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Leon Green

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CONTRIBUTORY NEGLIGENCE AND PROXIMATE CAUSE*

LEON GREEN

The attempt which common law courts have made to resolve every major problem of legal liability in tort into terms of causal relation marks the most glaring and persistent fallacy in tort law. Succeeding generations of judges continue this attempt without apparent protest. The legal mind indicates its kinship with the common mind in no more certain way than by rejecting the simplest truth for some complex superstructure of metaphysics. Of all the problems of the law of torts the problem of causal relation is the simplest, but it has become so enmeshed in meaningless terminology that there is little hope for its rationalization. Within the last half century with rare exception has any court given the problem its proper place in determining responsibility for tortious wrongs.

GENERAL SURVEY

The law pertaining to negligent conduct ought not to be difficult. It is based on the simple but broad premise of reasonable conduct in view of the danger to those interests which would probably be hurt by conduct less than reasonable. It becomes complex only when the attempt is made to crystallize reasonable conduct into subsidiary rules of exact standard such as those applied to a landowner and intruders upon his land, master and servant, carrier and passenger, and the various police regulations designed to regulate the conduct of traffic and the handling of the more dangerous instrumentalities in common use in society. Hard and fast rules are difficult of administration in any organization; they are none the less so, as rules of law for the control of conduct in society-at-large, by the societal agencies we call courts. In order to alleviate their severity courts find it necessary to resort, and are warranted in so resorting, to all the so-called technicalities they can devise.¹

* This article considers a phase of proximate cause omitted from the writer's book, *Rationale of Proximate Cause*, recently published (p. 2, n. 1). Mr. Green is Associate Professor of Law, Yale University.

¹ This necessity accounts very largely for the mass of decisions in tort law turned on such points as the plaintiff's being a trespasser, technical trespasser, bare licensee, licensee, social guest, invitee, implied invitee, business guest, and in part, for the numerous sorts of "causes" and "conditions" encountered in judicial opinions. Hard and fast rules require not only nice discriminations,

The basis of the rules of law which demand reasonable conduct—conduct not unreasonably dangerous to those legally protected interests within its radius—is the desire to control the conduct of those active in society most advantageously for the social order. Our sense of fairness, justice, well-being, our desire for a well ordered society, dictate the policy of these rules. We say to a defendant who does not conform to them that he must bear the risk of his nonconformity and compensate another for the damage done to his interest on account of the violation of a rule designed to protect such interest. These rules do not rest upon abstruse concepts; their basis is not metaphysical; they rest on our desires as social beings supported by our common intelligence.^{1*}

But we likewise demand of a person, who is capable of taking care of himself and appreciating his own interests and the dangers thereto, that he take the same reasonable precautions for his own interests as are required of others. If he does not do so and his interests are hurt as a result of his own unreasonable conduct, even though allied with unreasonable conduct on the part of another, he must bear the loss—the whole of it. This corollary is thought to be demanded by the same policy based on the same sense of fair play, justice and social well-being which gives foundation to the primary rules.² We call it “contributory negligence” and allow it to be invoked by a defendant, who though a wrongdoer himself, is allowed to escape responsibility on account of the contributing unreasonable conduct of the plaintiff.³ Much can be said against the harshness of

but now and then require repudiation. The latter is done sometimes by palpable fiction, sometimes by a process of legerdemain. In their efforts to minister justice, courts make use of the technique fashioned by generations of judges, and by virtue of its long history the technique of judging by courts is rather highly standardized. And in this discussion the criticisms made are not levelled at the employment of technique on the part of courts. On the contrary, my criticisms are levelled at the practice of courts in adhering too rigidly to the seeming logic of the rules they administer, or in resorting to unnecessary shams to escape them, when there are clear, wide open, legitimate means of escape which would make the judicial process more thoroughly rational and acceptable. I would promote a better technique.

^{1*} See generally, Pound: *Interests of Personality*, Harvard L. Rev. 343, Selected Essays on the Law of Torts 86; *Fore v. Geary*, 191 N. C. 90, 131 S. E. 387 (1927).

² *Malcolm v. Mooresville Cotton Mills*, 191 N. C. 127, 133 S. E. 7 (1926); *Moore v. Iron Works*, 183 N. C. 438, 111 S. E. 776 (1922).

³ “There is reason and justice in that policy of the law; it is an admonition to every one to exercise due care for his own safety, and it authorizes another to presume that he will do so, and so presuming, adjust his own conduct.” *Holmes v. Mo. P. Ry. Co.*, 207 Mo. 149, 105 S. W. 624 (1907). See Beach on Contributory Negligence, sec. 6 (1885).

this corollary because it throws the whole risk on the plaintiff, while it lets the defendant, also a wrongdoer, go free. The common law courts almost universally refused to look with favor upon the attempt made to alleviate this harshness by allowing a plaintiff to reduce his damages in proportion to the amount due to his own negligence, but the legislatures, through statutes in certain cases,⁴ and, by workmen's compensation laws, have very greatly reduced the rigor of the contributory negligence defense as applied to the most usual types of cases, so that the rejected doctrine of comparative negligence may eventually modify the contributory negligence rule generally. In case of children of tender years, the common law courts have already done away with the defense completely.⁵ The same policy which dictates the rule may likewise dictate its nullification.

But this is not all. Even though a plaintiff has been contributorily negligent, he is not necessarily defeated of a recovery against a defendant, if the latter had the opportunity of avoiding hurt to the plaintiff after defendant discovered, or (in some jurisdictions) should have discovered, the plaintiff's dangerous predicament. This exception (in fact, merely a limitation on the corollary rule of contributory negligence) is based on the same sense of fair play, justice, and social well-being as underlie both negligence and contributory negligence. We think it good policy; the value we place on human lives as well as other interests, demands it. There is no mystery about it; it is not the subject of fine spun logic. It is based solely on what appeals to us as a desirable thing to require. No better reason is needed. It is as good wisdom to demand that a defendant refrain from hurting a member of society who has put himself in a dangerous situation, as it is in the first instance when he is entirely cautious about his own well-being. A person who violates *one* rule of law, even though it be for his own safety, is not for that reason an outlaw and deprived of the protection afforded him by *other* rules

⁴ *Hinnant v. Tidewater Power Co.*, 187 N. C. 288, 121 S. E. 540 (1924); *Mangum v. A. C. L. R. R. Co.*, 188 N. C. 689, 125 S. E. 548 (1924); *City of Cilla v. Luke*, 28 Ga. App. 234, 110 S. E. 575 (1922); see sec. 3958, Va. Code 1919, making contributory negligence of plaintiff only a basis of mitigating damages where defendant railway fails to give crossing signals and there is a collision at a crossing—*State etc. Trust Co. v. N. & W. Ry. Co.*, 131 S. E. 331 (Va. 1926); *Tenn. Cent. Ry. Co. v. Page*, 282 S. W. 376 (Tenn. 1926); *Gordon v. Illinois Cent. R. Co.*, 169 N. W. 570 (Wis. 1918); *Haffke v. Mo. P. R. Corp.*, 193 N. W. 257 (Neb. 1923); *Tampa Electric Co. v. Limpus*, 91 So. 559 (1922); *Davis v. Elzey*, 88 So. 630 (Miss. 1921).

⁵ *Campbell v. Model Steam Laundry*, 190 N. C. 649, 130 S. E. 638 (1926); *Fry v. So. Pub. Utilities Co. et al.*, 183 N. C. 281, 111 S. E. 354 (1922).

of law designed for his benefit. This is merely good sense. But by some unfortunate turn this policy was damned by an undignified catch-phrase, "the last clear chance." No doubt this street name has caused some question as to the legitimacy of the rule. At least in some jurisdictions it is not given recognition under that name.⁶

We go even further; we make a corresponding limitation on the liability of a defendant. If plaintiff has been hurt by defendant's wrongdoing—in some instances, if only threatened—we require the plaintiff to use reasonable care to reduce, mitigate or avoid his loss. We call this the doctrine of "avoidable consequences." It is universally recognized even by those courts which deny its benefit to the plaintiff under the "last clear chance" rule. It rests upon the same grounds of policy as those discussed above and needs nothing more profound to support it.⁷

It would be thought that courts would be anxious to rest decisions made under these rules, corollaries and their limitations, upon these considerations of policy. They are understandable, quite sufficient, and should commend themselves without the necessity of strong words. But evidently they do not satisfy the lawyer's instinct for profound discourse and nice distinction. They afford little opportunity for display of "legal" learning. And it is at this point that judges rush so precipitately into that uncharted and mystic wild of "proximate" causation where their thirst for argumentation can be completely quenched, and where the least can confound the wisest. Here profundity is at her best. Here, too, our suspicions are not without warrant.

Let it be emphasized unqualifiedly that causal relation is an element in every cause of action and in every defense. It must be present for any action or defense to be sustained. It is a *universal*

⁶ *Spillers v. Griffin*, 109 So. Car. 78, 95 S. E. 133, L. R. A. 1918 D 1193; *Steele v. Burkhardt*, 104 Mass. 59 (1870); *Specht v. Chicago City Ry. Co.*, 233 Ill. App. 384 (1924); *Waldren Express & Van Co. v. King*, 291 Ill. 472, 126 N. E. 97 (1920).

⁷ *Loker v. Damon*, 17 Pick. 284 (Mass. 1835); *Ingraham v. Pullman Company*, 190 Mass. 33, 76 N. E. 237 (1906); *Fairfield v. Salem*, 213 Mass. 296, 106 N. E. 542 (1913); *Den Norske Ameriekalinge Actiesselskabet v. Sun Printing & Pub. Association*, 226 N. Y. 1, 122 N. E. 463 (1919) (excellent); *Simpson v. City of Keokuk*, 34 Iowa 568 (1872); Beale, *Cases on Legal Liability*, p. 785 *et seq.* This doctrine is generally considered a rule of damages. It is only incidentally so. It is primarily a limitation upon the scope of protection afforded a plaintiff by the rule of law violated by a defendant, just as the "last clear chance" rule is a limitation upon the defense of contributory negligence. It is constantly confused with the issue of causal relation, just as the damage problem is so confused. See Green, *Rationale of Proximate Cause*, p. 186. But it is purely a problem in good policy.

for every action. A defendant's conduct must be an appreciable factor in causing plaintiff's injury before plaintiff can recover.^{7a} Plaintiff's contributing negligence must be a substantial factor in his own hurt to defeat his recovery. But when this is said, all is said. In the overwhelming majority of suits brought and defenses interposed, this element is not only present, *but so clearly so* that no issue is raised for a jury's determination. There is nothing mystifying or profound about it. Notwithstanding this is true, the practice of submitting the matter to the jury prevails in all common law jurisdictions. What then is there that the courts find so alluring about causal relation, that they can neither keep away from it, nor deal with it understandingly?

LIMITS OF LEGAL PROTECTION CONFUSED WITH PROXIMATE CAUSE

The commonest error made by courts is in assuming that the only elements of a plaintiff's cause of action in a negligence case are: (1) Wrongdoing, i.e., negligence, (2) damages, and (3) causal relation; all fact inquiries if there is any evidence raising an issue. As I have already developed,⁸ the most important problem that courts have to pass upon—the one demanding the most of the judicial function—is whether the rule plaintiff relies on for recovery and the one violated by defendant is designed to protect plaintiff's injured interest, and especially, against the hazard this interest has incurred. The great majority of the problems treated as questions of proximate cause involve this inquiry and have nothing to do with causal relation. They are pure problems of law; they arise before any of the fact issues enumerated above are reached; a jury has no function to perform regarding them;^{8a} yet they are more frequently, than not, submitted to juries under the guise of determining proximate cause. In so far as this is done courts abdicate their prime function to the jury, and the results are frequently irrational.

*Paul v. Railroad*⁹ is such a case. Defendant violated an ordinance prohibiting the blocking of crossings by trains for a longer period than five minutes. Plaintiff started to go around to another crossing and his mule got frightened at defendant's engine, but

^{7a} Green, *Rationale of Proximate Cause*, chap. 5 (1927).

⁸ Green, *Rationale of Proximate Cause*, chap. 1 (1927).

^{8a} See the splendid opinion of Ladd, J., in *Gilman v. Noyes*, 57 N. H. 627 (1876).

⁹ 170 N. C. 230, 87 S. E. 66 (1915).

without any further negligence on defendant's part, and ran away. The court held that the only issue was whether the violation of this ordinance was the proximate cause of the injury and that issue was submitted to the jury and found in plaintiff's favor. Clearly the blocking of the crossing *was* a substantial cause factor (a proximate cause), and the violation of the ordinance being negligence *per se*, plaintiff had judgment. But the only problem about which there was any doubt was whether this ordinance was designed to protect travellers such as plaintiff from the hazard of their teams becoming frightened and running away. It is very doubtful that such was a design of the ordinance. This was a problem of law for the judges, but it passed unnoticed. The case was determined on a false issue and that by a jury.

Another instance is *Chancey v. N. & W. Ry. Co.*¹⁰ Here plaintiff alleged that defendant's coach on which he was a passenger was so over-crowded and dimly lighted that he had to stand, and in the jam his pockets were picked. The court sustained a demurrer, but it did so on the ground that defendant's negligence was not a proximate cause of plaintiff's loss. This was a false basis. According to the petition there were negligence, damages and certainly a clear causal relation between the two. If the court was correct in its disposition of the case it was because the rule defendant violated and upon which plaintiff relied for recovery was not designed to protect plaintiff against pickpockets. It was for other purposes, perhaps the *personal* safety and comfort of the passengers; not the money in their pockets.

The cases in which the minor issue of causal relation has been made to bear the burdens of the larger issue of defining the scope of protection given by the rule violated by defendant and invoked by plaintiff are numberless.^{10a}

ISSUE OF NEGLIGENCE CONFOUNDED WITH PROXIMATE CAUSE

The second most usual error made by courts in dealing with proximate cause is the confusion of the negligence issue with the issue of causal relation. The accepted test of negligent conduct is the foreseeability or probability of harm, as a result of the defendant's conduct, to the interest of plaintiff (or of some one so situated)

¹⁰ 174 N. C. 351, 93 S. E. 834 (1917).

^{10a} For a remarkable example of this fact see *The Federal No. 2*, 21 Fed. (2d) 313 (1927).

which has been injured. The formula runs thus: If a reasonably prudent person, under the circumstances, would have foreseen as a result of his conduct a probability of harm to plaintiff's injured interest, then defendant was under a duty to use reasonable care; failing to do so, he was negligent. If such negligence caused hurt to such interest, there is liability. This formula is variously worded. And one of the strangest things in the law is how the courts have used this test both as a test of negligence and as a test of causal relation. I have dealt with this elsewhere.¹¹ An example or two will suffice here.

In *Bowers v. E. T. & W. N. C. R. R. Co.*,¹² the only issue was one of negligence. The court passed it over to reach the question of causal relation, which was too clear to be an issue. The court's discussion revolves about proximate cause and the test it states is found in numerous cases:

"It seems from the authorities that there are two very essential elements in the doctrine of proximate cause: (1) It must appear that the injury was the natural or probable consequence of the negligent or wrongful act; (2) that it ought to have been foreseen in the light of attending circumstances."

First, it has only to be noticed to be appreciated that (1) and (2) mean exactly the same thing; and second, it is equally clear that neither is a test of causal relation, but merely the negligence test, in part, repeated in different words. While the court talked in terms of proximate cause and apparently thought it was dealing with a causal relation issue, it was in fact using the formula for determining negligence and, fortunately, dealing with a negligence issue. This sort of thing has been done in thousands of cases. It is never harmful so long as the court is dealing with a negligence issue. Usually there is no causal relation issue. So this process of perverting the negligence formula is one of those fatuous things courts have done so long without thinking that it has become a sort of necessary ritual. The worst thing about it is that some trial judges and many appellate judges come to take it seriously.

In the celebrated case of *Drum v. Miller*,¹³ the court made a similar mistake. A teacher, in order to attract a student's attention,

¹¹ "Are Negligence & Proximate Cause Determinable by the Same Test" (1923), 1 *Texas Law Rev.* 243, 423; *Rationale of Proximate Cause*, 177, *et seq.*

¹² 144 N. C. 684, 57 S. E. 453 (1907).

¹³ 135 N. C. 204, 47 S. E. 421 (1904).

threw a pencil at him. The student turned his head and the pencil struck him in the eye, causing a very serious injury. The only issues were those of wrongdoing: (1) whether defendant was an intentional wrongdoer, (2) a negligent wrongdoer. But the court almost lost those issues in its discussion of proximate cause—a very misleading discussion on that question. The amount of confusion that has been brought into the law by this sort of error is impossible of exaggeration. It renders the opinions of some of the ablest courts a jumble of nonsense, though their decisions may be sound. It gets in the way of clear and simple statement, as well as understanding. In difficult cases it frequently brings about regrettable results. The elements of negligence and causal relation are distinct. They can be kept so. The courts ought to keep them so. There is no excuse for not doing so. A simple test is stated in *Hudson v. Railroad*:¹⁴

“What a man may reasonably anticipate is important and may be decisive in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues.”¹⁵

This distinction is recognized in all well considered cases in which the two problems are involved.

WHETHER ANY ISSUE OF NEGLIGENCE OR CAUSAL RELATION FOR JURY, CONFUSED WITH PROXIMATE CAUSE

Very frequently it happens that plaintiff's evidence is not sufficient to raise an issue of negligence for the jury. The judge should either non-suit the plaintiff or give a directed verdict for defendant, depending upon the procedural requirements of the particular jurisdiction. This function of the judge is well recognized.¹⁶ But frequently instead of reversing a case because the trial judge did not exercise this function, the appellate courts launch into a discussion of what constitutes proximate cause. Their opinions purport to be determinations of fact questions as a matter of law and are fre-

¹⁴ 142 N. C. 198, 55 S. E. 103 (1906).

¹⁵ But the court's attempted definition of proximate cause itself is not so successful. No more so than that of many others. See Comment, 32 Yale Law Journal 276; see *Hall v. Rinehart & Dennis Co.*, 192 N. C. 706, 135 S. E. 790 (1926), where only possible issue was negligence, yet the court confused it with proximate causation.

¹⁶ *Metropolitan Ry. Co. v. Jackson*, House of Lords, 3 Appeal Cases 193 (1877); *Kearney v. Seaboard R. Co.*, 158 N. C. 521, 74 S. E. 593 (1912); *Lamb v. Boyles*, 192 N. C. 542, 135 S. E. 464 (1926).

quently so considered by other courts. They do the same thing in those cases in which a plaintiff's evidence fails to raise an issue of causal relation between defendant's conduct and his hurt. Such opinions are treacherous. All that is required of the judge in these instances is to determine that there is *no evidence* raising an issue of fact for the jury. All required of an appellate court is a review of that ruling. This function of saying there is no issue of fact raised by the evidence is entirely distinct from the judge's primary function of passing on the scope of protection afforded by the rule violated by defendant. But the two functions are both easily and frequently confused. A keen appreciation of the respective functions of judge and jury in the trial of a case is necessary to value the importance of this vital distinction between the several functions of the judge himself.¹⁷ Although the functions of judge and jury are the most distinctive features of the common law procedural system, and the most frequently employed, yet strange as it may seem, few lawyers and judges appear to have any clear understanding of them. "Questions of law for the judge, and questions of fact for the jury" is about as far as most of them appear to have thought. This maxim is about as true and about as misleading as most of its kind.¹⁸

ISSUE OF CONTRIBUTORY NEGLIGENCE CONFUSED WITH PROXIMATE CAUSE

There is no more excuse for confusing proximate cause with the defense of contributory negligence than for confusing proximate cause and negligence. The two are wholly distinct. Of course, a plaintiff's contributory negligence in order to defeat him must be a proximate cause of his injury, just as defendant's negligence must be a proximate cause to make him responsible to plaintiff. But further than this, the two elements are wholly distinct. Contributory negligence is merely the failure to use reasonable care for the protection of a plaintiff's own interests. It is determined by the same formula as a defendant's negligence. Contributory negligence necessarily implies a causal relation. It does not have to be the "sole" cause to

¹⁷ See *Laidlaw v. Sage*, 158 N. Y. 73, 52 N. E. 679 for a close case in which the court turned the decision both on the issues of wrongdoing and causal relation on the absence of proof rather than the absence of negligence and causal relation. For a fuller discussion see Green, *Rationale of Proximate Cause*, chap. 4.

¹⁸ See J. B. Thayer, "Law and Fact in Jury Trials," 4 Harv. L. Rev. 147 (1890); Sunderland, "Verdicts, General and Special," 29 Yale L. J. 253, 255 (1920).

defeat plaintiff any more than defendant's negligence has to be the "sole" cause to make him responsible.

Stacy, C. J., in *West Construction Co. v. A. C. L. & R. Co.*,¹⁸ states the point with precision:

"The plaintiff's negligence, in order to bar a recovery in an action like the present, need not be the 'sole' proximate cause of the injury, for this would exclude the idea of negligence on the part of the defendant, as in any legal sense material or significant. It is sufficient if his negligence is a cause, or one of the causes, without which the injury would not have occurred. *If the plaintiff's negligence be the sole and only cause of the injury it would not be contributory negligence at all, but rather the source of a self-inflicted injury.*"

It would seem that a matter so simple and so clear could not be misunderstood. But here again courts of nearly all jurisdictions have developed a confusion which mars the whole doctrine of this defense, and especially the exceptions which are made to it. For instance in *Lea v. Southern Pub. Utilities Co.*,¹⁹ the court says:

"It is well settled that when the plaintiff and defendant are negligent, and the negligence of both concur and continue to the time of the injury, the negligence of the defendant is in a legal sense not the proximate cause of the injury, and plaintiff cannot recover."²⁰

Such pronouncements ignore the fact that it is recognized on all hands that there may be two or more proximate causes of an injury.²¹ Moreover, it is wholly unnecessary to make this fictitious distinction in order to defeat the plaintiff. The defendant's negligence may clearly be a proximate cause of the injury, and still the plaintiff be defeated even though his negligence is also a proximate cause. This attempt to make the plaintiff's contributory negligence the "sole" proximate cause is not only gratuitous and fictitious, but it ignores the true basis for defeating the plaintiff's action and introduces a false doctrine which throws the whole subject into confusion.

¹⁸ 184 N. C. 179, 113, S. E. 672 (1922); see also Salmond on Torts (6 ed., 1924), p. 46; Clark & Lindell on Torts (7 ed., 1921), p. 511: "The doctrine that the plaintiff's negligence destroys the causal connection between the defendant's negligence and the injury, leaves no room for any meaning to be given to the word 'contributory,' and is open to question."

¹⁹ 176 N. C. 511, 97 S. E. 492 (1918).

²⁰ See same statement in *Hamilton v. Lumber Co.*, 160 N. C. 50, 75 S. E. 1087 (1912); *Harvell v. Lumber Co.*, 154 N. C. 254, 70 S. E. 389.

²¹ *White v. Carolina Realty Co.*, 182 N. C. 536, 109 S. E. 564 (1921); *Wood v. N. C. Public Service Corp.*, 174 N. C. 697, 94 S. E. 459 (1917); *Albritton v. Hill*, 190 N. C. 429, 130 S. E. 5 (1925); *Etheridge v. Norfolk Southern R. Co.*, 129 S. E. 680 (Va., 1925).

In the typical case of negligence and contributory negligence the courts are not often misled to do injustice by such an error. But when they are dealing with violations of police regulations (cases of negligence *per se*) and "last clear chance" situations, no result is too preposterous to be shocking.

(a) *Negligence per se Cases*

*Welch v. Wesson*²² is not a negligence case but it is a good beginning point. Plaintiff and defendant were engaged contrary to law in a horse race for a purse. Defendant wilfully ran his horse into that of the plaintiff. In a suit by plaintiff for the trespass defendant invoked as a defense the unlawful act of plaintiff in racing horses for a stake. The defense was not allowed. The court said:

"But neither the contract nor the race had, as far as appears from the facts reported in the bill of exceptions, or from the intimations of the court in its ruling, anything to do with the trespass committed upon the property of the plaintiff."

As a matter of fact the keen competition of the race likely had all to do with defendant's running into plaintiff's horse. The causal connection here was clear enough, but the defense was not good even admitting the clearest causal connection. The defense failed because the rule of law plaintiff violated was not designed to protect the defendant in his wilful trespasses, but to protect the public's interest against the evils of gambling. Plaintiff's engaging in a horse race did not make him an outlaw. The court expressed it well:

"He who violates the law (one rule of law) must suffer its penalties; but yet in all other respects he is under its (the law's) protection and entitled to the benefit of its remedies."

This was sound ground and sufficient basis for the decision.

In another Massachusetts case, *Bosworth v. Swansey*,²³ plaintiff brought suit for injuries caused by defects in the highway. The defense was that he was traveling on Sunday in violation of the statute. The court said:

"It has been repeatedly decided that, to maintain this action, it must appear that the accident was occasioned exclusively by the defect of the highway; to establish which, it must appear that the plaintiff himself is free from all just imputation of negligence or fault. . . . It (the act of plaintiff) would show that his own unlawful act concurred in causing the damage complained of."

²² 6 Gray 505 (Mass., 1856).

²³ 10 Metcalf 363 (1845).

Thus recovery was denied because plaintiff himself was a wrongdoer. The court is clearly correct in saying there was a causal relation between traveling on Sunday and plaintiff's injury. But that was not the question. Was the Sunday law designed to relieve defendant from its obligation to maintain the highway in repair for plaintiff? This was the real problem. The court did not advert to it. But the Vermont court²⁴ passed on the same sort of case and met the point squarely:

"The legislature did not intend to impose a duty upon towns in behalf of a person who was forbidden to use all highways for the purposes of travel, and at a time when he was so forbidden to use them. Can he be a traveller within the purview of the statute who is forbidden to travel? . . . The plaintiff when injured was forbidden by law to use the highway, and by reason thereof, the defendant town owed him no duty to provide any kind of a highway, and therefore was under no liability for any insufficiency in any highway."

Irrespective of whether this decision is agreed with, the court discovered the vital point. In cases where the violation of a statute is the ground of defense, the *primary* problem is *always* whether the purpose of such statute was to relieve the defendant from any obligation towards the plaintiff with reference to the injury that plaintiff has suffered.

The frequently cited case of *Sutton v. Town of Wauwatosa*²⁵ is a case of this kind. Plaintiff was driving his cattle to market on Sunday in violation of the statute. As they were crossing a bridge which defendant was under obligation to maintain, the bridge, being rotten, collapsed and many of plaintiff's cattle were killed or injured. As a defense to plaintiff's suit, his violation of the statute was invoked. The court held the violation of the statute was no defense to the suit. It spent most of its time in an attempt to demonstrate that there was no causal relation between the violation of the Sunday law and the loss of the cattle. This is the point for which the case is most frequently decided. But it is perfectly obvious that there *was* causal relation between the two. Certainly the same thing might have happened any other day, as the court argues, but that does not demonstrate that it did not happen on Sunday. It did. Driving the cattle on Sunday was a factor in the results. But that does not close the door on the plaintiff. Was this statute designed to relieve the defendant from its obligation to keep the bridge in repair, even

²⁴ *Johnson v. Irasburgh*, 47 Vt. 28 (1874).

²⁵ 29 Wis. 21 (1871).

though plaintiff was a violator of the law? That was the court's problem and it noticed it to this extent:

"Wrongs or offences cannot be set off against each other in this way. . . . Neither justice nor sound morals require this, and it seems contrary to the dictates of both that such a defense should be allowed to prevail."

This was good ground. It was the same as the Massachusetts court took in *Welch v. Wesson* (*supra*). The question was one of sound policy and the Wisconsin court took one view while the Vermont court took the other. Which was right? There is no right and wrong in such cases. It is a matter of judgment, good taste, an interpretation of the community's desires; in short, law making; at least the bounding of the scope of the protection afforded by the rule of law in question.

There may be a lack of causal connection in some of these cases, as for instance, suppose plaintiff in the last case had been carrying a concealed weapon, a bottle of anti-Volstead intoxicant, or had been standing on the bridge using profane language? It would have been clear here that the violation of the law would not have been an appreciable factor in the bridge's collapse. But not so the driving of a herd of cattle on the bridge on Sunday. The lack of causal relation is a rare ground of defense. Few cases are ever *properly* turned on such point. The policy of the particular statute as construed by the court is usually the important element in such cases. For instance, in Massachusetts an unlicensed automobile in operation on the highway²⁶ is in part an outlaw and its owner has no remedy against one who negligently injures it.²⁷ But an unlicensed operator who is negligently hurt while operating a car on the highway is not beyond the pale of the law, and may recover for his physical injuries unless he is a wrongdoer in some other particular, which constitutes contributory negligence on his part.²⁸ The problem is not one to be turned on the presence or want of causal relation. It is a matter of what the court thinks is sound policy. The attempt to discover this by tracing causal relations is entirely too tenuous and artificial. The

²⁶ *Killduff v. Boston Electrical Ry. Co.*, 142 N. E. 98 (1924).

²⁷ But see *Dudley v. Northampton St. R. Co.*, 202 Mass. 443, 89 N. E. 25 (1909) as to protection against reckless, wanton and wilful injuries.

²⁸ *Bourne v. Whitman*, 209 Mass. 155, 95 N. E. 404 (1911). The opinion in this case is a strange mixture of good sense and scholasticism. But no doubt the writer of the opinion was hard put to get away from the long line of decisions dealing with similar cases. See *Armstead v. Lounsbury*, 129 Minn. 34, 151 N. W. 542, L. R. A. 1915 D, 628 (1915).

controlling considerations are much larger, broader and more important. What are the needs and desires of the society which the court serves? These are the factors to be weighed.

In *Platz v. City of Cohoes*,²⁹ defendant made an excavation and left a pile of dirt in one of its streets. Plaintiff, with her husband, while riding on Sunday in violation of the statute, but without carelessness on the part of either, was injured by reason of their carriage being upset by the pile of dirt. Plaintiff's suit was met by the defense that she was a wrongdoer herself. The court found no causal relation between her violation of the law and her injury. This seems a most strained basis for deciding the case. There was the clearest causal relation, but that would not necessarily defeat plaintiff's case. The court saw this also but perhaps dimly. Nevertheless the opinion contains several very apt sentences which in themselves are a sufficient basis for the decision:

"But the object of the statute is the promotion of public order and not the advantage of individuals. The traveler is not declared to be a trespasser upon the street, nor was the defendant appointed to close it against her. . . . *At common law* the act was not unlawful, and the plaintiff was still under *its* protection, and may resort to it against a wrongdoer by whose act she was injured."

A sentence is quoted from another noteworthy case which is even more in point:

"We do not feel justified, therefore, on any principles of justice, equity, or of public policy, in inflicting an additional penalty of \$7,000 on the libelants, by way of set off, because their servants may have been subject to a penalty of twenty shillings each for breach of the statute."³⁰

*Berry v. Sugar Notch Borough*³¹ is the same sort of case. Defendant had allowed a large tree in a decayed condition to remain standing within the street line. A violent wind blew it down and it fell on a street car which plaintiff was operating. As a defense to plaintiff's action defendant relied on the violation of the ordinance regulating the speed of street cars along the streets, which ordinance plaintiff was violating at the time his car was struck by the falling tree. The court labored very hard to demonstrate the lack of causal relation between the two. It is clear that the violation of such an

²⁹ 89 N. Y. 219 (1882).

³⁰ *Phila., Wil. & Balt. R. R. Co. v. Phila. & H de G. Steam Towboat Co.*, 25 How. (U. S. Sup. Ct.) 209.

³¹ 191 Pa. 345, 43 Atl. 240 (1899).

ordinance should not defeat a recovery by plaintiff. The court's decision is correct, but there was no need of disputing a causal relation which was too clear for doubt. The defense should fail because the ordinance plaintiff violated was not designed to relieve the defendant from its duty to remove decayed trees likely to cause injury to travelers on the streets. The scope of the ordinance fell far short of such purpose.

The same analysis holds good as to common law rules which a plaintiff may violate but which were not designed to relieve defendant from its duties under other and different common law rules. *Smithwick v. Hall & Upson Co.*³² is an apt case of this sort. Plaintiff, an employee of defendant, ventured out on a part of a platform used in connection with an ice house where it was very dangerous to work. He had been warned not to work out there as he might fall or slip, and it being unprotected by railings he would be thrown below and hurt. While the plaintiff was out on this dangerous part of the platform, the brick wall of the building above the platform, in consequence of the negligence of defendant, gave way, the brick falling upon the platform where plaintiff was and thence to the ground. Plaintiff was struck by the brick and thrown to the ground. As a defense to a suit for his injuries, defendant invoked plaintiff's contributory negligence. The court spends considerable time speculating whether plaintiff's wrongful conduct had anything to do with his injuries, that is, whether it was "one of the proximate causes and not merely a condition." Finally the court concludes:

"Whether the claim that he would probably not have fallen had he remained where he was stationed be true or not, must forever remain matter of conjecture. But if its truth could be demonstrated it would not, as we have seen, change the relation of the plaintiff's act to the *legal* cause of his injury, or make that act, from a *legal* standpoint, a contributing cause where it was but a condition."

In other words, not being able honestly to say that plaintiff's conduct was not one of the proximate causes of his injuries, the court resorts to a fiction, "legal cause," which has often been employed in such situations, as a way out of the difficulty. This fiction is wholly useless if the problem is fully analysed. Fictions serve good purposes only when there is nothing better. They obscure rational thought process. Any "constructive" or "legal" or "in law" device for reaching a conclusion is justly the subject of suspicion. The

³² 59 Conn. 261, 21 Atl. 924 (1890).

way out for the court in this situation is very clear. It is this. The rule that plaintiff violated was not designed to relieve the defendant from its obligation owed to its employee to furnish him a reasonably safe place about which to work. The purpose of the common law rule which plaintiff violated did not go that far; the hazard towards which it was directed was entirely different, to-wit, the hazard of slipping off an unprotected platform while engaged about his work, not the hazard of being crushed under bricks from a collapsed wall of the building. Plaintiff did not become an outlaw by being contributorily negligent. His negligence did put him in a dangerous place and contributed to his hurt. But irrespective of such causal relation, defendant's obligation as to the safety of the wall was in no wise affected. Plaintiff was still entitled to its protection. It is exactly the same question as is involved in the case of statutes. The courts are called upon to define the scope of the respective rules involved. They cannot be offset one against the other. This is a matter of defining the scope of legal rules based upon what, for the lack of ability to enumerate all the factors to be taken into consideration, we call *sound policy*. If the rule which a plaintiff has violated does not give a defendant relief from an obligation owing plaintiff imposed by some other rule of law, then such contributory negligence, however clear a causal relation can be traced between it and plaintiff's hurt, affords defendant no ground of defense. The respective rights and duties of the parties are turned on much more important factors than mere causal relations.³³

In *Graham v. City of Charlotte*³⁴ plaintiff was riding on a truck in violation of an ordinance providing ". . . no person when riding, shall allow any part of his body to protrude beyond the limits of the vehicle. . . ." The defendant had negligently placed and maintained a heavy post in the edge of the street, and without any negligence of the driver of the truck it was driven so close to this post as to crush plaintiff's limb and foot so that he became a cripple for life. Defendant was negligent and plaintiff was negligent *per se* by virtue of violating an ordinance. The court prevented plaintiff's

³³ There are numerous cases of this sort. *Wagner v. Mo. P. Ry. Co.*, 97 Mo. 512, 10 S. W. 486 (1888); *N. Y. L. E. & W. R. Co. v. Ball*, 53 N. J. L. 283, 21 Atl. 1052 (1891); *Webster v. Rome W. & O. R. Co.*, 115 N. Y. 112, 21 N. E. 725 (1889); *Gray v. Scott*, 66 Pa. 345 (1870); *Bowman v. Humphrey* (Iowa, 1906), 109 N. W. 714; *Montambault v. Waterbury & M. T. Co.*, 98 Conn. 554, 120 Atl. 145 (1923); *Reiter-Conley Mfg. Co. v. Hamlin* (Ala., 1906), 40 So. 280; *Belcher v. M. K. & T. Ry. Co.* (Tex., 1899), 50 S. W. 559.

³⁴ 186 N. C. 648, 120 S. E. 466 (1923).

defeat by resolving the issue into one of proximate cause and sustaining the jury's finding that plaintiff's negligence did not contribute to his injury. This was as untrue as it was unnecessary. Plaintiff's violation of the ordinance was as substantial a factor in the results as any other one cause. The causal relation was as strong as it could be. But the purpose of the ordinance plaintiff violated was not to relieve the defendant of responsibility for obstructions negligently maintained in the street, nor to protect the plaintiff from such obstructions. Doubtless the type of hazard aimed at by the ordinance was that ordinarily produced by hanging outside of vehicles in an area of crowded traffic. No such risk as plaintiff encountered was sought to be protected against. Thus the court converted a simple problem of statutory construction—a defining of the limits of protection afforded by a rule of law—into one of causal relation to the further confounding of that already confused subject. This has been done almost too often to deserve protest, but it is none the less a vicious way of arriving at a good result; a way that leads to error in cases not so clear.

In *Hinton v. Southern Ry Co.*,³⁵ we have an entirely different case. Plaintiff was driving her car in violation of a statute prohibiting speed in excess of seven miles per hour when approaching an intersecting highway. In this case the highway was a railway crossing. Defendant negligently let the gates to the crossing down immediately in front of plaintiff's car, which caused her to turn her car into a building with the result that she was injured. Defendant relied on plaintiff's contributory negligence as a defense. She was negligent *per se*. But the court said:

“She should not be prevented from recovering solely because she was moving in excess of the statutory speed unless, as stated, such violation was clearly the proximate cause of the injury.”

That plaintiff's violation of the statute was a very substantial contributing factor in her injury, and this is all that is required, was very clear. But the court said that such question could not be withdrawn from the jury. Thus the plaintiff was allowed to recover behind the smoke screen of proximate cause. Perhaps the court should be commended for the decision. But was there not a more rational way out?

This is a different type of case from those we have been discussing. Here the purpose of the rule violated was to control traffic

³⁵ 172 N. C. 587, 90 S. E. 756 (1916).

and that under the very sort of condition that plaintiff found herself faced with. So far as logic is concerned this was a simple case of negligence and contributory negligence and plaintiff should have had no recovery. But the rule plaintiff violated is a hard and fast one, allowing no flexibility. Seven miles per hour is a very low rate of speed even at intersections. If determined by the common law standard plaintiff was doubtless not negligent; she was only so by virtue of violating a statute. Legislative attempts at making exact standards of conduct are perhaps desirable, but that does not mean that inexorable logic will be or must be followed in all such cases. About the only utility of the fantastic doctrines of proximate cause is that they can be used as a smoke screen in these cases. After awhile perhaps when courts come to see that logic is not the life of the law they will do openly what they now do timidly and covertly. There are other ways around which are more sensible. For instance a court could conceivably hold that these regulations are merely police regulations and should not affect the civil rights or liabilities of parties.³⁶ The issue of negligence and contributory negligence would then always be an open one. It is held by some courts that such violations are *mere evidence* of negligence. This likewise leaves the issue open as at common law and allows flexibility. This is the method adopted by the New York and Massachusetts courts.³⁷ It is on this basis (although the lack of proximate cause is also erroneously thrown in) that the Massachusetts court holds an unlicensed driver, although the violator of a law designed to control and regulate traffic, is not necessarily negligent in driving a car without license, and if hurt by a collision on the highway is not thereby defeated by the doctrine of contributory negligence. This issue is left open to be determined by the common law rule. As already noted the same court is not so liberal when an unlicensed *vehicle* on the highway is injured. There the doctrine of negligence *per se* is carried to its logical extremity. Since the rule is designed to control traffic on the highway, an unlicensed automobile becomes a trespasser beyond the protection of the common law rule of negligence. The North Carolina court in the case under

³⁶ See the suggestion in *Bourne v. Whitman*, *infra* 37, and in *Dudley v. Northampton*, *supra* N. 27, and cases cited.

³⁷ *Knuppfe v. Knickerbocker Ice Co.*, 84 N. Y. 488 (1881); *Corbett v. Scott*, 243 N. Y. 66, 152 N. E. 467 (1926); *Bourne v. Whitman*, 209 Mass. 155, 95 N. E. 404 (1911); see 20 Col. Law Rev. 710; *Armstead v. Lounsberry*, 129 Minn. 34, 151 N. W. 542 (1915); *Hausen v. Kemmich*, 208 N. W. 277 (Iowa, 1926).

discussion while accepting the logic of the rule in so far as the plaintiff is held to be negligent *per se*, avoids its severity by holding that there is still the issue of proximate cause which must be left to the jury. The jury appreciating the arbitrariness of the rule usually finds for the plaintiff. The only thing that can be said for the latter holding is that it is one way of avoiding the harshness of the statute. But it does it at the expense of further cluttering an already much abused doctrine. Moreover it abdicates to the jury a function that only a judge should exercise.³⁸ The upshot of decisions like this is that in so far as the violation of a police regulation constitutes contributory negligence, that defense is broken down. To this extent there is a divergence in the policy of states which hold as Massachusetts does and states which hold as North Carolina does. It is not a mere juggling of causal relations as appears on the surface.^{38*}

(b) *Last Clear Chance Exception*

The "Last Clear Chance" exception to the contributory negligence rule begins with *Davies against Mann*³⁹—the celebrated hobbled ass case—and figuratively speaking is restricted to that type of case. This exception was there stated very simply:

"The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to have been lawfully there; but even were it otherwise, it would have made no difference, for as the defendant might, by proper care (at this stage of the matter) have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there."

The parenthesis "at this stage of the matter" was added by a

³⁸ *Zagier v. Southern Express Co.*, 171 N. C. 692, 89 S. E. 43 (1916) is another such case. See the dictum in *Ledbetter v. English*, 166 N. C. 125, 81 S. E. 1066 (1914). See also, *Tenn. Cent. Ry. Co. v. Page*, 282 S. W. 376 (1926). There are not many such cases, for usually the situation is like *Graham v. City of Charlotte, surpa*, where the rule violated by plaintiff was not designed to protect against the hazard which was encountered. When this is the case, the decisions can be placed on sound ground, but such is seldom done. The morass of proximate cause is too alluring for the courts to pass by.

^{38*} See following authorities as pertinent to the analysis: "Negligence as Proximate Cause of Injury," 58 Pa. L. Rev. 306; Pollock on Torts (12 ed.), 197 (1923); *Dohm v. Cordoza & Bro.*, 206 N. W. 377 (Minn., 1925); *Hansen v. Kemmish*, 208 N. W. 277 (Iowa, 1926) (hard case); *Cahoon v. Ry. Co.*, 90 Iowa 169, 57 N. W. 727 (1894); *Martin v. Ry. Co.*, 118 Iowa 148, 91 N. W. 1034, 59 L. R. A. 698, 96 Am. St. Rep. 371 (1902); *Schaar v. Comfort*, 151 N. W. 275 (Minn., 1915); *Floaten v. Lyons*, 196 N. W. 478 (Minn., 1923).

³⁹ 10 M. & W. 546 (1842).

latter case⁴⁰ and this was a necessary qualification in order to prevent the exception from being a complete repudiation of the rule itself. The exception is a severe limitation on the contributory negligence rule.

The decisions have developed two branches of the exception. In one liability is restricted to instances in which the plaintiff's dangerous situation is actually discovered and appreciated by the defendant in time for the latter by the exercise of reasonable care to prevent injury to plaintiff. This is the doctrine of "discovered peril." All courts in one guise or another accept this branch.

The other branch goes a step further and includes those instances in which the defendant by the exercise of reasonable care *should* have discovered and appreciated plaintiff's peril in time to have prevented his hurt by the exercise of reasonable care. Whether this branch of the exception is accepted is purely a matter of policy like that of the first, and whether it shall be fully accepted or only as to certain types of cases is none the less a matter of policy. Many courts do not recognize this branch. There is not much room for taking the one side or the other. It is not a question of right or wrong. It is purely a matter of which interest, in a particular case, society prizes most highly. Either plaintiff or the defendant, under the common law rule, must bear the risk—which shall it be? The cases range themselves on the one side or the other of this branch of the exception as the courts of the respective jurisdictions value the interests involved in view of what the social wants and desires of their jurisdictions are interpreted to be.

Under either branch there is much room for differences of opinion as to when a person has been, or should have been, discovered in peril. Is a person standing on a railway track engaged in conversation, about his work, in reverie, walking down the track, walking towards the track, when at any moment he could become conscious of his peril and step out of it, a person in peril? Clearly he may be just as much so as a drunk or epileptic on the track, but the difficulty arises in saying *when* the engineer *must appreciate*, or *has appreciated*, the peril of such person, sufficiently to require measures to be taken to avoid hurting him. Such cases vary infinitely in their cir-

⁴⁰ *Radley v. London & N. W. Ry. Co.*, L. R. 1 Appeal Cases 754 (1876); Salmond, *Law of Torts* (6th ed., 1921), p. 41: "When an accident happens through the combined negligence of two persons, he alone is liable to the other who had the last opportunity of avoiding the accident by reasonable care."

cumstances.⁴¹ Much discussion has raged about the application of the rules to these cases, but no far reaching principle of law is involved, unless it is whether good policy would not require in *all* cases in which *human life* is at stake, that the benefit of the doubt should be given *it* as opposed to all other interests. The Missouri courts have apparently settled the difficulties of the problem at least as to railways and automobiles by accepting the rule as based on this broad policy.⁴² It is inevitable that in bounding the scope of the exception nice discriminations have to be made.

But the most startling observation about the development of this exception is the quickness with which it became lost in the limbo of proximate cause. It had hardly secured a footing before the courts and writers began to demand a sounder basis for it than that afforded by the good sense apparent from the simple statement of the rule itself. They found that basis in tracing out, and the identification of, causes. The following excerpts indicate how they found it.

"In some cases there may have been negligence on the part of the plaintiff *remotely* connected with the accident, and in those cases the question arises whether the defendant by the exercise of ordinary care and skill might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the oft-quoted donkey case. There, although without negligence of the plaintiff the accident could not have happened, *the negligence is not supposed to have contributed to the accident within the rule upon this subject.*"⁴³

"The rule has been misunderstood and misapplied. It means only that that negligence upon the part of the plaintiff which bars his

⁴¹ See generally *Pickett v. Wilmington & W. R. R. Co.*, 117 N. C. 616, 23 S. E. 264 (1895); *Gahagan v. Moston & Maine R. R.*, 70 N. H. 441, 50 Atl. 146 (1900); Goodrich, "Applications of the Last Clear Chance Doctrine," 5 Iowa Law Bul. 36-56; Notes 22 Col. Law Rev. 745; 21 Mich. Law Rev. 586; 15 Cal. Law Rev. 43; Bohlen, 66 Pa. Law Rev. 73; Annotations 28 A. L. R. 283; 46 A. L. R. 1047; 5 North Carolina L. Rev. 58; 9 Va. L. Rev. 237.

⁴² See *Hutchinson v. St. L. & M. R. R. Co.*, 88 Mo. App. 376 (1901). This is the so-called "Humanitarian" doctrine, and the court in this case assumed, and numerous other courts have assumed, that there is some vital distinction between this and the "Last Clear Chance" doctrine. There is not. But the Missouri courts are more liberal toward human life in construing the defendant's duty to discover a plaintiff's peril than are the courts in most jurisdictions, and also take no account of a defendant's prior conduct so long as plaintiff's peril is discovered in time to prevent hurting him. See *Banks v. Morris & Co.*, 302 Mo. 254, 257 S. W. 482 (1924); *Moore v. St. Louis & S. F. R. Co.*, 283 S. W. 732 (1926). See 13 Va. L. Rev. 326. But in railway and automobile cases there is perhaps a *general* tendency towards the liberal policy of the Missouri courts. See note, 23 Mich. Law Rev. 668.

⁴³ Lord Campbell in *Dowell v. Navigation Co.*, 5 Ellis & B. 195 (1855), quoted with approval in *Tuff v. Warman*, 2 C. B. N. S. 740, 5 C. B. N. S. 573, 27 L. J. C. P. 263, 267 (1857).

recovery from the defendant must have been a proximate cause of the injury, *and that it is not a proximate but only a remote cause of the injury*, when the defendant, notwithstanding the plaintiff's negligence, might by the exercise of ordinary care and skill have avoided the injury."⁴⁴

"A negligent act of the plaintiff does not become contributory unless the proximate cause of the injury; and although the plaintiff in going on the track, may have been negligent, when he was struck down and rendered unconscious by a bolt of lightning his conduct as to what transpired after that time was no longer a factor in the occurrence, and, as all the negligence imputed to defendant on the first issue arose after plaintiff was down and helpless, the responsibility of defendant attached because it negligently failed to avail itself of the last clear chance to avoid the injury; *so its negligence became the sole proximate cause of the injury*; and *the act of the plaintiff in going on the track even though negligent in the first instance, became only the remote and not the proximate or concurrent cause.*"⁴⁵

The courts in practically all jurisdictions accepted this rationalization of the doctrine. By this method of reasoning the only limitation placed upon the contributory negligence rule was the failure of plaintiff's negligence to be a proximately contributing factor, which meant it was not *contributory* negligence at all.⁴⁶ This was the ground on which the exception was explained. As so explained it was *not an exception* at all and did not in anywise conflict with the contributory negligence rule. This is the end both courts and writers desired to reach. And, curious as it may seem, many able courts and writers still insist upon this empty explanation.

Sir Frederick Pollock states his conclusion as follows:⁴⁷

"This leaves no doubt that the true ground of contributory negligence being a bar to recovery is that it is the proximate cause of the mischief; and negligence on the plaintiff's part which is only part of the inducing causes will not disable him."⁴⁸

"On the whole, then, if the plaintiff's fault, whether of omission or of commission, has been the proximate cause of the injury, he is

⁴⁴ Patterson, *Railway Accident Law*, 51. See also to the same effect: Beach, *Contributory Negligence*, secs. 10 & 11 (1885); Wharton on Negligence, sec. 323, *et. seq.* (1874); Thompson on Negligence, sec. 1157 (1880); see same author's second ed. (1901), secs. 230-241.

⁴⁵ *Edge v. Atlantic C. L. Ry. Co.*, 153 N. C. 212, 69 S. E. 74 (1919). See *McLamb v. The W. & W. R. R. Co.*, 122 N. C. 862, 29 S. E. 894 (1898); also see *Gunter v. Wicker*, 85 N. C. 310 (1881); *Nashua Iron & Steel Co. v. Worcester & Nashua R. R. Co.*, 62 N. H. 159 (1882).

⁴⁶ See *supra*, note 18.

⁴⁷ Pollock, *The Law of Torts* (12 ed., 1923), pp. 463 *et seq.*

⁴⁸ Page 468.

without remedy against one also in the wrong. On the other hand, if the defendant's fault has been the proximate cause he is not excused merely by showing that the plaintiff's fault at some earlier stage created the opportunity for the fault which was that cause.⁴⁹

"In regard to the latter class of cases, such as *Davies v. Mann* and *Radley v. L. & N. W. Ry. Co.*, the rule may be stated thus: That he who last has an opportunity of avoiding the accident, notwithstanding the negligence of the other, is solely responsible. And the ground of both rules is the same; that the law looks to the *proximate cause*, or, in other words, will not measure out *responsibility* in halves or other fractions, but holds that person liable who was *in the main* the cause of the injury."⁵⁰

⁴⁹ Page 471.

⁵⁰ This distinguished author writes as though *proximate cause* were the most definite thing, and that it could be ascertained by a yardstick. It seems to me that the author and many others, as well as courts, are sometimes misled by confusing "sole responsibility" and "sole cause." Of course a defendant who had the last clear chance is "solely responsible," but this does not mean that he was, or must be found to be, the "sole cause." See Shearman & Redfield, *Negligence* (6 ed., 1913), sec. 99. Here the doctrine of contributory negligence and the last clear chance exception are stated well, but at the very last the authors seemed to have added out of an abundance of precaution this innocuous sentence: "His (defendant's) negligence and not that of the one first in fault is the sole proximate cause of the injury." No writer seems to have escaped the dead weight of this constantly reiterated absurdity.

Clerk & Lindsell on *Torts* (7th ed., 1921), p. 505: "The ground of the defendant's liability in such a case is not that he was anymore negligent than the plaintiff, for both were guilty of a want of ordinary care, and there was nothing in the facts to impose a greater obligation to exercise that care upon one party than upon the other; nor is it that the defendant's negligence was later in time than that of the plaintiff, for the negligence of the plaintiff in omitting to remove his person or property from its position of danger continued down to the moment of the accident just as much as did the defendant's omission to take care; it is simply that the latter *being in motion* was the one who actually did the damage. He is responsible who was the efficient cause." These authors face the facts candidly, but cannot resist the temptation of placing their conclusion on the basis of causes. The idea of the sole activity of defendant will, of course, not stand up.

Blashfield, *Cyclopedia of Automobile Law*, p. 1008, 1270 (1927): "The doctrine of contributory negligence is a part of the general doctrine of proximate cause, which says that a man shall not be held responsible for the consequences of his wrongful acts except so far as they are the proximate results of those acts. . . ." "The doctrine of last clear chance, sometimes called the humanitarian or discovered peril doctrine, is a phase of the doctrine of proximate cause. . . ." This writer seems merely to be reflecting the statements of hundreds of opinions to this general effect.

Nehring v. Connecticut Co., 86 Conn. 109, 84 Atl. 301, 45 L. R. A. (N. S.) 896 (1912); *Tullock v. Connecticut Co.*, 94 Conn. 201, 108 Atl. 556 (1919); *De Noma v. Sioux Falls Traction System*, 39 S. D. 10, 162 N. W. 746 (1917); *Mosso v. E. H. Stanton Co.*, 75 Wash. 220, 134 Pac. 941, L. R. A. 1915 A. 943; *Teakle v. San Pedro, L. & A. S. L. R. Co.*, 32 Utah 276, 90 Pac. 402, 10 L. R. A. (N. S.) 486 (1907); *Osgood v. Maxwell*, 78 N. H. 35, 95 Atl. 954 (1915); *Drown v. Northern Ohio Traction Co.*, 76 Ohio 234, 81 N. E. 326, 10 L. R. A. (N. S.) 421 (1907); *Dyer v. C. C. P. & L. Co.*, 120 Me. 411, 115 Atl. 194 (1921); *Dyerson v. Union Pac. R. R. Co.*, 74 Kan. 528, 87 Pac. 680 (1906);

Some states have refused to recognize the exception by "the last clear chance" name. Nevertheless, they have recognized it. The Massachusetts case of *Steele v. Burkhardt*⁵¹ indicates the method employed by the courts which reach the same result by a supposedly different route. In that case, plaintiff had backed his wagon to the curb and left his team standing cross-wise the street in violation of an ordinance. There was still enough room to pass between the front of the team and the opposite curb. But defendant negligently drove his team and wagon over and upon the hoof of plaintiff's horse. To plaintiff's suit defendant interposed the defense of contributory negligence. The court said:

"So the evidence that the plaintiff's team was standing in the street in violation of a city ordinance was admissible to show negligence on his part. It did show negligence in respect to keeping the ordinance, but *did not necessarily show negligence that contributed to the injury*. . . . In such a case he must prove that his position was not so carelessly taken as to contribute to the collision. The fact is here found that it was not so taken, though it was in violation of the ordinance. There was therefore no such negligence on his part as to defeat the action."

The court found that plaintiff's contributory negligence was not a proximate cause of his injury. This is the position taken by the other courts which deny the doctrine.⁵² These courts are much more logical than are those numerous courts which recognize the last clear chance exception but straightway attempt to base it upon an absence of proximate causation. The exception is not needed if proximate causation is its basis, as the courts of Illinois, Massachusetts and South Carolina have demonstrated. It is just so much excess baggage. Why be bothered with it? But as a matter of fact the exception is not founded upon the absence of proximate cause between plaintiff's negligence and his injury. Nor do these courts which claim to deny the exception actually do so. What they do is this: In a last clear chance situation as in *Steele v. Burkhardt*,⁵³ if the case is a strong one for the plaintiff, the court will declare as a matter of

Pilmer v. Boise Traction Co. (Idaho, 1908), 94 Pac. 432; *Grand Trunk Ry. Co. v. McAlpine* (1913), A. C. 838; *Canadian Pac. Ry Co. v. Frechett* (1915), A. C. 871; and see Comment 29 Yale Law Journal, 896-901.

⁵¹ 104 Mass. 59 (1870).

⁵² *Darwin v. Charlotte C. & A. R. R. Co.*, 23 So. Car. 531 (1885); *Farley v. Charleston Basket & Veneer Co.*, 51 So. Car. 222, 28 S. E. 193, 401 (1897); *Clyde v. So. Pub. Utilities Co.*, 109 So. Car. 290, 96 S. E. 116 (1918); *Waldren Express & Van Co. v. Krug*, 291 Ill. 472, 126 N. E. 97 (1920).

⁵³ *Supra*, note 51.

law that there is no proximate cause between plaintiff's negligence and his injury. If they think it doubtful, they leave the matter to the jury to find whether plaintiff's negligence contributed to his injury proximately, and under their short range tests of proximate cause, the jury will normally find that it did not. Good results are achieved by a repudiation of a factual causal relation of the clearest sort. This is merely another instance of circumventing by a fiction what could be better done by the frank acceptance of the exception. Another shift of these courts in such cases is to consider the defendant's negligence reckless, wanton or gross. Plaintiff's wrongdoing is then not a defense to defendant's more serious conduct. This process is made clear by an excerpt from Cooley on Torts:⁵⁴

"If therefore, the defendant discovered the negligence of the plaintiff in time, by the use of ordinary care to prevent the injury, and did not make use of such care for the purpose, he is justly chargeable with *reckless* injury, and cannot rely upon the negligence of the plaintiff as a protection. Or it may be said that in such a case the negligence of the plaintiff only put him in a position of danger, and was, therefore, only the *remote* cause of the injury, while the subsequently intervening negligence of the defendant was the proximate cause."⁵⁵

This marks a tendency even among courts which recognize the last clear chance doctrine.⁵⁶ There is no need for this extra twist if once the exception is recognized. But courts often fail to realize when they have struck sound bottom. They are apparently ever on the lookout for some really nice point of distinction.

A great many courts are beginning to see the utter futility of tying up the last clear chance exception with the follies which have been committed in the name of proximate cause. At least in a great many cases the doctrine is being stated without any reference to proximate cause, and many that refer to it at all do so with slight if any emphasis. In *Haynes v. Southern Ry. Co.*,⁵⁷ Stacy, J., in a

⁵⁴ 3 Ed. 1906, p. 1443.

⁵⁵ See *Murphy v. Deane*, 101 Mass. 455 (1896); *Aiken v. Holyoke Street Ry. Co.*, 184 Mass. 269, 68 N. E. 238 (1903); *Banks v. Braman*, 188 Mass. 367, 74 N. E. 594 (1905); *Waldren Express & Van Co. v. Krug*, 291 Ill. 472, 126 N. E. 97 (1920).

⁵⁶ See Note, 8 Minn. Law Rev. 329-35; Bohlen, 66 Pa. Law Rev. 73; *Wilson v. Traction Co.*, 111 Texas 361, 234 S. W. 663 (1921); *Mueller v. Dewey*, 159 Minn. 173, 198 N. W. 428 (1924); *Moreno v. Los Angeles Transfre Co.*, 44 Cal. App. 551, 186 Pac. 800 (1920); *Gamble v. Uncle Sam Oil Co.*, 100 Kan. 74, 163 Pac. 627, L. R. A. 1917 D. 875; *Dildine Flynn*, 116 Kan. 563, 227 Pac. 340 (1924); *Sherman & Redfield on Negligence* (6 ed., 1913), sec. 64, p. 159.

⁵⁷ 182 N. C. 679, 110 S. E. 56 1921.

clear cut opinion states the doctrine with admirable accuracy and simplicity:

"It has been held uniformly with us that, notwithstanding the plaintiff's contributory negligence, if the jury should find from the evidence that the defendant, by the exercise of ordinary and reasonable care, could have avoided the injury, and failed to do so, and had the last clear chance to so avoid it, then the defendant would be liable in damages."⁵⁸

In *Gunter's Adm'r v. Southern Ry. Co.*,⁵⁹ is found another clear expression by Burke, J.:

"After the defendant's negligence has been established, if it be shown that the plaintiff also was guilty of negligence which proximately contributed to his injury, there cannot, as a general rule, be any recovery, as the courts will not lend their aid to apportion the injury between two wrongdoers. But this rule is a harsh one, and at times works great hardships, so that the courts have felt compelled to qualify it, or make an exception to it, independently of cases specially provided for by statute, and to declare that, while the general rule would be enforced in cases where the negligence of both parties was concurrent, and continuous down to the time of the injury, they would not enforce it, but would allow a recovery in that class of cases, where, although the plaintiff had been negligent in the first instance and that negligence had proximately contributed to his injury, there was an appreciable interval of time between the plaintiff's negligence and his injury, during which the defendant by the exercise of ordinary care, could and ought to have avoided the effects of the plaintiff's prior negligence, but failed to do so. This is a just and humane qualification or exception, and is generally designated as the doctrine of the 'last clear chance'."⁶⁰

Sir John Salmond, a standard text writer,⁶¹ leaves little to be said by way of clarifying the confusion that has been produced by the effort to place the exception on the basis of causal relation. He says:

"Attempts are often made to simplify it by resorting to the theory, or at least the language, of causation, and by applying some distinguishing adjective to the kind of causation which makes the defendant liable, notwithstanding the negligence of the plaintiff. We find it said, for example, that the defendant is not liable unless his negligence was a direct cause of the accident, or the immediate cause, or the decisive cause, or the proximate cause, or the real efficient,

⁵⁸ See a like statement in *Ray v. Railroad*, 141 N. C. 84, 53 S. E. 622 (1906).

⁵⁹ 101 S. E. 885 (Va., 1920).

⁶⁰ See also *Va. Ry. & Power Co. v. Leland*, 129 S. E. 700 (Va., 1925).

⁶¹ Salmond on *The Law of Torts* (6 ed., 1921).

or effective cause, or the *causa causans* as opposed to a mere condition or *causa sine qua non*. If these terms are used merely as legal nomenclature, and with reference to definite legal principles independently established, they may be unobjectionable. If, however, as usually happens, they are used as if they were themselves illuminative and possessed of some independent logical significance, capable of application to the problems of contributory negligence, their use is merely a deceptive substitute for the formulation of definite legal principles."

There is no honest escape from the position taken by these authorities, and to attempt to escape by a resort to a lack of causal relation is a useless attempt to climb down the back way; the statement of the exception carries on its face all the support it needs.⁶²

The unsoundness of the "proximate cause" basis of the exception may be demonstrated in another fashion. If the negligence of both plaintiff and defendant cause the injury of a third person, both plaintiff and defendant may be held liable, even though the defendant had the last clear chance. Clearly plaintiff could not be held unless his negligence was a proximate cause of the injury. Nor can plaintiff defend on the ground that defendant had the last clear chance.⁶³

⁶² Schofield, *Davies v. Mann*: "Theory of Contributory Negligence," 3 Harvard Law Rev. 263 (1890); Bohlen, "Contributory Negligence," 21 Harvard Law Rev. 233, 241, 258; 5 Cornell Law Quarterly 486; 22 Columbia Law Review 745; 57 Am. Law Rev. 115; 37 Harvard Law Rev. 625; *Kinney v. Chicago & G. W. R. Co.*, 17 Fed. (2d) 708 (C. C. A., 1927); *Bogan v. Carolina Central R. R.*, 129 N. C. 154, 39 S. E. 808 (1901); *Freeman v. Schulz* (Colo., 1927), 256 Pac. 631; *Read v. Pacific Electric R. Co.*, 185 Cal. 520, 197 Pac. 791 (1921); *Arnold v. San Francisco-Oakland Terminal R. Co.*, 175 Cal. 1, 164 Pac. 798 (1917); *Wilson v. So. Traction Co.*, 111 Tex. 366, 234 S. W. 663 (1925); *Peterson v. New Orleans R. & Light Co.*, 142 La. 835, 77 So. 647 (1918); *Southern Ind. Gas & Electric Co. v. Harrison*, 151 N. E. 703 (Ind., 1926); *Levein v. Rhode Island Co.*, 43 R. I. 167, 110 Atl. 602 (1920); *Joyner v. Interurban R. Co.*, 172 Iowa 727, 154 N. W. 936 (1915); *Graubner v. Wells*, 260 S. W. 521, 214 Mo. App. 163 (1924); *Towbermain v. Des Moines City Ry. Co.*, 211 N. W. 854 (1927); *Banks v. Morris & Co.*, 302 Mo. 254, 257 S. W. 482 (1924); *McGowan v. Tayman*, 132 S. E. 316 (Va., 1926). In this last case the court mars a good statement by adding a meaningless statement at the conclusion as to proximate cause. In *Buckner v. Southern Ry. Co.*, 138 S. E. 538 N. C. (1927), the court clearly places the decision of a difficult case on the *Davies v. Mann* doctrine, but adds an unnecessary sentence: "The failure of the engineer . . . was the proximate cause of the injury." Such statements are but the echoes of the confusion which has reigned so long. The same able judge who wrote the opinion in this case handled a far more difficult one in *Lawrence v. Yadkin River Power Co.*, 190 N. C., 130 S. E. 735 (1925) without becoming entangled in the complexities of causation.

⁶³ *Cordiner v. Los Angeles Traction Co.*, 5 Cal. App. 400, 91 Pac. 436 (1907); *Spear v. United Railroads of S. F.*, 16 Cal. App. 637, 117 Pac. 956 (1911); *Austin Electric Ry. Co. v. Faust*, 133 S. W. 449 (1910); see Notes, 47 L. R. A. (N. S. 1081); 37 Harvard Law Rev. 625; see Pollock's attempt to avoid this difficulty by saying: "Thus it appears that the term 'proximate' is

It is a simple case of two or more proximate causes producing the injury, any one or more of which can be held responsible.⁶⁴

(c) *Further Exception to Contributory Negligence Rule*

A still further exception to the contributory negligence rule has been made which will doubtless in time be generally recognized. Several examples may be given:

Plaintiff's intestate is negligent in driving on a crossing without looking or listening for a car. The motorman is negligent in driving his car too fast, discovers deceased in time to stop his car and prevent hurting him, but he cannot stop on account of the negligence of defendant in sending out a car with bad brakes. Plaintiff is allowed to recover.⁶⁵

Plaintiff's intestate negligently walked upon defendant's bridge at night. People were accustomed to trespass upon defendant's tracks at this point. On account of the motorman's running without a good light he was unable to discover the intestate in time to stop his car so as to prevent striking him. A recovery was allowed.⁶⁶

Defendant's train was being run at an unlawful rate within city limits where there were blind crossings. On account of the speed of defendant's train, after discovery of plaintiff, who was negligent himself in going upon the crossing, it could not be stopped in time to prevent a collision. Plaintiff was allowed to recover.⁶⁷

Plaintiff, a pedestrian, negligently walks out into the traffic at a street crossing. Defendant sees plaintiff and could stop except for the fact that he is driving a car equipped with defective brakes, or at such a rapid rate that he cannot stop, although if his car had been equipped with good brakes, or if he had been driving with due care, he could have stopped. Plaintiff is run over and hurt. Should plaintiff be allowed to recover?

not used in precisely the same sense in fixing a negligent defendant's liability and a negligent plaintiff's disability."—Pollock, *The Law of Torts* (12 ed., 1923), p. 469.

⁶⁴ *White v. Carolina Realty Co.*, 182 N. C. 536, 109 S. E. 504 (1921); *Albritton v. Hill*, 190 N. C. 429, 130 S. E. 5 (1925); *Etheridge v. Norfolk Southern R. Co.*, 129 S. E. 680 (Va., 1925).

⁶⁵ *Loach v. British Col. Elec. Ry. Co.*, *Privy Council* (1916), 1 Appeal Cases 719. See also *Brenner v. Toronto Ry. Co.*, 13 Ont. Law Rep. 423, *Canadian Law of Motor Vehicles* (1926), p. 484-6; but see *Smith v. City of Regina*, 34 Dom. L. R. 238.

⁶⁶ *Dent v. Bellows Falls & S. R. St. Ry. Co.*, 95 Vt. 523, 116 Atl. 83 (1922); *Lloyd v. Albemarle & R. R. Co.*, 118 N. C. 1010, 24 S. E. 805 (1896).

⁶⁷ *Goben v. Quincy O. & K. C. R. Co.* (Mo. App.), 226 S. W. 631; *Mason United Rys. of St. Louis*, 296 Mo. 66, 246 S. W. 3 R. (1922); see also *Moore v. St. Louis Transit Co.*, 194 Mo. 1, 12, 92 S. W. 390, and other cases cited in *Goben* case. Also see 27 *Harvard Law Rev.* 757; 4 *Texas Law Rev.* 394.

The number of such situations which may arise as the result of steam, electric and gasoline motor transportation are many. If the exception stated shall be generally recognized the doctrine of contributory negligence will be still further qualified.

In the cases passing on the point the courts have indulged two fallacies. In the first place they have tried to determine the cases on the ground of proximate cause, and in most of them the conclusion has been that the defendant was the sole proximate cause and plaintiff's contributory negligence was a remote cause, a condition, etc. A discussion on such a basis is as idle as those instances we have already considered. That both parties were negligent and that the negligence of both contributed appreciably to plaintiff's injury is too clear for argument.

In the second place the courts have sought to invoke the "last clear chance" exception. This, too, is futile, for in all the instances on record the defendant has done all in his power to stop after discovering plaintiff's peril. Even so able a writer as Sir John Salmond, seeing that in most instances the injured party had, in fact, the last clear chance, is inclined to think the "last clear chance" exception has not yet been correctly stated or at least needs qualification.⁶⁸ The observations made by Salmond are valid, and he should have seen that what is called for in these instances is a corollary to the last clear chance exception—merely *another* qualification of the contributory negligence rule. It, of course, might be considered as an extension of the last clear chance exception, but it would be rather difficult to state it as such, and it is easier to consider it merely as a corollary to that exception. At least there is sufficient basis for these decisions without departing from good sense, whatever terminology may be employed to designate the breach made thereby in the contributory negligence rule. It might possibly be termed the "*first* clear chance."

The instrumentalities under defendant's control in these cases are dangerous to human life and limb unless kept under control, and unless the means of control are adequate. The experience of operators is such that they know their cars will meet many emergencies in which others will be found in perilous situations. Normal experience does not warrant the assumption that others will always act prudently;⁶⁹ we know better. Under the law as it now is, these

⁶⁸ Salmond, *The Law of Torts*, 6 ed. 1921, 42-44.

⁶⁹ See *Jaroszewski v. Chicago Railways Co.*, 241 Ill. App. 1 (1926).

dangerous situations impose the duty to use every reasonable means at hand to avoid such injuries when the dangers are discovered, and in most cases even to keep a lookout in order to discover them. If the defendant is negligent in providing his car with the means of controlling it in such situations, is there anything unjust in placing upon him the risk which could have been successfully prevented had his car been properly equipped? Would not such a requirement stand upon the same sound policy as that on which the rules of negligence, contributory negligence, and the "last clear chance" exception, are all based? It is the defendant who is enjoying the ride or making the profit from the operation of such machines as make the highway perilous. While his activity is lawful and desirable, yet he is not on equal footing with the plaintiff he hurts; he enjoys every advantage. He runs little risk of hurt from plaintiff's negligence, either physically or financially; plaintiff has an excess of both risks. In addition defendant has the social utility of the machine itself. Moreover, defendant knows that he is certain to meet with these emergencies sooner or later, and he knows that they will be created by his own fault in part, and should he not be under the risk of making it safe, so far as reasonable means can do so—either with brakes or insurance—for those he may expect to catch off their guard? Is not the *social* interest in *human* life, as opposed to the other interests involved, worth this much? It is enough here to say that this is the only basis upon which recovery in these cases can be placed, unless a much broader collapse of the contributory negligence rule is to take place. And courts will accept or reject it as their sense of fair play, social well-being, and desirable policy, approves or disapproves it. Proximate causation has no contribution to make to this problem; no more than to any of the others. The exception might well be limited to those instances in which the defendant had the last clear chance, but was unable to take advantage of it by reason of operating his machine without proper controls. Nor is it any objection that the exception would apply only to the operations of the instrumentalities of rapid transportation which we employ in our social and economic life.

CONCLUSION

The rules of law pertaining to negligent conduct are simple; they have been made complex, difficult of understanding and application by a useless resort to the mysticism of words. Perhaps this was

necessary in the growth of the law as in every other science. But the fashioning of the law has been the courts' responsibility and it is theirs now to clarify. The courts by the mere process of forgetting—refusing to carry forward in their opinions the refuse which has been generated by the judicial process in fashioning the law—can give the only effective restatement of the law. This is expecting nothing beyond their power or proper function. If they could call into being the rules of conduct we label the law of negligence, they can refine those rules of the dross with which they are encumbered. Then we shall hear no more of "proximate cause."