He cannot help himself to a verdict . . . by the . . . facile comment that it threw him with a jerk.")

A note to the Pennsylvania cases discussed above, notes 108, 109, 110, (1944) 48 DICK. L. REV. 109, suggests that with present day transportation and its speed a certain amount of jerking and jolting is unavoidable and to be expected so that any more lenient rule would make it impossible for street railways to operate. But this confuses standard of conduct and proof of the breach. The substantive law should and does reflect the policy mentioned, and the carrier will be held only for extraordinary jerks and jolts. The rule in question is concerned with the measure of proof required to make out what is admittedly a wrong. In that respect it is like other rules found elsewhere in our law. See discussion of synthetic (or quantitative) rules in WIGMORE, EVIDENCE (3d. ed. 1940) §§ 2030–73.

112. Belledeau v. Connecticut Co., 110 Conn. 625, 149 Atl. 127 (1930).

113. Nash v. Raun, 149 F. (2d) 885, 888 (C. C. A. 3d, 1945). This rule is to be differentiated from that applied by the trier of facts. The court must determine whether the existence of fact A (which has been testified to) is more probably than not, *as a generalization*, attended by the coexistence of fact B (which is sought to be inferred). If the court makes this initial determination in favor of the legitimacy of the inference, the issue goes to the jury to determine whether upon the preponderance of the evidence *in this case* they find (1) that fact A *did exist* and, if so, (2) whether fact B *did exist* (again, *in this case*).

The rule dealt with here is that by which the court tests the sufficiency of circumstantial evidence. It is often expressed thus, where from the facts most favorable to plaintiff the nonexistence of the fact to be inferred is just as probable as its existence, the conclusion that it exists is a matter of speculation, surmise, and conjecture and a jury will not be permitted to draw it. See PROSSER, TORTS (1941) 292.

But even here it is not safe to forget how often the science of the morrow makes the commonsense of the day seem foolish. Moreover the area is vast wherein thoughtful men who accept today's common sense would either disagree or refuse to guess on which side of the line the greater probability lies. All that has been said has not, quite properly, prevented the law from constantly coming to conclusions about circumstantial proof. But it does mean that the authoritative language of nice and scientific precision in which such conclusions are cast is after all only the language of delusive exactness. And it does mean that throughout the field of circumstantial proof there is not a little room for considerations of policy and expediency to play a part in choosing between two very fallible and equally undemonstrable generalizations about the balance of probability.

As a general rule, the more detailed and specific are the given facts, the more sure-footed are our judgments as to the probability of the existence of other facts, which we are asked to infer, and the less room there is apt to be for those judgments to be dictated by the desirability, for one reason or another, of an end result. Yet there is nearly always some room at least for viewing the claimed inferences sympathetically or otherwise.[114]

Res ipsa loquitur is not usually invoked until a court is asked to draw inferences from circumstances where many of the important given facts are pretty general.[115] And where that is the case there is often the widest latitude for choosing one premise or another concerning the probabilities of negligence. So far as accountability to any genuinely scientific standards go, it is a matter of dealer's choice, and the court is the dealer. In this field it is far more important to see how and why the court chooses its premise, than to note the arid fact that the final conclusion is cast in the form of a syllogism which is just like that in any other case of circumstantial evidence.[116]

As usually stated, the first condition necessary for the application of the principle of *res ipsa loquitur* is that the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence.[117] An attempt to follow out the literal implications of this re-

114. This is well illustrated in Dillon v. Rockaway Beach Hospital and Dispensary, 284 N. Y. 176, 30 N. E. (2d) 373 (1940), where though the New York Court of Appeals' conclusions seem reasonable enough, the trial court and the Appellate Division had both taken a narrower view of the evidence. Another illustrative contrast is that between Morrison v. Le Tourneau Co. of Ga., 138 F. (2d) 339 (C. C. A. 5th, 1943) and Eickhoff v. Beard-Laney, Inc., 199 S. C. 500, 20 S. E. (2d) 153 (1942).

115. In Eickhoff v. Beard-Laney, Inc., 199 S. C. 500, 20 S. E. (2d) 153, (1942) the court takes pains to point out that South Carolina does not accept the doctrine of res ipsa loquitur.

116. But see PROSSER, TORTS (1941) 291–302; Prosser, *The Procedural Effect of Res Ipsa Loquitur* (1936) 20 MINN. L. REV. 241, 258. Of course examples can be chosen which emphasize the fact that the inference is sometimes one that all men would draw.

117. PROSSER, TORTS (1941) 295.

quirement is seen in two recent California cases. In *Honea v. City Dairy*,[118] a milk bottle broke without apparent cause and injured the plaintiff who was carrying it. The decision turned on whether the accident would ordinarily occur without negligence. The court was satisfied that a jury could infer that the bottle was defective; but since there was no basis for saying that the defect was more likely to have been reasonably preventable or discoverable than not, there was no case for the jury. In *Escola v. Coca Cola Bottling Company*,[119] a bottle burst just as unaccountably and again the decision depended upon the application of the rule under discussion. The court thought the bottle must have been overcharged or defective. As to the possibility of overcharge, it was common knowledge that this would be negligent. Common knowledge would not indicate whether a defect would probably be reasonably preventable or discoverable, but in this case there was detailed testimony by the bottle manufacturer showing how its tests for defects were almost fool-proof. This, the court thought, showed that the bottle probably had no *undisclosed* defects when delivered to defendant, and defects occurring after delivery would probably be discoverable. So there was a rational basis for finding that if a defect caused the trouble it was a defect which defendant should have found.

These cases represent a conscientious effort to enter upon the quest for probabilities which the statement of the rule literally implies. They point up several things: (1) that in the vast majority of decided cases the court determines whether the *res ipsa loquitur* principle applies without having before it any such elaborate showing of the processes and probabilities involved as are to be found in the *Escola* case;[120] (2) that the kind of evidence which goes to make such a showing is apt to be peculiarly accessible to defendant; and (3) that even in the *Escola* case this showing covered only one aspect of the matter, and the court had to invoke common knowledge that bottles usually do not get overcharged without negligence. This may, to be sure, be the case. The overcharge probably points to something going wrong with the machine or its operation. But here again, without the benefit of expert knowledge, it is bold to assume that such a flaw would more probably than not be preventible by due care. What is said is not in criticism of the

118. 22 Cal. (2d) 614, 140 P. (2d) 369 (1943).

119. 24 Cal. (2d) 453, 150 P. (2d) 436 (1944).

120. Of course the court had already decided that from common knowledge alone it could not be told whether defects in bottles probably showed negligence. In such a case it was natural for the parties to make a showing like this and for the court to rest its decision upon it. Contrast the less resilient attitude of the Maine court which, when faced with the contention that scientific advances had rendered res ipsa loquitur appropriate in airplane cases, replied that the courts are powerless to change the doctrine as "This would change a rule of evidence into a rule of public policy." Deojay v. Lyford, 139 Me. 234, 241, 29 A. (2d) 111, 114 (1942).

California decisions. Courts should and do get all the light they can on the questions of probability. They are not likely to invoke the rule unless there seems a fair chance that the probabilities are as they assume. But the initial decision must often be made without much light, and the real problems are who should have the burden of shedding whatever light is available, and whether defendant's enterprise or its victims should bear the cost of injury from unexplained accidents of the kind in question when there is no light to shed. The California courts have been keen to recognize this and to invoke the doctrine without much regard to the matter of probability where the policy of the situation was felt to demand it. In *Judson v. Giant Powder Company* [121] the court applied the doctrine to an unexplained explosion of a powder factory. Expert evidence was offered that such explosions do not occur without negligence. The court accepted the evidence but disparaged its value and necessity (though it had the most direct bearing on any issue of probability), remarking that since the making of dynamite was lawful the court might assume that if dynamite is properly handled explosions will not probably occur.[122] And in a very recent case where defendant claimed that the doctrine did not apply to an injury suffered under anaesthetic, the court replied "If this were the state of the law of negligence, the courts, to avoid gross injustice, would be forced to invoke the principles of absolute liability."[123]

121. Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020 (1895).

122. In Koskela v. Albion Lumber Co., 25 Cal. App. 12, 142 Pac. 851 (1914), defendant's employee was killed while being taken in a travelling chute from shore to ship, when there was an unexplained break in the tackle. The court thought this showed a probability of negligence because "It is inconceivable that defendant would have adopted these means had they supposed that in the ordinary course of their operation, with proper care, such accidents as the one here was likely to occur." *Id.* at 22, 142 Pac. 855. A moment's reflection shows the fallacy of the statement and that in the *Judson Powder Co.* case. Industries constantly adopt devices that are not yet foolproof, witness the airplane. Indeed if we are to progress, that must be the case. The reasoning of the court but ill conceals the fact that liability is being imposed on the defendant for unexplainable accidents without any real knowledge at all as to the probabilities of negligence.

A high watermark of judicial candor on this point is to be found in Kleinman v. Banner Laundry Co., 150 Minn. 515, 517–8, 186 N. W. 123, 124 (1921) where in a boiler explosion case, Dibbell, J., said "Boilers sometimes explode. Comparing the number of explosions with the extent of the use of boilers, explosions are not frequent. If they are kept in proper condition and repair, and if they are operated properly explosions are unusual. Whether the res ipsa doctrine which permits an inference of negligence from the fact of an explosion, should apply, is largely a question of how justice in such cases is most practically and fairly administered. There is nothing legally illogical in permitting the inference to be drawn. Usually the party injured is without information upon which he may with certainty allege the exact cause, and is without direct proof. Perhaps the exact cause is incapable of ascertainment. The actual proof, if any, is with the party having the management of the instrumentality. These are practical considerations. We think the jury should have been permitted to draw an inference of negligence of the laundry company from the occurrence of the explosion. Though the holding may put us with the minority, we are content with it."

123. Ybarra v. Spangard, 25 Cal. (2d) 486, 490, 154 P. (2d) 687, 689 (1944).

Other recent bursting bottle cases indicate a trend in favor of applying the doctrine where its other conditions are met, but the former split of authority continues.[124] In the case of unexplained airplane accidents there is still a marked reluctance to apply the principle,[125] though commentators continue to insist that aviation has now progressed far enough so that it is fair to say accidents generally do not happen without negligence.[126] For the rest, the rule seems to have been applied in situations which fall well within precedent.[127]

A second requirement of the rule is that the injury must have been caused by an agency or instrumentality within the exclusive control of the defendant.[128] As usually applied, this simply means that there must be a rational basis for finding that the negligence (inferable from the type of accident) is that of defendant and not of another. In the bursting bottle cases, for example, plaintiff must know that nothing untoward happened to the bottle between the time it left defendant's custody and the time it exploded.[129] And plaintiff will fail if this proof does not cover the vicissitudes of the bottle during part of that time.[130]

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124. The doctrine was applied in Bradley v. Conway Springs Bottling Co., 154 Kan. 282, 118 P. (2d) 601 (1941); Ortego v. Nehi Bottling Works, 199 La. 599, 6 So. (2d) 677 (1942); Lanza v. De Ridder Coca Cola Bottling Co., 3 So. (2d) 217 (La. App. 1941); Berkendorfer v. Garrett, 143 S. W. (2d) 1020 (Tex. Civ. App. 1940). *Contra*: Berkens v. Denver Coca Cola Bottling Co., 109 Colo. 140, 122 P. (2d) 884 (1942). These cases all dealt with explosions. In Coralnick v. Abbotts Dairies, Inc. 337 Pa. 344, 11 A. (2d) 143 (1940) the doctrine was not applied where a milk bottle simply broke.

Several recent notes treat the question: (1943) 31 CALIF. L. REV. 608; (1943) 42 MICH. L. REV. 536; (1944) 17 So. CALIF. L. REV. 330.

125. Morrison v. Le Tourneau, 138 F. (2d) 339 (C. C. A. 5th, 1943); Deojay v. Lyford, 139 Me. 234, 29 A. (2d) 111 (1942); Smith v. Whitley, 223 N. C. 534, 27 S. E. (2d) 442 (1943), (1944) 22 N. C. L. REV. 160, (1945) 30 IOWA L. REV. 232; Wilson and Anderson, *Liability of Air Carriers* (1942) 13 J. AIR. L. & COMM. 281; *cf.* Towle v. Phillips, 180 Tenn. 121, 172 S. W. (2d) 806 (1943).

126. Goldin, *The Doctrine of Res Ipsa Loquitur in Aviation Law* (1944) 18 So. CALIF. L. REV. 15; *cf.* Nysted v. Wings, Ltd. (1942) 3 D. L. R. 336 (K. B. Manitoba).

127. Examples: Dittiger v. Isal Realty Corp., 290 N. Y. 492, 49 N. E. (2d) 980 (1943) (falling ceiling); Geo. Foltis, Inc. v. New York, 287 N. Y. 108, 38 N. E. (2d) 455 (1941) (break in watermain); Etheridge v. Etheridge, 222 N. C. 616, 24 S. E. (2d) 477 (1943), 21 N. C. L. REV. 402 (unexplained leaving of road by auto, skidding, blowout, and puncture being eliminated); Washington L. & T. Co. v. Hickey, 137 F. (2d) 677 (App. D. C. 1943) (ventilator falling from building).

128. PROSSER, TORTS (1941) 295.

129. See cases cited in note 124 *supra*. Other recent decisions involving a similar application of this requirement are Washington L. & T. Co. v. Hickey, 137 F. (2d) 677 (App. D. C. 1943); Nickisch v. Madison—34th St. Corp., 185 Misc. 25, 55 N. Y. S. (2d) 767 (City Ct. N. Y. 1944) *aff'd* 185 Misc. 108, 55 N. Y. S. (2d) 770 (1st Dep't 1945). In each of these cases what was done wrong happened while defendant's employee was cleaning premises. The opinions in both cases are well reasoned.

130. Dunn v. Hoffman Bev. Co., 126 N. J. L. 556, 20 A. (2d) 352 (1941). Other cases where the court held there was not sufficient control are Gibbs v. General Motors Corp., 350 Mo. 431, 166 S. W. (2d) 575 (1942) (brakes failed to work properly after plaintiff had

But in some situations, something less than this logical requirement is insisted on. Where plaintiff shows he was a passenger injured when his common carrier collided with another, one line of cases gives him the benefit of *res ipsa loquitur* against the carrier but not against the third person though the result can scarcely be justified by the probabilities of the situation and the control by each defendant is only partial. The District of Columbia has recently adopted this rule by a decision which reviews the divergent authorities.[131] But the outstanding decision on the question of control is *Ybarra v. Spangard.*[132] There plaintiff had an appendectomy. After the operation it was found that he had received a traumatic injury to his shoulder while under anesthetic. He sued all the nurses and doctors (six of them) who attended the operation and on the showing described, relied on *res ipsa loquitur*. The California court stressed the new flexibility in the requirement of control, the exceptional nature of the circumstances and the plaintiff's utter inability to identify the wrongdoer, and put the burden of exculpation on defendants. This decision shows real judicial statesmanship.

The procedural effect to be given to the doctrine when it applies has been the subject of a recent New York decision which appears to adopt the majority rule authoritatively for that state, and to end the uncertainty which had existed there. *Geo. Foltis v. New York* [133] states

car two months and had driven it 1,530 miles); Highland Golf Club v. Sinclair Refining Co., 59 F. Supp. 911 (N. D. Iowa, 1945) (fire started when defendant's employee was delivering gasoline to plaintiff); McBride v. Paluxy Asphalt Co., 164 S. W. (2d) 32 (Tex. Civ. App. 1942) (deceased loading truck with defendant's loading equipment when truck exploded); Watkins v. Taylor Furnishing Co., 244 N. C. 674, 31 S. E. (2d) 917 (1944), (1945) 23 N. C. L. REV. 376 (magic eye door); Mineo v. Rand's Food Shops, Inc., 32 N. Y. Supp. (2d) 23 (City Ct. N. Y. 1941) (restaurant stool); Easson v. London & N. E. R. R. [1944] K. B. 421 (opening of door in corridor train).

131. Capital Transit Co. v. Jackson, 149 F. (2d) 839 (App. D. C. 1945). A note to the decision below appears in (1944) 33 GEO. L. J. 119.

132. 25 Cal. (2d) 486, 154 P. (2d) 687 (1944), (1945) 25 B. U. L. REV. 295; (1945) 33 CALIF. L. REV. 331; (1945) 18 So. CALIF. L. REV. 310.

133. 287 N. Y. 108, 38 N. E. (2d) 455 (1941), (1945) 17 ST. JOHN'S L. REV. 117.

A rule resembling res ipsa loquitur is applied in cases where a bailor can show delivery of the thing bailed in good condition, and failure to redeliver it, or redelivery in damaged condition. He then makes out a prima facie case of negligence against his bailee and the latter must come forward with explanations. But here, as in res ipsa loquitur, courts differ as to the procedural effect of such a showing. Some courts hold that if the bailee simply shows the goods were lost by fire or theft, he is entitled to a directed verdict unless the bailor then proves negligence. Castorina v. Rosen, 290 N. Y. 445, 49 N. E. (2d) 521 (1943). Others—probably a majority—hold that defendant must go further and show that the fire or theft occurred without negligence on defendant's part. Berkowitz v. Pierce, 129 N. J. L. 299, 29 A. (2d) 552 (Sup. Ct. 1945); Huie v. Lay, 170 S. W. (2d) 823 (Tex. Civ. App. 1943) (bailor entitled to judgment n.o.v. where no explanation of fire was offered); Zanker v. Cedar Flying Service, Inc., 214 Minn. 242, 7 N. W. (2d) 775 (1943) (Charge putting risk of non-persuasion on defendant, upheld). An excellent treatment of recent cases is found in a note (1944) 22 N. C. L. REV. 252. Here the presumption or rule is grounded frankly on policy and it clearly appears that the question of how much procedural effect

that even in the absence of any evidence from defendant, plaintiff will not be entitled to a directed verdict unless his prima facie proof is so strong as to leave no room for a reasonable inference favorable to defendant. But the facts which bring a case within the principle of *res ipsa loquitur* afford an inference of negligence unless they are explained away.

(d) *Causation.* As in the case of any other issue, proof of cause is often circumstantial. Where it is, as we have seen, there is sometimes a great deal of latitude in evaluating the sufficiency of evidence. This is brought into rather bitter relief by the unsympathetic rejection of inferences, in *Morrison v. Le Tourneau*, which an able writer has shown to be well within the realm of the reasonable.[134]

This case also deals with a much vexed and it seems to me unnecessarily confused aspect of legal cause, the injury caused by the unlicensed operator. Of course a licensing statute may be purely a revenue measure and not meant at all to protect the safety of members of the public. But many licensing statutes have as a purpose "the protection of the general public against injury . . . [by] unskilled or unlearned practitioners . . . [or operators, as the case may be]." [135] When a man who is unlicensed causes injury in the course of doing something for which such a license is required there can be little question that an act prohibited by a safety statute has caused the injury. To some that ends the matter.[136] But others have been troubled by the fear that the defendant may in fact have been highly skilled, though unlicensed, or that there may have been no connection at all between any possible want of skill and the injury, so that the injury did not come about through the evil the statute was aimed at. Because of these possibilities some courts in effect deprive plaintiff of any benefit of the statute at

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to give it is purely a matter of how much it is felt the policy requires the rule to accomplish. It is a matter of adjusting a judicial handicap. In res ipsa loquitur cases policy is blended with and often obscured by consideration of real or supposed balances of probability. So there are (at least) two variable factors which might effect the strength which will be attached to a showing made under the rule. Sometimes the problem is oversimplified by losing sight of the very considerable policy factor.

An interesting variation of the rule as to bailments is suggested in Elliott v. N. Y. Rapid Transit Corp., 293 N. Y. 145, 56 N. E. (2d) 86 (1944), where the court states that a prima facie case of negligence against a carrier is made out by showing its acceptance of a passenger in a very drunk but otherwise undamaged condition, and his death by falling from the elevated trestle to the street before carrier custody was terminated.

134. 138 F. (2d) 339 (C. C. A. 5th, 1943) criticized in Note, (1944) 38 ILL. L. REV. 326.

135. Brown v. Shyne, 242 N. Y. 176, 180, 151 N. E. 197, 198 (1926).

136. This point of view is clearly spelled out in Johnson v. Boston and M. R. R., 83 N. H. 350, 143 Atl. 516 (1928). See also Lowndes, *Civil Liability Created by Criminal Legislation* (1932) 16 MINN. L. REV. 361, 373. A recent reflection of this point of view is found in Bushnell v. Telluride Power Co., 145 F. (2d) 950 (C. C. A. 10th, 1944) (setting fire without permit).

all.[137] Both views seem extreme. The great surgeon from another state who performs an operation while on his vacation in the Adirondacks should not be held for malpractice merely for want of a New York license. On the other hand it is more than reasonable to suppose that the unlicensed, as a class, are deficient in the particular skill for which a license is required. And it is certainly true that when the unskilled attempt what it takes skill to do, some of the intangible factors that go to make up lack of skill are far more likely than not to have contributed to any mishap that occurs. Frequently they do this in ways that it is hard to prove; moreover what evidence there is in the matter is likely to be in the defendant's hands. Both probability and policy, therefore, call for the rule that breach of a licensing statute, if it is negligence to the plaintiff at all, should be prima facie evidence that it is the "proximate cause" of any injury that ensues.[138]

Many problems that are sometimes treated as matters of proximate cause have been dealt with above under the head of duty where, as Dean Green and others have shown, they more appropriately belong.[139] Questions whether the intervening acts of third persons "break the chain of causation" between defendant's wrong and plaintiff's injury, are, for instance likely to be questions of the extent of defendant's duty.[140] Nevertheless some courts continue to insist on discussing these problems in terms of legal cause. Two recent decisions illustrate the difficulties that result. In *Neering v. Illinois Central Railroad*,[141] the court had to decide whether a railroad must take affirmative steps to protect women passengers from assault in a lonely waiting room where hoboes were known to congregate. The court found there was the duty because of the relationship between the parties and the likelihood of

137. See Morrison v. Le Tourneau, 138 F. (2d) 339 (C. C. A. 5th, 1943) "There is argument that the possession of only a pilot's license is evidence, or the basis of a presumption, that the possessor is lacking in skill as a pilot. This does not *necessarily* follow. He *may* not have chosen to take further examinations although he *might* have been abundantly qualified for commercial or transport license for aught the record shows. . . ." *Id.* at 341 (Italics supplied). Why does the court insist in talking about *possibilities* which are patently less than probable? See Smith v. Whitley, 223 N. C. 534, 27 S. E. (2d) 442 (1943). The classic opinion is that in Brown v. Shyne, 242 N. Y. 176, 151 N. E. 197 (1926).

138. Compare Martin v. Herzog, 228 N. Y. 164, 126 N. E. 814 (1920) (fact that unlighted vehicle was struck by another in the dark is evidence that the collision occurred *because* of the lack of lights).

139. GREEN, RATIONALE OF PROXIMATE CAUSE (1927). The authorities are collected and the matter is treated with excellent clarity in PROSSER, TORTS (1941) c. 8.

140. But sometimes the problem is one of whether to limit defendant's liability for a breach of duty. A typical example is the problem of the injury negligently caused by defendant but aggravated by a doctor's malpractice. Ash v. Mortensen, 24 Cal. (2d) 654, 150 P. (2d) 876 (1944). The decision below, reversed on appeal, is noted in (1944) 17 So. CALIF. L. REV. 328. *Cf.* also City of Port Arthur v. Wallace, 141 Tex. 201, 171 S. W. (2d) 480 (1943), (1944) 22 TEX. L. REV. 240; and the Pennsylvania rule referred to in note 91, *supra*.

141. 383 Ill. 366, 50 N. E. (2d) 497 (1943).

harm. It then repeated exactly the same inquiry into likelihood to see whether injury from such an assault was the proximate result of breach of the duty. Since the conclusion in the two inquiries was identical, no harm was caused except confusion. But in another decision the same court shows that confusion can be a very serious harm. In *Merlo v. Public Service Company*,[142] defendant's high tension wires over the highway had been allowed to sag and become uninsulated. Deceased, the employee of a contractor working on the highway, was electrocuted when the boom of an excavator fouled the wire. Defendant was held negligent because "men would likely be working in the streets with modern machinery, such as was used in this instance . . . ," [143] but this negligence was not the legal cause of the death because "the crane operator's negligence was [not] the natural and probable consequence of the lack of insulation and the sagging wires." [144] These decisions are the subject of able critical comment by Dean Green.[145]

Impediments to Recovery Because of Plaintiff's Own Conduct or Relationships

As long as fault is the guiding principle in accident law, the most satisfactory way to treat plaintiff's contributory fault is by applying the principle of comparative negligence. Juries probably do just about this when cases get to them, in spite of the instructions,[146] and the office of a comparative negligence statute should be fully as much to assure that cases get to the jury as to permit language of comparative negligence to find its way into the charge. For that reason it is disappointing indeed to find that one of the few states to have a comparative negligence statute still rules a plaintiff out of court as a matter of law in just about the same situations as it did before the statute.[147]

142. 381 Ill. 300, 45 N. E. (2d) 665 (1942). Contrast Bosjnak v. Superior Sheet Steel Co., 145 Ohio St. 538, 62 N. E. (2d) 305 (1945).

143. Merlo v. Public Service Co., 381 Ill. 300, 315, 45 N. E. (2d) 665, 674 (1942).

144. *Id.* at 318, 45 N. E. (2d) at 675.

145. Green, *Illinois Negligence Law IV* (1945) 40 ILL. L. REV. 1, 11, 12, 28; Green, *Merlo v. Public Service Co.—A study in Proximate Cause* (1943) 37 ILL. L. REV. 429.

146. See Malone, *Contributory Negligence and the Landowner Cases* (1945) 29 MINN. L. REV. 61, 62–66; James, *Last Clear Chance: A Transitional Doctrine* (1938) 47 YALE L. J. 704, 721.

147. Peters v. Chicago M. St. P. & P. R. R., 230 Wis. 299, 283 N. W. 803 (1939); Geyer v. Milwaukee E. R. & L. Ry., 230 Wis. 347, 284 N. W. 1 (1939); Patterson v. Chicago, St. P., M. & O. Ry., 236 Wis. 205, 294 N. W. 63 (1940). Under the statute plaintiff may recover only if his negligence "was not as great as the negligence" of the defendant. WIS. STAT. (1943) § 331. 045. The technique of these cases is to hold that as matter of law plaintiff's negligence was at least equal to defendant's. Apparently, however, in cases where there would not formerly have been a directed verdict on the issue, the court is reluctant to formulate rules of thumb as to when faults are equal, and this is commendable. Campanelli v. Milwaukee Electric Railway and Transport Co., 242 Wis. 505, 8 N. W. (2d) 390 (1943). 27 MARQ. L. REV. 219.

In states which have no such statute, modifications of contributory negligence have come through rules which eliminate it as a defense entirely in certain types of situations.[148] One such development has recently taken place in Connecticut. It is now established in that state that contributory negligence is no defense to an action for a nuisance where the very condition which constitutes the nuisance was created intentionally (though with no intent to cause injury).[149] Such a nuisance is called "absolute." Thus where a driveway was constructed so as to cause a depression in the sidewalk dangerous to travelers,[150] where a cable was stretched across a highway,[151] or where a diving board was installed in a public park over a pond whose shallowness was dangerously concealed,[152] there was a nuisance to which contributory negligence was no defense. But not all nuisances are "absolute." They are not if the danger arises from the negligent manner in which the intended conditions are created or maintained, instead of from those conditions themselves.[153] And to nuisances thus grounded on negligence, contributory negligence is a defense. So far as I know this rule is unique. The grandfather of all contributory negligence cases[154] represented precisely the situation wherein the Connecticut court now expressly says that contributory negligence is unavailable, namely, an obstruction placed in the highway. This development has the merit of cutting down the defense of contributory negligence. But if that should not be regarded as a merit, the rule might be a little hard to justify.

148. An interesting development, which has taken place largely before the war, concerns the defenses of contributory negligence and assumption of risk in automobile guest cases. See Rice, *The Automobile Guest and the Rationale of Assumption of Risk* (1943) 27 MINN. L. REV. 323, 429; Campbell, *Host-Guest Rules in Wisconsin* (1943) WIS. L. REV. 180; Note (1943) 29 IOWA L. REV. 115. Under some guest statutes at least contributory negligence is no longer a defense; but assumption of risk is. Garrity v. Mangan, 232 Iowa 1188, 6 N. W. (2d) 292 (1942) (plaintiff who rides with driver known to be drunk assumes risk). See also Malone, *Contributory Negligence and the Landowner Cases* (1945) 29 MINN. L. REV. 61.

149. Beckwith v. Town of Stratford, 129 Conn. 506, 29 A. (2d) 775 (1942).

150. *Ibid.*

151. Hill v. Way, 117 Conn. 359, 168 Atl. 1 (1933). Actually a different view was taken in that case. But to the extent that it was, the decision was expressly overruled by Beckwith v. Town of Stratford, 129 Conn. 506, 29 A. (2d) 775 (1942), cited *supra* note 147.

152. Hoffman v. City of Bristol, 113 Conn. 386, 155 Atl. 499 (1931).

153. This is all explained in the opinion in Beckwith v. Town of Stratford 129 Conn. 506, 29 A. (2d) 775 (1942). The street sweeper proceeding against traffic with insufficient lights on a dark night, was given as an example of a nuisance which is not absolute. See Warren v. City of Bridgeport, 129 Conn. 355, 28 A. (2d) 1 (1942).

154. Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. R. 926 (K. B. 1809); Bohlen, *Contributory Negligence* (1908) 21 HARV. L. REV. 233. The leading modern case is McFarlane v. Niagara Falls, 247 N. Y. 340, 160 N. E. 391 (1928). There the defect in the sidewalk was due to a flaw in its construction and the Connecticut court distinguishes it on that ground. But there is nothing in the *McFarlane* decision to suggest that the New York court would draw any such distinction. On the contrary it cites with apparent approval Butterfield v. Forrester, *supra*.

Though the elimination of contributory negligence as a defense to actions based on wilful or wanton misconduct had become quite general, a recent Pennsylvania case adopts the rule for the first time in that state.[155] Because of the way Pennsylvania has extended the concepts of what is wilful or wanton in cases involving injuries to trespassers, it is a little uncertain just what the consequences of this step will be, particularly in the field of last clear chance (a hitherto forbidden pasture in Pennsylvania).[156]

The bar of contributory negligence is often avoided by invoking the doctrine of the last clear chance. Here, too, there have been notable developments. In *Chesapeake & Ohio Railway v. Pope*,[157] a mail carrier with his bag on his back negligently tried to cross in front of an approaching train. In spite of his carelessness he would have reached safety had not his foot caught in a depression on the crossing which defendant was bound to keep in repair. The train crew had no reasonable opportunity to avoid running over him. He was allowed to recover, nevertheless, on the ground that the defect in the crossing was the sole proximate cause of his injury. This distortion of reasoning brings about a result like that in the famous *Loach* [158] case which may perhaps be gaining ground in America.[159] There, it will be recalled, the defendant railroad company was held liable, despite contributory negligence, because the trolley car's defective brakes were not, but should have been, able to stop it in time to avoid a collision.

There may well be here another case where demonstrable fallacy in logic is more than compensated by avoiding the harsh conclusion which would otherwise be required by deductive reasoning, when the outworn premises do not meet the needs or reflect the sentiments of today. The trouble with the process described is that it may be capricious and rudderless if it is not accompanied by a careful thinking through of the premises that today's conditions demand; and unfortunately the very nature of the process tends to conceal rather than highlight this real problem.[160] Yet it is the way the law often moves

155. Kasanovich v. George, 348 Pa. 199, 34 A. (2d) 523 (1943).

156. The background of the case in former Pennsylvania law is well described in a note, *Those Weasel Words—"Wilful and Wanton"* (1944) 92 U. OF PA. L. REV. 431. One commentator voices the caution that "What the Pennsylvania courts must do is avoid the application of the discovered peril doctrine under the guise of talking the language of wanton misconduct." Note (1944) 48 DICK. L. REV. 197, 200, n. 9. It is hard to see why that would be such a misfortune.

157. 296 Ky. 254, 176 S. W. (2d) 876 (1943), (1945) 33 KY. L. J. 132 (pointing out that Kentucky had theretofore rejected the principle in the *Loach* case).

158. British Columbia Electric Ry. v. Loach, [P. C. 1916] 1 A. C. 719.

159. PROSSER, TORTS (1941) 415. Most of the previous American cases have had to do with defendant's antecedent failure to provide the means for effective look out (*e.g.*, proper headlight). During the war another jurisdiction has adopted this branch of the Loach rule. Krause v. Pitcairn and Nicodemus, 350 Mo. 339, 167 S. W. (2d) 74 (1942).

160. PROSSER, TORTS (1941) § 54, particularly pp. 410, 416; James, *Last Clear Chance:*

and no one can intelligently appraise or forecast the judicial process without realizing it.

Another case in which a progressive result is reached through logic's back door is *Gregory v. Maine Central Railroad.*[161] Here the Massachusetts court put on the defendant the burden of disproving last clear chance. The burden of proving contributory negligence, it reasoned, was on defendant. Defendant, therefore, must show that plaintiff's negligence was the proximate cause of the injury. But plaintiff's negligence was not such a proximate cause if defendant had a last clear chance. Therefore defendant must negative this last clear chance in order to show the causal relation between plaintiff's negligence and his injury, necessary to render such negligence "contributory." The majority rule, with unerring accuracy, points out that in all these cases plaintiff's negligence *is* a proximate cause of his injury (else there would be no need to invoke last clear chance), and that last clear chance is analytically a matter of avoiding a defense.[162] What this rule overlooks is that the whole structure of last clear chance is a logical anomaly anyhow; that its real function is not to serve a syllogism but to lessen the harshness of the rule under which any contributory negligence keeps a plaintiff from all recovery; and that this function is better served by the Massachusetts rule although that does involve using the phrase "proximate cause" in a special Pickwickian sense for which after all there is plenty of respectable authority.

There has generally been a marked tendency in last clear chance cases to hold more strictly accountable the person who sees the trouble brewing, than the person who is negligently unaware of danger.[163] This is sound comparative negligence (though again the result distorts the logic actually used), and it has led to a sensible decision in a recent Missouri case.[164] Defendant's freight train blocked a crossing at night. A brakeman saw an approaching truck and realized it was not slowing up. Defendant was held for the brakeman's failure to shout a warning. The humanitarian rule here is used to narrow the unfortunate gap between law and morals as in the "good Samaritan" cases, though it is

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A Transitional Doctrine (1938) 47 YALE L. J. 704. *Cf.* Norwegian Shipping & Trade Mission v. Behenna, (1943) 76 LI. L. R. 91, which, if it is accurately described in Note (1944) 60 L. Q. REV. 15, applies to the *Loach* case principle in reverse to defeat recovery.

161. 317 Mass. 636, 59 N. E. (2d) 471 (1945), 25 B. U. L. REV. 147.

162. Russell v. Kelly, 180 Va. 304, 23 S. E. (2d) 124 (1942); Clark v. Boston & Maine R. R. 87 N. H. 434, 182 Atl. 175 (1935); Redmon v. Southern Ry., 195 N. C. 764, 143 S. E. 829 (1928).

163. James, *supra* note 158, at 712–4.

164. Zickefoose v. Thompson, 347 Mo. 579, 148 S. W. (2d) 784 (1941), *rehearing denied,* 237 Mo. App. 690, 157 S. W. (2d) 259 (1941), (1942) 7 MO. L. REV. 185. On the whole, however, a conservative trend has been noted in recent Missouri decisions on the humanitarian rule. Note (1941) 6 MO. L. REV. 230. *Cf.* also Becker, *The Humanitarian Rule* (1943) 8 MO. L. REV. 261; Note (1942) 7 MO. L. REV. 320.

plain to be seen that the brakeman's chance was no later than the truck driver's.[165]

The quest of a financially responsible defendant.

It was once the law's prevailing attitude that it had no obligation to provide plaintiff with a financially responsible defendant. But with a wider recognition of the serious social problem created by the uncompensated accident victim, it has become the increasing concern of society not only to extend the substantive rules of liability, but also to give ever greater assurance that theoretical liability will be satisfied.[166] The state of Massachusetts, and several foreign countries, have taken the thoroughgoing step of making liability insurance compulsory in the critical motor vehicle field. During the war, the decrease in automobile traffic and the preoccupation with other matters brought a lull in the pressure for this sort of thing although a few states tightened up their financial responsibility laws.[167]

The courts, too, have played a part in this process by extending principles of vicarious liability (notably by the family car doctrine).[168] But in a good part of the automobile field the importance of these judicial doctrines has been overshadowed by statutes imposing even wider

165. Compare note 100 *supra*.

166. COLUMBIA UNIVERSITY RESEARCH COUNCIL, REPORT BY COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932); BOWERS, COMPULSORY AUTOMOBILE INSURANCE (1929); PROBLEMS RELATING TO BILL OF RIGHTS AND GENERAL WELFARE (1938) New York State Constitutional Convention Committee, c. xxx; Coretvet, *The Uncompensated Accident and its Consequences* (1936) 3 LAW & CONTEMP. PROB. 466.

167. *Auto Accidents—What Shall We Do About Them?* (1942) 27 MINN. L. REV. 103, shows that the Minnesota State Bar Association proposed a compulsory insurance act for that state. A Comment (1943) 22 MICH. ST. BAR J. 387, indicates some of the experience under the New York amendment. N. Y., Laws 1941, c. 872. The Michigan amendment was adopted in 1943, Mich. Acts 1943, Act 203, § 3A.

168. Although there has been a tendency to extend the vicarious liability of certain classes of defendants, there has been almost as pronounced a shift away from doctrines which would impute another's negligence to a plaintiff. See generally SHULMAN AND JAMES, CASES AND MATERIALS ON TORTS (1942) 681 *et. seq.* Illustrative recent cases are Hessler v. Nelipowitz, 55 N. Y. S. (2d) 692 (Mun. Ct. Syracuse, 1945) (although owner of auto liable under statute to third persons injured by negligence of bailee, yet such negligence will not be imputed to owner in suit for damage caused to auto by third person's negligence); Turenne v. Smith, 215 Minn. 64, 9 N. W. (2d) 409 (1943), 27 MINN. L. REV. 579 (relationship of principal and agent does not confer immunity in suits between them. Case also holds that immunity which principal would enjoy from suit by son, does not enure to agent). A recent North Carolina decision, however, seems to assume that an agent enjoys immunity from suits by the principal for injuries caused him by the agent's negligence. Harper v. Harper, 225 N. C. 260, 34 S. E. (2d) 185 (1945).

Apparently the fear of having a driver's negligence imputed to the guest in a possible suit by or against a third person caused the Washington court recently to restrict the rule of joint venture so that it no longer applies where expenses are to be shared by persons on a trip for non-business purposes. Poutre v. Saunders, 19 Wash. (2d) 561, 143 P. (2d) 554 (1943).

vicarious liability or by extended coverage clauses voluntarily written into liability policies by insurance companies.[169] These have pushed the frontiers of litigation beyond "scope of employment" to the construction of such words as "consent" contained in statutes or policies.[170] Several recent decisions indicate a liberal attitude towards such problems.[171]

CONCLUSION

In spite of general preoccupation with other matters and notwithstanding such factors as the decreased civilian use of automobiles, the war years produced their share of significant judicial decisions dealing with the adjustment of the losses which are the accidental by-product of mechanical progress. Where these decisions make a change, they generally do so along paths which had started to become well marked before the war. The system of liability based on fault is being modified by the courts so as constantly to extend the bases of recovery for accident victims. Judicial modification is likely to continue along the same lines and at about the same pace.

During the war there has, however, been virtually no important legislative modification in this field of tort law. The future here is harder to predict. Although Workmen's Compensation statutes were among the first major steps which this country took in the direction of social insurance, yet the great movement during the depression towards increased social security saw no really significant statutory advance in assuring compensation for accidents beyond the Massachusetts compulsory insurance law. This fact may have been due in part to the greater ability and willingness of the courts to make so many more of the needed changes in this field than in providing for the vicissitudes of illness, old age, unemployment and the like. At any rate it makes unsafe any forecast that the pace of legislative change in adjusting the losses from accident will be greatly quickened in the foreseeable future, though the direction and end of future legislative change seem clear enough.

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169. See PROSSER, TORTS (1941) 500.

170. See SHULMAN AND JAMES, CASES AND MATERIALS ON TORTS (1942) 669-697; PROSSER, TORTS (1941) 503.

171. Souza v. Corti, 22 Cal. (2d) 454, 139 P. (2d) 645 (1943), 31 CALIF. L. REV. 572, (1944) 17 So. CALIF. L. REV. 326 (owner liable even where son lends car to forbidden person); Krum v. Malloy, 22 Cal. (2d) 132, 137 P. (2d) 18 (1943), (1944) 28 MINN. L. REV. 282 (co-ownership of auto affords inference of consent by one co-owner to use by other); Ridley v. Young, 64 Cal. App. (2d) 503, 149 P. (2d) 76 (1944), 18 So. CALIF. L. REV. 75 (minor held as consenting owner even though minor cannot validly give authority to agent); Gutknecht v. Johnson, 62 Cal. App. (2d) 315, 144 P. (2d) 854 (1944), 17 So. CALIF. L. REV. 414 (conditional vendor who had not given the required statutory "immediate" notice of transfer to department of motor vehicles, held as consenting owner).