

# LOSS APPORTIONMENT IN NEGLIGENCE CASES

## PART I—THE DEFECTS OF THE COMMON LAW RULES \*

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A proposal to divide between the parties the loss suffered by plaintiffs in negligence cases has no novelty among law teachers. In the last few decades it has been advocated by highly competent authorities on tort law. It is believed that very few lawyers would deny that the defense of contributory negligence often operates with great injustice, nor disagree with the view that the principle of last opportunity, which to a slight extent curbs the operation of the other rule, is unsatisfactory in merely shifting the entire loss from plaintiff to defendant. The shift is nevertheless demonstrably justifiable to the extent that at least it places liability on the party whose fault is preponderant. Probably few lawyers have given much thought to the fact that, given a "wrongful act", the criminal law punishes the *wrong* but civil liability is based upon the *act*—including its consequences. An act perfectly traced in consequences would be the best basis for judgment of the wrong, but our inability exactly to trace actual consequences, and our forced reliance upon artificial rules of "legal causation", sometimes result in an unjustifiable disregard of the parties' comparative faults.

An apportionment of loss between them must, it would seem, be acknowledged to be a just solution, and a reluctance to alter the common law should not obstruct improvement if the reluctance cannot be rested on any logical or ethical basis. Objections urged against it have been of a supposedly practical nature. The possibility of accurately appraising comparative negligences has been questioned, and therefore the possibility of a just apportionment of loss. It has been urged, perhaps in particular, that a jury is unfit for the performance of the task. Nevertheless, in one great field of law, this principle of comparative negligence has been successfully applied by judges for centuries in various countries, and is today applied in every great maritime country in the world save only the United States. Moreover, the principle is today established by statute to varying extent in some of the states of this country in the field of negligence. It is notorious, too, that lawyers in any state would be very much divided on the question of a jury's

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\* In two parts. Part II will be published in a later issue.

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unfitness to apply the principle. And it is certain that juries actually do apply it, however roughly, in their verdicts, and have done so always, and notably ever since the bar of contributory negligence came into the law in the early 1800s.<sup>1</sup>

A proposal to displace by a statutory rule the rules of common law is certainly undesirable unless the latter are demonstrably unethical or otherwise unsatisfactory, and the former not. The first part of the present discussion will therefore be devoted to consideration of the common-law system of civil liability for negligence, with attention centered upon the doctrines of contributory negligence and last opportunity<sup>2</sup> as dealt with under principles of "legal" causation. The primary purposes of this discussion are to emphasize what is generally well recognized—the impossibility of explaining either doctrine by those principles; to remind readers of the artificial character of "legal" causation; to make clear the relation between our present system of act-and-consequence causation and the original rule of liability in our medieval law; to demonstrate the extraordinary confusion in orthodox explanations of the last clear chance doctrine as embodied in the *Restatement of Torts* between liability for the consequences of an act and liability for moral fault—even were the former undistorted by restrictions of legal causation; and<sup>3</sup> to urge the desirability of basing upon social fault any statutory provision for apportionment of loss between plaintiff and defendant.

Writing of the thirteenth century, Holdsworth tells us that "a man is liable for the harm which he has inflicted upon another, whether . . . intentionally, carelessly or accidentally. In adjudicating upon questions of civil liability the law makes no attempt to try the intent of a man, and the conception of negligence has as yet hardly arisen. A man acts at his peril."<sup>4</sup> And this was stated as still law by Bacon in 1596 and by Hale after 1660.<sup>5</sup> It is very evident, however, that even in the

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1. The above factors will be treated in Part II of this article.

2. This name will be used in referring to the general doctrine developed before publication of the *Restatement of Torts* and "last clear chance" will be employed in referring to the narrower doctrine embodied in the *Restatement* as sustained by dominant authority. In the designation "ultimate negligence," sometimes employed by writers, the "ultimate" is open to the same qualifications as "last," and omission of reference to "chance" or "opportunity" disregards the doctrine's most distinctive feature.

3. To be discussed in Part II.

4. 3 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 299 (1909); 8 *Id.* 446 (2d ed. 1937).

5. "In capital causes, *in favorem vitae*, the law will not punish in so high a degree, except the malice of the will and intention do appear; but in civil trespasses and injuries that are of an inferior nature, the law doth rather consider the damage of the party wronged, than the malice of him that was the wrongdoer". 7 BACON, *WORKS* 307, 347 (Spedding); 1 HALE, *PLEAS OF THE CROWN*, 15, 16. Both are cited by Holdsworth.

medieval period there were present in the law forces that were destined to destroy the old conception of liability.

In the first place the criminal law, even then,—since its object was to punish a wrongdoer, whereas that of the civil law was to give monetary compensation to a sufferer—did mitigate punishment on the basis of self-defense and misadventure, which can reasonably be regarded as mental states. This example was bound to affect, ultimately, consideration of a defendant's civil liability. Its influence was manifest from the fifteenth century onward in the appearance of new types of tort based on wrongful volition or intent; but most significantly it operated from the sixteenth century onward through the doctrine of negligence.<sup>6</sup> The immediate result was an addition to the medieval system of a few new torts in which acts were wrongful because negligent. The ultimate result was the transmutation of that system into our modern law.

But that does not mean that the transmutation is even today complete. Long after negligent acts had come to constitute the greatest portion of the field of torts, blameworthy conduct, "fault" or wrongdoing, was established as the basis of all liability, civil and criminal. But it was *only in a limited sense* that this was true. Negligence is the moral (or social) fault of so acting as to expose another person or his interests to an unreasonable risk of harm.<sup>7</sup> Now, the wrongful conduct of the actor, being merely and precisely an expression of his fault, this latter is no less and no more than the wrongful act the cause of the ultimate harm. It is, indeed, the true cause of the harm. But fault and act are no more identical than artistic genius is identical with a picture in which it finds expression. In the thirteenth century violent and intentional wrongs were recognized in acts, but there was no glimmer of a general conception of fault in legal minds. Once, therefore, wrongs were recognized which we call negligent, the liability attached to them was that imposed for the older wrongs of violence and intent: liability for the act, therefore for its consequences (so far as men then imperfectly discerned them).<sup>8</sup>

6. 8 HOLDSWORTH, HISTORY 449-64.

7. Excluding conduct that is "recklessly disregardful" of others. RESTATEMENT, TORTS § 282 (1934) (Hereinafter cited as "RESTATEMENT"). It is there said that "In the RESTATEMENT . . . negligence is any conduct," etc. § 463, comment *b*. The phrase "negligent conduct" illustrates the general understanding that negligence is a quality of conduct. § 283 reads: "Unless the actor is a child or an insane person, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances." Many passages could be cited in the official comments to the same effect. The phrase "wrongful conduct" is constantly used to indicate the act as distinguished from the fault, and the distinction is important.

8. There is no negligence unless the actor foresees some harm. Holdsworth felt that liability, like fault, should be limited (as in contract) to foreseeable harm, he therefore disliked the modern English cases that establish a contrary view. *In re Polemis* [1921] 3 K.B. 560; *cf. Weld-Blundell v. Stephens* [1920] A.C. 983-84 (per

"In fact", says Holdsworth, "right down to the nineteenth century there is a chain of authority in which the medieval rule is stated and relied on . . . It would, however, be misleading to think that the lawyers, as late as the nineteenth century, were prepared to hold that direct damage, caused by an unavoidable accident in the doing of a lawful act, would expose to liability".<sup>9</sup>

There is a reason why men repeated the old words and assumed the sufficiency of the old idea. It is a very simple one: that an act is visible and its simpler consequences readily detectable. In looking for consequences attention was therefore naturally directed to the wrongful act, not to moral fault. Theories of causation were necessarily developed in seeking to define what harm was the consequence of a man's act, and so by whose act harm was done.

It should here be noted that cases even of the medieval period refused relief to a plaintiff if the admitted act of the defendant was followed by "intervening events of such a kind that no foresight could have been expected to look out for them."<sup>10</sup> It might, then, happen that the intervening action which defeated the plaintiff was his own.<sup>11</sup> Obviously, there was latent in these cases something which in result resembled the bar of contributory negligence. Whether there was any similarity other than in result will be later discussed. The old cases meant, says Holdsworth, that a defendant could escape liability if he proved "that the act, which was the immediate cause of damage, was done, not by himself, but by the plaintiff."<sup>12</sup>

It must have been clear from a very early time that identification of the actual consequences of even a single act involved difficulty, and that disentanglement of the consequences of concurrent causes was impossible. Some limitation, for practical purposes, upon the tracing of

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Lord Sumner). The basis for his dislike of the rule they enforced was the opinion quoted *infra* at note 17. Cf. also remarks of Vaughan-Williams, L.J., in *The Racine*, [1906] P., at 277. Our rule with exceedingly few exceptions is the ancient rule for all torts. For example, if an excavator causes to fall neighboring land which (the jury finds) would have fallen if in its natural state, but which actually has buildings on it, the excavator is liable for damage to the buildings because liable for the natural consequences of his wrongful act—which was, causing land in its natural state to fall, without reference to what could be foreseen. Similarly, if one negligently digs, knowing the likelihood of harm to the buildings, his liability therefor is not limited to harm reasonably foreseeable.

9. 8 *HOLDSWORTH, HISTORY* 454, with a page of illustrative quotations, and 455.

10. *HOLMES, COMMON LAW* 92 (1881); approved in 3 *HOLDSWORTH, HISTORY* 303.

11. 3 *HOLDSWORTH, HISTORY* 301-2.

12. 8 *Id.* 446. This rule has been referred to by writers as "the medieval rule" or "Holdsworth's medieval rule." It must be distinguished from the *general* medieval principle of liability stated *supra* at note 4. It is, however, an application of that principle in a special case—not an exception to it. It will therefore be referred to as the medieval rule of non-recovery.

actual causation—some more or less artificial theory of causation within the law—was therefore inescapable.

That rules of legal causation should have been developed with reference to the wrongful conduct of the actor was so natural, indeed inevitable, that one is inclined to assume that they could in no way be objectionable. Nevertheless such rules have had regrettable results, which are, for example, startlingly manifested in the treatment of the problems of last clear chance as embodied in the *Restatement*. The reason is that our rules of legal causation, being developed in relation to the act without constant recurrence for correction to the fault, are in some cases far removed from both actual causation and ethical solutions. Mr. Bohlen described them as follows:

“Legal proximity of causation may be defined as that conception of cause and effect which has been adopted by the courts as the test by which to ascertain whether a particular harm is to be ascribed to a particular act or omission as its consequences as a prerequisite to the imposition of legal responsibility therefor. This conception has from time to time varied . . . The proximity between the act done and the harm sustained is, however, only one step to the determination of the final question of legal liability. This depends also on many other principles of limitation of legal liability which are entirely distinct from, and in no way dependent upon, legal causal connection. Some of these have their origin in the historical development of the law; others are based on principle of policy; others upon an instinctive conservatism . . . and others are founded on deep-rooted fundamental principles of justice as conceived and developed in the common law of England.”<sup>13</sup>

No matter how excellent it may be, it is necessarily an artificial system,<sup>14</sup> but the point here in question is that its long development has necessarily left it subject to one great defect. To have chosen the concrete act instead of the intangible fault as the starting point of causation was quite right; essentially they were indistinguishable as the cause. But since the causation chain was made artificial in the manner indicated, and its course not corrected by constant reference to the *original fault and cause*, the fault and the harm are often not logically connected by the rules of legal causation. This will be found true, for example, of both contributory negligence and last clear chance. But this was rarely

13. Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233, 234, 236 (1908). This essay is reprinted in BOHLEN, *STUDIES IN THE LAW OF TORTS* 500, 502, 504 (1926). It was easy to ignore or forget the difference between actual and legal causation before the *Restatement* was written, and judicial opinions did so. Even Mr. Bohlen, in an essay of 1901, wrote of “the legally proximate (that is the natural) consequences” of an act—40 AM. L. REG. (N.S.) 79, 83.

14. The gain in ability to identify actual consequences which has come with increasing knowledge (*infra* note 36) has been more or less offset in rules of legal causation by the causes which Mr. Bohlen mentions.

judicially admitted. Instead, it was masked in the latter case by misrepresenting—when so-called “antecedent negligence” is excluded—the nature of defendant’s moral fault.<sup>15</sup>

Holdsworth explained the long life of the medieval principle of civil liability by the fact that “it had been made the basis of a technical system of fixed rules”.<sup>16</sup> The rules he had in mind were not those of legal causation, but it is believed that no others were in the long run so effective to that end. He also adhered through many years to the opinion that “the doctrine [of civil liability] in the form in which it exists in our modern common law is anomalous. It is anomalous, because it represents an attempt to piece together two incompatible theories of civil liability—the medieval theory that liability is based on an act which causes damage, and the modern theory that liability is, as a general rule, based upon some moral fault either of the negligent or of the intentional variety.”<sup>17</sup> This has much foundation, and some will later appear. It is also true, as he likewise said, that in our legal history there are many illustrations of a growing insistence that civil liability “should be based on some moral shortcoming . . . . [The] medieval view as to liability was too narrow; and both the ethical ideas and the social needs of modern times made it necessary that it should be modified.”<sup>18</sup> This also will come into view in a later part of this discussion.

Until a little more than a century ago there was only slow elaboration of the principles of negligence, without basic alteration in the system. Very great changes took place in the first half of the 1800s through the introduction of the principles of contributory negligence and the countervailing doctrine of last opportunity. Various early cases of the first half of the last century presented two remarkable features. One was, that although there clearly appeared to be negligence by both plaintiff and defendant, and although the application of the bar of contributory negligence (had it already been clearly established as a principle of law) was therefore possible, it was also possible to say that one or the other party might nevertheless have averted the accident, either, therefore, justifying the bar if plaintiff also had that “last” opportunity, or nullifying it if the opportunity was the defendant’s. The second salient characteristic of this group of early cases is that—withstanding the medley of judicial utterances that characterizes them as respects the doctrines applicable and as respects legal causation—both judges and juries

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15. See text at note 13 *supra*.

16. 8 HOLDSWORTH, HISTORY 447.

17. *Id.* at 462.

18. *Id.* at 455. He is there discussing (452-58) the long persistence of the medieval rule in bailments and trespass. Cases in which it still survives are discussed at 465-82.

(sometimes in defiance of the court's instructions) strove to put liability on the more blameworthy party. The confusion caused by the vague terminology of causation is conspicuous. Notwithstanding the desirability of avoiding in this summary discussion a clutter of detail regarding individual cases, it will therefore be profitable to look carefully at the opinions in some of these early cases from which the doctrines of contributory negligence and last opportunity are customarily derived. Reasons can be given for denying that either doctrine was involved in the earliest decisions now assigned to it. Some cases could perfectly well have been assigned to one or the other doctrine. But, what is far more important, their examination throws light, as just said, on the identification of the primary wrongdoer as the all-important objective, and on the confusion inherent in any belief that that party can be discovered by applying the terminology of causation.

A very few cases will therefore be examined *seriatim*.

*Butterfield v. Forrester*<sup>19</sup> is generally regarded as having been the first application of the bar of contributory negligence. Defendant put a pole across the highway and plaintiff, "riding violently" in early evening when otherwise he might have seen the obstruction and escaped injury, ran into it. There is only one judicial utterance in the opinions that can be reasonably read as expressing the principle of contributory negligence. Lord Ellenborough said: "One person being in fault will not dispense with another using ordinary care for himself." But this can not be read as expressing the bar of contributory negligence in its usual sense because it does not fit the ordinary facts, the plaintiff being manifestly regarded as the primary wrongdoer; and he was also the last wrongdoer—though note that in applying contributory negligence order in time is not vital.<sup>20</sup> On the other hand, Bayley, J. had charged the jury, on circuit, "that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction; and if . . . [plaintiff was not so riding] they should find . . . for the defendant." These words can be read, in the light of later history, as embodying the language of last opportunity, but note that it was the plaintiff who had that opportunity, which therefore only justified the bar of contributory negligence (though a recent precedent had applied the principle against a defendant).<sup>21</sup> Note also that the case falls outside

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19. 11 East 60 (K.B. 1809).

20. "Except as stated in §§ 479 and 480 [which deal with Last Clear Chance], in determining whether the plaintiff's negligence has so contributed to his harm as to bar recovery therefor it is immaterial that his negligence is antecedent or subsequent to that of the defendant or that the two are actively and simultaneously operating"—See RESTATEMENT, TORTS § 478 (1934).

21. Plaintiff was on wrong side of road, defendant turned into it and crossed to the same side as properly his, and in turning struck plaintiff's horse. Lord Ellen-

the *Restatement*, which only provides for negating the bar when a defendant has a last clear chance to save plaintiff from harm. Bayley, J. also remarked in the argument before the court en banc: "the accident appeared to happen entirely of his [plaintiff's] own fault." This language could be read in two ways without involving innovation in the law. One is, as meaning that plaintiff's conduct amounted to assumption of risk, which was not then nor for a long time afterward distinguished from negligence<sup>22</sup>—and for this view, also, there was recent precedent in another judicial utterance (though it did not control the decision).<sup>23</sup> The other is, as a perfect statement of Holdsworth's "medieval rule",<sup>24</sup> that anyone—defendant *or* (as here) plaintiff—is liable for the harm done by his acts.

*Davies v. Mann*,<sup>25</sup> habitually cited as the source of the principle of last opportunity—a case extraordinarily vague in pleading, facts, and verdict—exhibits much better than *Butterfield v. Forrester* the principle for which it is cited. The trial judge instructed the jury that if plaintiff had been negligent he could nevertheless recover (1) if defendant's negligence was "the proximate cause" of plaintiff's injury, or (2) if the injury could have been avoided by defendant's exercise of ordinary care (meaning: after seeing plaintiff's jackass on the road). Both instructions are easily accepted as presenting in different words the principle of last opportunity. The plaintiff had judgment, and a motion for a new trial was refused. In the higher court it is notable that Baron Parke relied on the charge in its second form. The truth of the matter, so far as it can be stated in terms of causation, was stated with rare judicial candor by Lord Campbell in his comment upon the case:

"There,"—said he—"although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed within the rule upon this subject; and, if the accident might have been avoided by the exercise of care

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borough charged the jury that plaintiff's negligence could not relieve defendant; that defendant "was bound to take that course which should carry him clear of the person who was on his wrong side." *Clay v. Wood*, 5 Esp. 44 (K.B. 1803).

22. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 17 (1906). This essay is reprinted in his *STUDIES*, *supra* note 13, at 445.

23. Defendant was driving on the wrong side of the road. Plaintiff's servant, riding correctly on that side, instead of passing on the mid-road side, crossed over defendant's line to pass him on the curb side, and his horse was killed. Lord Kenyon instructed the jury: "It was putting himself voluntarily into the way of danger, and the injury was of his own seeking." *Cruden v. Fentham*, 2 Esp. 685 (K.B. 1798). See BOHLEN, *supra* at 17 n.2, *STUDIES* at 446 n.9.

24. *Supra* at note 4.

25. 10 M. & W. 546 (Ex. 1842). Defendant's team collided with the plaintiff's jackass. Whether the jackass was either negligently tethered or through plaintiff's negligence on the highway did not appear. Baron Parke was of opinion that defendant did not even plead plaintiff's negligence, and the jury made no finding thereon.



and skill on the part of the defendant, to his gross negligence it is entirely ascribed, he and he only [supposedly] proximately causing the loss".<sup>26</sup>

More notable was Baron Parke's suggestion that the bar of contributory negligence be limited to cases where failure to utilize a last opportunity to save himself from harm was included in (or alone constituted) the negligence of the plaintiff. This formula, which covered and justified the decisions in both the *Butterfield* and *Davies* cases, is clearly to be taken as evidencing hostility to the new principle of contributory negligence, in particular because in an earlier enunciation of it Parke had justified it as embodying the traditional principle of the law. In such cases, he said, the plaintiff was "the author of his own wrong".<sup>27</sup>

In the years between these two leading cases the bar of contributory negligence was very clearly declared in a number of cases.<sup>28</sup> As a whole they leave with one the impression that juries were reluctant to bar plaintiffs because of contributory negligence. Eight cases have been cited above that seemingly involved it, yet plaintiff had judgment in all with a single exception, and in that case he clearly had a last opportunity

26. *Dowell v. General Steam Navigation Co.*, 5 E. & B. 195 (Q.B. 1855). No doubt his comment was ironical; such would have been the attitude of anyone familiar, as he was, with admiralty practice, in which loss had for centuries been divided. In common law the novelty of barring plaintiff for contributory negligence has been introduced, then within a generation counteracted by a doctrine that merely shifted the loss without solving the problem, and was supported by specious but deceptive theory.

27. In *Bridge v. Grand Junction Ry. Co.*, 3 M. & W. 244 (Exch. 1838) at 248, he had said of *Butterfield v. Forrester*: "although there might have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover: if by ordinary care he might have avoided them, he is the author of his own wrong." In that case plaintiff fit this description and did not recover. In *Davies v. Mann*, *supra* note 25, at 548, he said: "the negligence which is to preclude a plaintiff from recovering . . . must be such as that he could by ordinary care have avoided the consequence of the defendant's negligence." This would have permitted recovery, no matter how serious plaintiff's negligence, unless it was of the particular type stated.

28. In *Pluckwell v. Wilson*, 5 C. & P. 375 (C.P. 1832) the evidence left in doubt the question whether defendant was driving on the incorrect side of the road. The court charged that "if the plaintiff's negligence in any way concurred in producing the injury the defendant would be entitled to the verdict." In *Williams v. Holland*, 6 C. & P. 23 (C.P. 1833) at 24, Bosanquet, J. charged: "if the injury was occasioned partly by the negligence of the defendant, and partly by the negligence of plaintiff's son, the verdict could not be for the plaintiff." In *Luxford v. Large*, 5 C. & P. 421 (K.B. 1833) plaintiff's wherry was possibly overloaded, defendant's steamer's speed was improper. The charge, at 426, was that plaintiff could have a verdict only if the swell that swamped the wherry was caused by defendant's improper speed "alone," so that plaintiff "was not at fault, and did not contribute to his misfortune."

In Lord Campbell's opinion in *Dowell v. General Steam Navigation Co.*, *supra* note 26, at 206, which on various points is particularly clarifying, he contrasted the rules in admiralty and at common law: "in a court of common law, the plaintiff has no remedy if his negligence *in any degree* contributed to the accident"—italics as in original.

to avoid injury.<sup>29</sup> In two others, despite contributory negligence, he recovered because defendant had a last opportunity to avoid harming him.<sup>30</sup> In another, defendant's plea of his contributory negligence was held bad in failing to show that that negligence lay "in not avoiding the consequences of defendant's default".<sup>31</sup> In three cases it seems highly improbable that plaintiff was in no way contributorily negligent, and the court charged explicitly that if he was, a verdict for him was impossible—yet in all he recovered.<sup>32</sup> Finally, in one, the jury's repugnance to the rule very plainly appears. In that case Lord Kenyon expressed the opinion that plaintiff voluntarily risked the harm he suffered—that it "was of his own seeking"; adding that if the jury thought otherwise they should find for the plaintiff—which they did, and defendant moved a rule for a new trial. Lord Kenyon repeated his opinion but refused the rule, remarking "that after the finding of the jury, as it was a question of public convenience [namely, use of the highway], the verdict had better rest as it was".<sup>33</sup>

This conflict of will between judge and jury appeared strikingly in another case. Defendant's brig collided with plaintiff's sloop, and Tindal, C.J., charged the jury that in order to give the latter a verdict they must be satisfied that the injury "was not imputable in any degree to any want of care . . . on the part of the plaintiff". He had a verdict, and objections being immediately taken the Chief Justice asked the jury how the verdict was reached. The answer was: "there were faults on both sides". Defendant thereupon claimed a verdict, but the Chief Justice answered: "No. There may be faults to a certain extent".<sup>34</sup>

Without doubt the thought of the Chief Justice was that plaintiff's fault might be merely trivial in its consequences, in which case justice could not be served by barring recovery. Chief Justice Mansfield had

29. *Butterfield v. Forrester*, *supra* note 19.

30. *Clay v. Wood*, *supra* note 21; *Davies v. Mann*, *supra* note 25.

31. *Bridge v. Grand Junction Ry. Co.*, *supra* note 27.

32. See note 28 *supra*.

33. *Cruden v. Fentham*, *supra* note 23.

34. *Raisin v. Mitchell*, 9 C. & P. 613 (C.P. 1839). Professor James remarks that this "could fit in well enough with a scheme of liability based on negligence"—meaning, the moral fault—"but, as Holdsworth points out, it is quite incompatible with the 'medieval principle'."—*Last Clear Chance: A Transitional Doctrine*, 47 *YALE L.J.* 704, 706 (1938). Mr. James refers to the fact that plaintiff recovered despite admitted negligence. Holdsworth nowhere cites *Raisin v. Mitchell*. It is not inconsistent with either the general medieval principle of liability (*supra* at note 4) or with the special medieval principle making plaintiff liable when his own negligence was in fact the primary cause of harm—*supra* at note 12. It is inconsistent with the latter, however, if that rested on plaintiff's act being, not the primary cause of the harm he suffered, but the "direct" cause in the sense of being nearest in time, and that was Holdsworth's belief—it also seems to be Mr. James'. As already noted, it is repudiated under § 478 of the RESTATEMENT, quoted *supra* note 21.

earlier evidenced the same attitude in *Flower v. Adams*,<sup>35</sup> which was decided in the same year as *Butterfield v. Forrester*. A disregard of conduct deemed to be trivial was desirable under any rule of social behavior. It was also a necessity, inherent in our limited ability to trace the causal connection between conduct and effects and in the problem of presenting cases to a jury.<sup>36</sup>

The traditional terminology by which the law designated such conduct as that referred to, designated harms that were equally trivial, and expressed the causal connection between other acts and harms which—not being trivial—were important in law, was certainly an utterly imperfect instrument for the analysis of cause, the expression of thought, or the instruction of juries. There is here no intent to discuss legal cause,<sup>37</sup> beyond commenting briefly upon defects in terminology which are obvious upon superficial consideration of certain words; and this is done in order to make clear the enormous advance made by the *Restatement* in sweeping away all the old terminology—thus testifying that such terminology was neither an essential part of the law nor desirable.

On legal cause only a few words may be ventured. Time has no relation to it except to indicate that of an act which originates it, or to mark the moment when one cause concurs with another. Place has no relation to it whatever. It is natural to think of it as a physical "force", and seemingly no better analogy is available, but it is not therefore to be thought of as running straight or crookedly as through a conduit, or as sharing the locality of persons and things that successively affect or are affected by it. It is not subject to deflection, as by switches; nor

35. 2 Taunt. 314 (C.P. 1810). Defendant placed lime rubbish on the edge of highway, wind raised from it dust that frightened plaintiff's horse, which nearly collided with a wagon passing in the opposite direction on the other side of the road; to avoid that plaintiff, seemingly unskillfully, drove into other rubbish placed by X at the same side of the road as defendant's, and was overthrown and injured. The Lord Justice charged, at 316, that "if there was blameable negligence" of defendant, the verdict should be for plaintiff; but if the accident was due to plaintiff's lack of skill, or was mere "accident" (if placing the rubbish "before the door was no more than a person would do in the usual course of business"), defendant should have the verdict. Verdict was for defendant, and a motion was made for a new trial, for misdirection. In refusing this, the Chief Justice suggested that defendant's act was "too remote"; and Lawrence, J. added, "The immediate and proximate cause is the unskillfulness of the driver."

36. An increasing ability to make such distinctions in important fields, such as those of industrial accidents and bodily injuries, has been the result of increasing knowledge in medicine and engineering. See Goodnow, *Emotional Disturbances as Legal Damages*, 20 MICH. L. REV. 497 (1922).

Our growing consciousness of difficulty is reflecting in the sharpening distinctions between the words "effect", "result", "sequel", and "aftermath".

37. Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 223, 303 (1911); Terry, *Proximate Consequences in the Law of Torts*, 28 HARV. L. REV. 10 (1915); Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920); Edgerton, *Legal Cause*, 72 U. OF PA. L. REV. 211, 343 (1924); McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149 (1925); L. Green, *Contributory Negligence and Proximate Cause*, 6 N.C.L. REV. 3 (1927); Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 229, 396, 471 (1932).

to neutralization by a counter force. It is a logical conception, and it would seemingly have been proper to consider it as operating consistently, persistently, and undeviatingly. Whatever may be its consequences, it would seem that they must be direct. To speak of a cause in that sense as operating directly or indirectly, of only a particular cause as "direct", of one cause as being more or less "proximate" than another to the effect they concur in producing, or to speak of one cause being "superseded" by another when both are operating toward the same end, is to introduce figures of speech into matter that calls for inartificial and logical treatment. Mr. Beale was surely correct in thinking of a wholly satisfactory legal cause as one "logically direct, direct in causal sequence";<sup>38</sup> but to call it, because of its having those qualities, "proximate"—a word of obviously different meaning—was quite a different matter. The cases have not allowed him or other commentators to abide long with logic.

The word "remote" was presumably current when Bacon framed his maxim, *in jure non remota causa sed proxima spectatur*. It has been generally understood as referring to remoteness in place or time of the wrongful act,<sup>39</sup> but the adjective has probably most often been used, as Bacon used it, to qualify the cause that originates in the act. When remoteness is attributed to harm, act, or cause its meaning is almost always that of triviality or negligibility.<sup>40</sup> If a harm is very plainly the

38. *Supra* note 37, at 642.

39. As used *supra* note 35 by Chief Justice Mansfield.

No attention seems to have been paid to the origin and original meaning of Bacon's maxim. He took from Aristotle a conviction "that true knowledge is knowledge of causes"; adopted from the schoolmen their simplified version of Aristotle's division of causes—namely into proximate and remote; and made proximate cause the subject for his scientific examination of law and other fields of knowledge. See Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201. Mr. Green shows the above and much more by quotations from Bacon's writings. He says of the meaning of the terms: "A proximate cause is one in which is involved the idea of necessity. It is one the connection between which and the effect is plain and intelligible. . . . A remote cause is a cause the connection between which and the effect is uncertain, vague or indeterminate. . . . This idea of necessity—the necessary connection between the cause and the effect—is the prime distinction between a proximate and a remote cause"—at 204. He quotes from the schoolmen: "By the remote cause is not meant something which is the cause of a cause, or the cause of several causes" (Occam); "whatever is the cause of a cause is the cause of the effect"—that is, the "proximate cause"; "a cause is said to be remote . . . when neither in its existence nor in its power is it joined to its effect" (Burgersdyk, whose *INSTITUTIONES LOGICAE* was a textbook at Oxford and Cambridge)—at 206, 207. According to Mr. Green, all this was common knowledge in Bacon's day. He points out that time and space had nothing to do with the distinction between remote and proximate causes— at 205. Mr. Green's writings were reprinted in *ESSAYS AND NOTES ON THE LAW OF TORT AND CRIME* (1933).

40. Mr. Bohlen recognized both meanings (and also threw light on the difference of view, next referred to in the text, between Chief Justice Mansfield and Lord Campbell) in the following comment: "How can it be said that any result is the legal consequence of an act which the law deems so far removed, whether by reason of its lack of actual proximity or because of any principle limiting legal liability for actually proximate results,"—here referring, in a third sense, to the harm—"that it

effect of an act, the former has ordinarily been called the "direct" consequence and the latter the "direct" cause. When the connection between the act and the harm was not so obvious, but satisfactorily demonstrable, either one or the other was described as "proximate". But if it was very difficult to trace a causal connection, or it seemed desirable to dismiss the harm as trivial, it was common in older cases to dismiss this as "consequential", or "merely consequential". Thus, within the entire field of consequences, the quality of being consequential was, in words, ascribed with dumbfounding irrationality solely to the situation in which it was most difficult to prove the sequence, or in which though assumedly proved it was nevertheless to be ignored. This usage is today not wholly unknown, and is preserved in various statutes. Each of the words just mentioned has been involved in more or less confusion.

"Remote" has perhaps been subject to least misunderstanding. The mere date of an act cannot possibly affect its effectiveness as a cause of harm; remoteness in time may, however, increase the difficulties of proof—which often are included, like other irrelevancies, in discussions of causation. Even when not used in a temporal sense the word has not always been used to indicate the legal negligibility of an act. Lord Campbell, for example, seemingly thought that the "remoteness" of a plaintiff's contributory negligence might have an important effect on his case.<sup>41</sup> The phrase "remote cause", constantly used, involved in itself confusion, for although a wrongful act ends when performed and may properly be characterized as remote in time or place from the alleged result, this is not necessarily true of the cause which the act originated. Bacon's reference to it is plainly to a cause related to a wrong presently in litigation; therefore a cause of some present potency. If intended to refer to a cause once discernible but which had for practical purposes lost all potency, the phrase would be misleading. Used as Bacon used it, it clearly implies a comparative judgment be-

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refuses to recognize it as a basis of legal claim or redress against the author of the alleged cause? Obviously, however, this is merely to state in terms of apparent causation the limits of legal liability"—Bohlen, *supra* note 13 at 241 n.1.

41. In *Dowell v. General Steam Navigation Co.* *supra* note 26 at 206—immediately following the statement there quoted, and another that he is barred by any negligence that was "a proximate cause" of an accident, "however much [defendant] might be in fault"—he added: "In some cases there may have been negligence on the part of a plaintiff *remotely connected with* the accident; and *in these 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 often quoted *Donkey case, Davies v. Mann.*" Here, (1) the reference to the act in *Davies v. Mann* as remote is curious; (2) he seemingly implied that when plaintiff's negligence was "a proximate cause" not even defendant's failure to utilize a last opportunity could enable plaintiff to recover; but (3) when plaintiff's act was "remotely connected with" his own harm liability could nevertheless be put upon defendant in the manner stated.

tween causes operating concurrently in causing the harm in litigation. Unless proximate is given some wholly artificial meaning it is obvious that "there may be two or more proximate causes of an injury."<sup>42</sup> To begin with, then, "remote" is read as merely "less immediate"—which is an enormous alteration. In that form the rule became, in Jeremiah Smith's words, "productive of infinite confusion and error".<sup>43</sup> The less immediate, or earlier, cause being disregarded, and the more proximate treated as the sole cause, gave rise to the last wrongdoer rule. But proximate was given various other meanings. One was that no cause, or "not too many" causes could have intervened between the actor's wrongful conduct and the harm under consideration. Another made it synonymous with "natural and probable cause". So many situations were supposedly explainable by it,<sup>44</sup> that "proximate cause" became very generally accepted as the equivalent of all "legal cause". Nearly every other word used in stating rules of causation therefore became synonymous with proximate—that is, as some employed them.<sup>45</sup> When the situations referred to are eliminated from the rule it becomes essentially one of liability for reasonably probable harm, since the original rule of eliminating less immediate causes was discredited by developments of the last wrongdoer application,<sup>46</sup> and a supposed test of reasonable foreseeability likewise lost some favor.<sup>47</sup> One peculiar result in some jurisdictions where a defendant is liable for all proximate consequences and proximity is tested by foreseeability, will be referred to later.

The word "direct" was often used indistinguishably from proximate. It implies that a cause can also operate indirectly—and of course the physical consequences of the original wrongful act are generally spoken of as direct or indirect. Assuming that causes can be or can operate similarly, what connection is there between the effectiveness of the cause and that distinction? Direct "forces" have been defined as operating without the intervention of any other force between the wrongful act and the resultant harm, all other "forces" (causes) as indirect; and it was assumed that the latter could "come to rest . . . in a dangerous position" or in "a position of apparent safety" unless

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42. L. Green, *supra* note 37, at 12.

43. J. Smith, *supra* note 37, at 106.

44. See Carpenter, *supra* note 37, at 246-55; Green, *supra* note 37, at 7 *et seq.*

45. See, for a list, McLaughlin, *supra* note 37, at 196 and n.117; Edgerton, *supra* note 37, at 213.

46. See text *infra* at note 118.

47. McLaughlin, *supra* note 37, at 166; Carpenter, *supra* note 37, at 238 *et seq.*; Smith, *supra* note 37, at 245-52, 303 *et seq.* See also, STREET, FOUNDATIONS OF LEGAL LIABILITY 116, 451 (1906).

“some new force combines with this condition to create harm”.<sup>48</sup> The definition of “direct” is one possible definition; the assumptions respecting “indirect” causes seem to be wholly imaginary. In very common usage direct had the meaning of relative immediacy in time or space to the harm—the inartificial meaning of proximate. But here again this immediacy cannot of itself affect the potency of the cause; it only makes the connection clearer and the proof easier that the blameworthy act was the cause. This was really the ordinary meaning of the word. The important thing to note is that the idea of effectiveness, of the relative significance or insignificance of the cause, is wholly absent from the word’s connotation.

Its absence disastrously affected legal thinking. This cannot be better illustrated than by Holdsworth’s *History*, in which the word “direct” in its temporal sense controlled the interpretation of every part of the law of civil liability. The cases which would be apposite in this connection are legion, but merely to select a few for discussion would be open to a suspicion of undue selection, and to analyze more than a few is impracticable. A consideration of Holdsworth’s treatment of the subject can be briefer, and covers the entire field. He read into medieval cases<sup>49</sup> in which recovery was denied to plaintiff when the harm was caused by his own act the interpretation that his act was the direct or proximate cause of the harm, and defined those words as meaning that such act was subsequent in time to defendant’s—a restriction which, though we have always used the same words of causation, is repudiated by the *Restatement*. It is true that Holdsworth’s intent (perhaps always undesirable in writing history) was merely to state the medieval principle “in the terms of the new phraseology”.<sup>50</sup> However, that phraseology seemingly had not in England the meaning he gave it—and certainly had not in the United States; the assumed meaning was not shown to apply to the medieval facts; and thus to the obscurity of the past there were added terminological doubts of the present.

These terms “direct” and “proximate”, as descriptions of causation, were latecomers in the law. It is difficult to see how there could have been any idea in the medieval rule of non-recovery other than that of placing liability on him by whose act, practically considered, a

48. Beale *supra* note 37, at 641, 650. Mr. McLaughlin calls this “natural causation” (*supra* note 37, at 184), but why nature should be thus restricted is a puzzle; apparently “simple,” the causation may be very complex.

49. *Supra* at note 12. Similarly: the doctrine that, “if the plaintiff’s act was the proximate cause of the damage, the plaintiff could not recover, was well established mediaeval doctrine, and wholly consonant with the mediaeval principles of civil liability”—8 HOLDSWORTH, *HISTORY* 459; “if my negligent act is the direct or immediate or proximate cause of the damage, I cannot recover”—*Id.* at 460.

50. *Ibid.*, speaking of the nineteenth century doctrine of contributory negligence, and also describing it quite correctly as “the disguise of the new phraseology.”

harm was done; that is, of applying to the plaintiff the general rule of liability that made every man responsible for his acts. In his earliest references to the rule Holdsworth described plaintiff's act as "the effective cause of the damage which he has suffered".<sup>51</sup> In the medieval cases which he then or later cited on the point plaintiff's fault was more than merely substantial; it was decisive.<sup>52</sup> He also quoted<sup>53</sup> as equivalents of his "direct cause" description the characterization by Bayley, J. of plaintiff's act in *Butterfield v. Forrester*: "the accident appeared to happen entirely from his own fault";<sup>54</sup> Baron Parke's statement in *Bridge v. Grand Junction Railway Company*: "if by ordinary care he might have avoided [the consequences of defendant's negligence], he is the author of his own wrong";<sup>55</sup> and the pondered statement of the Exchequer Chamber in *Tuff v. Warman* that a direct cause is one by which plaintiff "so far contributed to the misfortune . . . that but for such negligence on his part, the misfortune would not have happened"<sup>56</sup>—which certainly must be understood to mean, would not have happened in substantially the same amount and manner.<sup>57</sup> Now, in the first of these cases plaintiff's contributory negligence consisted in not utilizing a last opportunity to avoid all harm; and in the second Baron Parke expressed his belief that no contributory negligence less than failure to make reasonable utilization of such an opportunity should ever suffice to bar recovery by plaintiff. In other words, the "direct cause" contributed by plaintiff in these two cases to his own harm was a manifestly preponderant moral fault (or "act"); and in the third

51. 3 *Id.* at 302.

52. (1) Y.B. 10 Edw. IV, Patch pl. 19—action for damages caused by cattle defendant drove along highway; plea, that plaintiff's land was not properly enclosed, which defect caused the damage. (2) Y.B. 11 Edw. IV, Trin. pl. 6—(translated) "if a man sell me a horse and warrants that he has two eyes, which he has not, I shall have no action of deceit, for I could have known that from the beginning." These two cases are cited in 3 HOLDSWORTH 301-02. (3) *Baily v. Merrel*, Cro. Jac. 386 (1606)—action on the case for deceit by a common carrier against a shipper who understated the weight of goods shipped; held, no recovery because plaintiff could have weighed goods, "and being his own negligence he is without remedy." This case is cited in 8 HOLDSWORTH 459. It is the same case as *Baily v. Merrell*, 3 Bulst. 95 (1695) which Mr. Bohlen preferred to cite as one of assumption of risk—Bohlen, *supra* note 16 at n.43.

53. 8 HOLDSWORTH 461.

54. See text *supra* at note 19.

55. *Supra*, note 27.

56. *Tuff v. Warman*, 5 C.B. N.S. 573 (1858), 141 Eng. Rep. 231, was a collision case in which defendant had the last opportunity to avoid the collision. Willes, J. on circuit charged the jury that despite plaintiff's possible negligence he could recover if that did not contribute "directly" to the collision. Misdirection was alleged in failing to charge that recovery was impossible if he contributed either "directly or indirectly." In the Common Pleas argument was primarily on that point. The court upheld the refusal of a new trial and defined "direct cause." In view of defendant's last opportunity, plaintiff's negligence would not be, it said, a direct cause; "that is to say, would not be a cause without which the injury would not have happened" at 586, 141 Eng. Rep. at 236.

57. See text *infra* at note 77.



case his contributory cause is implied, at the very least, to be substantial. Under the "direct cause" test plaintiff in *Butterfield v. Forrester*<sup>58</sup> did not fail because he could, by using ordinary care, have escaped harm, nor because the violent and reckless manner of his riding made his harm appear almost wilfully his own act, but only because that act, being subsequent to defendant's, was the "direct" cause of the harm.

Holdsworth believed that he corrected misunderstandings respecting contributory negligence. Assuming in that modern bar to plaintiff's recovery a requirement that plaintiff's negligence be last<sup>59</sup> (though according to the *Restatement* that was never necessary), and reading back the same requirement into the medieval rule of non-recovery,<sup>60</sup> he insisted through decades that the two rules were identical.<sup>61</sup> However, although within the requirement of "direct" incidence plaintiff's contribution in each case might theoretically be insubstantial, we have noted above his contrary assumption as respects the medieval rule, whereas he wrote of the modern rule that in it "the go-by is given to any consideration of the respective seriousness of the negligence of the two parties, and the court merely looks to see to whose act of negligence the damage is directly imputable".<sup>62</sup> And no matter what variant opinions may be entertained as respects the origin of the defense of contributory negligence, it certainly soon acquired the meaning that negligence which contributes in any degree to his own injury bars recovery by plaintiff of any damages whatsoever. As a matter of mere language, "contributory" negligence might seemingly be either trivial or serious, less or even greater than defendant's in potential harmful-

58. *Supra* note 19.

59. "The substance of the defence called 'contributory negligence' is not the fact that the plaintiff has been negligent; but that his negligent act is the direct cause of the accident"—8 *HOLDSWORTH* 461.

60. Referring to a case of 1474, he wrote: "We may note, too, that this case clearly shows that a man is not liable unless his act is the proximate cause of the damage"—3 *id.* 302; it was proximate and preponderant. Again: ". . . the doctrine that, if the plaintiff's act was the proximate cause of the damage, the plaintiff could not recover, was well established mediaeval doctrine, and wholly consonant with the mediaeval principles of civil liability"—8 *id.* 459.

61. Referring to the medieval rule of non-recovery he wrote in 1909: "this is exactly the substance and the meaning of that miscalled doctrine 'contributory negligence.' According to this doctrine, when the plaintiff's own act is the effective cause of the damage which he has suffered, he cannot recover"—3 *id.* 302. Referring to the general medieval rule of liability he wrote in 1937 that one illustration of the survival in modern law of that rule that a man is liable for his "act," "is the technical meaning of the defence miscalled contributory negligence"—8 *id.* 459. "That the mediaeval principle"—of non-recovery—"was, in effect, affirmed in the disguise of the new phraseology, is clear from the cases of the nineteenth and twentieth centuries"—8 *id.* 460. "In other words, as in the Middle Ages, the defendant, who succeeds on this plea, escapes because it was not his wrongful act, but the wrongful act of the plaintiff, which was the direct cause of the accident . . . if his negligence had *as great a share* in causing the damage as that of the defendant—if, for instance, the negligent acts of the plaintiff and defendant were contemporaneous, he cannot recover"—8 *id.* 461 (italics added).

62. 8 *id.* 463.

ness. But since, in the state of law long existing, plaintiff's lawyer ought not to bring suit unless he believes negligence by his client to be non-existent, the assumption seems fair that the word "contributory" in the great majority of litigated cases has not had the meaning of concurring but, rather, *at the utmost*, the meaning of a tributary or subservient influence, and when contributory negligence appears, and bars recovery, it is of that character. This assumption necessarily underlies all criticism of the defense of contributory negligence as unjust, and the proposal that it be displaced by an apportionment of the plaintiff's loss in accord with the respective faults of the parties. In the relatively few cases in which the plaintiff, despite contributory negligence, recovers because of defendant's failure to utilize with reasonable competence a last opportunity to save plaintiff from harm, the decision rests, not upon the fact that defendant has, literally, the "last" opportunity—though the *Restatement* found that requirement in the precedents,<sup>63</sup>—but upon the fact that defendant's social fault is more reprehensible.<sup>64</sup>

Holdsworth also attempted, by applying the test of "direct" causation, to clarify the principle of last opportunity, and in so doing ignored all that is significant in it. In *Davies v. Mann*,<sup>65</sup> for example, plaintiff recovered, on this theory, not because defendant could by exercising ordinary care have saved him from harm, but because of a (supposed) quirk in legal causation: "there was contributory negligence, but *the defence* of contributory negligence was not available, because the defendant's act was subsequent to the plaintiff's, and the direct cause of the accident."<sup>66</sup> Since this distinction would apply to every case of last opportunity, it would remove from our tort law the doctrine which perhaps best illustrates the fact that legal problems in the field of negligence can be justly settled only by giving *special attention* to negligence—the social faults of the respective parties. It happens in last opportunity cases (with particular clarity in the personal injury cases covered in the *Restatement* doctrine of last clear chance) that the act that is last in time also expresses the preponderant moral fault.<sup>67</sup> But that coincidence is fortuitous. In general, the test of temporal immediacy is necessarily without reference to fault. In a famous English case that will again be referred to, plaintiff's intestate, who was plainly negligent in driving upon a crossing, was killed by a railway car which defendant's agent endeavored to stop, but vainly because of

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63. §§ 479-80 and Comments.

64. *Infra* page 604.

65. Note 25 *supra*.

66. 8 HOLDSWORTH 461 n.6 (italics in original). The law, of course, does not concern itself at all with contributory negligence otherwise than as a bar to recovery.

67. *Infra* page 599.

antecedent negligence in not repairing its brakes.<sup>68</sup> According to Holdsworth this was "the first case [1915] in which a plaintiff, whose negligence was in fact the direct cause of the accident, was allowed to recover. So that . . . this was the first case in which a comparison of the comparative negligences of the plaintiff and defendant was a real element in the defence".<sup>69</sup>

Whether this innovation seemed to Holdsworth desirable or undesirable (his position seems obscure<sup>70</sup>) does not concern us. We are considering merely the usefulness of the word "direct" in a terminology of causation, and upon this the preceding examination of Holdsworth's various views certainly throws light. If cause be conceived as a force or influence which produces a particular effect the phrase "direct cause" would most naturally suggest, seemingly, the directness of an act's impact, or the clarity of connection between cause and effect, and certainly would have no temporal suggestion. It is therefore difficult to understand why this last should ever have been given that meaning.<sup>71</sup> For some reason immediacy in time became very generally its superficial meaning, but since the other conception of an effective influence could not be excluded it was attached to the phrase by implication—as though it were equivalent to "last acting effective cause". This is, however, clear evidence of the inadequacy and undesirability of the phrase, not of its adequacy. Because the true meaning was only implied the phrase necessarily tended to divert attention from the relative causal potency and social reprehensibility of different acts, as is plainly indicated by Holdsworth's treatment of the subject. In the first place, the wrongful

68. *British Columbia Ry. Co. v. Loach*, [1916] 7 A.C. 719 discussed *infra* following note 136.

69. 8 HOLDSWORTH 462. It will be noted that he here attributes "direct" causation to plaintiff's act although defendant's subsequent *inaction* was nearer in time to the harm, contrary to the principle of the *Restatement*.

70. He tells us (8 *id.* 464), quite justly, that the defence of contributory negligence and the measure of damages for a negligent act (*supra* at note 8) illustrate "the imperfect way in which the conception of negligence has . . . been reconciled with earlier conceptions of liability." The question naturally arises whether he desired the conception of social fault to displace, or be displaced by, the conception of act-and-consequences. A few remarks point to the former view. He condemned "upon purely logical grounds" (8 *id.* 463) the rule for the measure of damages, but accepted it nevertheless as easy of application and, seemingly, desirable (8 *id.* 464). He pronounced it, in its disregard of relative faults, to be "comparable to . . . the defense of contributory negligence" (8 *id.* 463, *supra* at note 62). Now, as to the latter, since he assumed that when the negligence of the two parties are contemporaneous they necessarily cancel each other (8 *id.* 461 and n.6), and that when plaintiff's is subsequent in time it is always the effective cause of harm because "direct," naturally one nowhere finds the defense of contributory negligence condemned as either illogical or unethical. On the whole, if he had any preference, it would seem to be for the rule of act-and-consequences, from ancient times down to the present day and into the future, purged of the entanglements with the element of fault.

71. Possibly it was because, if a course be conceived of as a force or influence, it was difficult to explain why only causes operating "directly" should be recognized.

acts required in the medieval precedents to bar plaintiff's recovery were, as above noted, decisively adequate to account for the harm he suffered; the fact that Holdsworth used only the word "direct" in its temporal sense, with only the rarest reference to—and no emphasis upon—the actual substantive fault, reveals the danger of the phraseology. It is made clearer by his insistence upon the identity of the medieval rule and the modern bar of contributory negligence, notwithstanding his explicit recognition of the complete absence in the latter of any requirement of substantial fault. All this despite the fact that the *Restatement* shows no basis whatever in our law, outside the doctrine of last opportunity, for the restricted temporal meaning of "direct".<sup>72</sup>

And finally, as respects that doctrine, which he likewise explained in terms of direct causation, he explicitly denied that the decisions between 1809 and 1915 were *doctrinally grounded* upon comparative fault, although that is obviously their *justification*, and the order of negligences merely establishes the preponderance of defendant's fault. Still another objection to "direct cause" applied to acts rather than faults as the basis of liability, is revealed in the above quotation. In every case of last opportunity defendant's negligence is a failure to act. It is inaction that subjects him to liability. Holdsworth refers to comparative "negligences" but refers to plaintiff's act as the "direct cause". A conception of cause as a force which only positive action can produce is obviously narrow, and obviously inconsistent with the cases. In the *Restatement* provisions on last clear chance<sup>73</sup> the word "cause" is not used. Why is liability there placed on defendant? Is it because his fault preponderates over the "cause" attributed *sub silentio* to plaintiff's "act"? Or because defendant's inaction is likewise a cause and preponderant? Or because only faults are considered, and his fault, fully defined, is dominant?

However, the ambiguity of the traditional phraseology of causation was perhaps not so great a defect as its scantiness. The terms available were wholly inadequate to afford dependable distinctions; they were too few to be precise even if they had not been inherently ambiguous.<sup>74</sup> No judicial decision was precise until re-expressed in terms relative to act and harm. One result of dependence upon an imperfect terminology was that even the meaning of "cause" became ambiguous. As a thoughtful writer has said, it "may be a conclusion as to legal responsibility stated as if it were a reason leading to that conclusion, or

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72. See note 20 *supra*.

73. §§ 479-480.

74. Compare the discussion of contributory negligence and voluntary assumption of risk in Bohlen, *supra* note 13, at 245-51; and cases cited by HOLDSWORTH, *supra* note 52.

it may connote greater blameworthiness. The former is a common factor in all the legal uses of the word. . . . The latter, when separable from the former, is . . . peculiar to last clear chance cases".<sup>75</sup>

What could not, perhaps, be done while the law was developing was done in the *Restatement*.<sup>76</sup> In not one of the sections in the volume on Negligence and chapter on Causation does one find the words "remote," "direct," or "proximate." One does find "superseding cause", but always explicitly stated as a phrase describing "legal causation"—that is, artificial causation—and in situations, within legal causation, clearly illustrating a just and sensible public policy. It starts with the general principle that an actor's negligence cannot be "a legal cause" of a harm unless it is "a substantial factor in bringing about the harm".

The definition of "substantial" evidently gave much difficulty; it is, in effect, whatever a jury pronounces to be substantial in the general sense of that word as defined in the dictionaries.<sup>77</sup> Various practical suggestions are then added for guidance in determining what is a "substantial" cause. The *Restatement* then proceeds to state the rules governing liability for harms—incidentally illustrating their nature and extent—for which a negligent actor is liable when his conduct is a substantial cause thereof. It next deals with the act of a third person, "or other force", following the actor's negligent conduct, which may relieve him of liability; again listing practical considerations which afford aid in answering the question whether a particular intervening force "is" (that is, should be regarded as) a superseding cause; follows with various concrete examples of factors not to be treated as such, and a few which either are, or, under stated conditions, may be so treated; and then deals at length with particular rules of causal relation which affect solely the extent and not the existence of liability—whereas all preceding affected both; and all these special situations relate to the nature and extent of the harms for which liability may exist.

In short, for the partially misleading and wholly inadequate terminology of "cause" theretofore used in judicial opinions—and which the

75. MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225, 1226 (1940).

76. What follows relates to §§ 430-53, dealing with the causal relation that creates liability (general principles, §§ 430-34—note the small number; rules determining a negligent actor's responsibility for harm, §§ 435-39; superseding cause, §§ 440-53 and on §§ 454-61, which deal with the causal relation affecting extent, but not existence, of liability.

77. In the official Comment *a* on § 431 it is stated that the word is "used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause; using that word in the popular sense in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense,' which includes every one of the great number of events without which any event would not have occurred." The credit for this summation of what the law requires goes to Jeremiah Smith, *supra* note 37, at 308 *et seq.*

*Restatement* discarded as neither a part of the law nor desirable—it has substituted a very few general principles of causation and has then illustrated the operation of these in many precisely stated situations relating to the actor's "wrongful conduct" (again preferring the concrete act to the abstract "fault") or the resultant harm. No doubt all this was what counsel had always struggled to get before juries; and, indeed, what judges had sought to convey in the obscure phraseology of precedents they were bound to copy.

The clarification of principles effected by the *Restatement* is enormous, and nobody examining it can miss the point that the improvement derives from concentrating attention upon precise situations of act and harm, in connection with each of which the existence of cause is either assumed or denied in a pronouncement of the legal responsibility of one or the other party. Certainly juries could never have been intelligently guided to verdicts by instructions couched in the old terminology, and now can be guided by the distinctions presented in the *Restatement*.

Despite the improvements made by this, however, there are good reasons why the preceding discussion of the old terminology seemed necessary. The *Restatement* is not, and the old cases are, the law. As a result of the *Restatement* better opinions and decisions will follow, but until they displace the old the latter will of necessity be cited and quoted. The main reason is, however, that the inconsistencies between liability based on fault and liability based on acts are inconsistencies in the law—that is, in the cases. Moreover, although necessarily not at all removed by the *Restatement*, its language does not so readily reveal these inconsistencies, and an examination of them beginning with it would not make the significance of the distinction between act and fault so plain as it appears when traced from its origin onward. The fact that all the *Restatement's* pronouncements upon the legal responsibilities of the parties are made in relation to precisely stated forms of wrongful conduct, makes it an admirable basis for consideration of the changes which would result in the law if a direct appraisal of the wrong, and not of the consequences ascribed to the conduct under artificial rules of legal causation, were made the basis of liability.

Most important in connection with our definite problem of apportionment is the fact that the *Restatement* has of necessity in no way affected the law respecting the bar of contributory negligence, which would disappear if statutory provision should be made for loss apportionment in negligence cases. On the other hand, it of course preserves certain limitations upon that bar which have been prescribed by general legislation<sup>78</sup> or, in specific situations of frequent occurrence, by general

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78. §§ 285(a) 475(a).

judicial law.<sup>79</sup> It has also recognized as generally established law a portion of the precedents on last opportunity. It remains to consider these two doctrines before passing to consideration of the desirability and feasibility of a statutory remedy.

It is true that the decision in *Butterfield v. Forrester* aroused no controversy when decided,<sup>80</sup> and taking it as introducing the defense of contributory negligence that is surprising unless, as Holdsworth contended, it was understood as stating traditional law.<sup>81</sup> Nevertheless, so taking it, it has already been seen that in its total disregard of the parties' relative fault the defense of contributory negligence had no background in the law; it was a sudden and enormous break with tradition. Be it noted, then, that it has had only a brief history in the development of civil liability. A proposal that it be eliminated is no attack on an ancient common law principle. Its prominence, and its ill effects, have been due to the great number of accidents in an industrial age.

Returning to its innovative character, its derivation has been generally regarded as a complete mystery. It had no analogy in Roman law nearer than assumption of risk,<sup>82</sup> and is wholly without parallel in modern civil law systems.<sup>83</sup> Though greatly resembling in its early applications (less so in many harsh applications in later development) equity's denial of relief to a complainant whose conduct was "unclean" in respect to the very matter of his petition, Lord Ellenborough, who presided over the court in which the case which assumedly first pronounced the doctrine was decided, was certainly one of those least likely of all judges of his time to have borrowed a principle of chancery. Mr. Bohlen has shown, also, that refusal of relief to one of joint tortfeasors could not be the root of the doctrine.<sup>84</sup> It was said by Pollock

79. §§ 285 (b), 475 (a), 468 *et seq.*

80. Bohlen, *supra* note 13 at 233.

81. If in the defense of "contributory negligence" reference had actually been made to, and emphasis placed upon, the fault (negligence) that would be the best reason for rejecting Holdsworth's identification of the modern rule and the medieval rule of non-recovery. But, though the *Restatement* requires "substantial" influence the cases have certainly not required that it approach in causal potency defendant's act. Therefore the name "contributory negligence" cannot be taken, as has been suggested, as indicating a turning of men's minds to the element of fault in liability. Holdsworth assumed that because of the name a re-examination of the old doctrines was compelled, that it was intended to be reaffirmed, hence their identity—8 HOLDSWORTH 460. The name, was however, adopted after the new doctrine had been introduced and thereafter recognized, and nothing in the period of emergence indicates the re-examination of the medieval rule. The truth seems to be that both rules rest liability on an act, but that in the medieval rule an act of decidedly effective character was assumed, and in the modern rule it is not required.

82. Bohlen, *supra* note 13, at 252 n.2, 253 n.2.

83. The Scotch and Quebec Law are discussed by MacIntyre, *supra* note 75, at 1236-38, 1240-41.

84. Bohlen, *supra* note 13, at 242-43.

long ago that the name of the doctrine suggests "that a man who does not take ordinary care for his own safety is to be in a manner punished for his carelessness by disability to sue any one else whose carelessness was concerned in producing the damage."<sup>85</sup> Lord Ellenborough had long before made a remark much to the same effect.<sup>86</sup> These remarks may have led Mr. Bohlen to suggest that the doctrine was an expression of English individualism, resting with consent and assumption of risk on "the same individualistic view as to the proper province of private law"; and that the occasion for its appearing when it did was "the enormous growth of protective duties" which the courts were asked to enforce when England became highly industrialized early in the 1800s. "Unless each man was to be regarded as his brother's keeper . . . it was necessary that the correlative duty of self-protection should be extended"; "the courts are the last resort of him who not merely does not, but cannot, protect himself."<sup>87</sup> All this is extremely plausible, but no proof can be given.

If the suggested explanation of the doctrine's origin be correct, it should not be ignored in considering a proposal to abrogate it in consequence of altered social conditions and ideals now prevailing.

Professor Bohlen long ago pointed out that the general principles of legal causation admit of no modification which, without utterly repudiating their basic ideas, will explain the bar of contributory negligence.<sup>88</sup> As he said of that doctrine:

"it applies only in particular cases and between parties litigant to destroy a chain of causation sufficient to render the defendants *prima facie* liable, and it regards an act already seen to be a sufficient link in the chain of legal causation, as a break therein, not because any new fact has altered its actual position in the sequence of events, not even because of some newly discovered legal characteristic, but simply because the person legally responsible therefor is seeking compensation for the harm it has aided in bringing on him. This is not a modification of the original conception of legal proximity; it is an entirely new and antagonistic principle. The one deals with the relation of fact to fact as *facts*, the other concerns itself with the merits and demerits of the authors thereof as parties litigant".<sup>89</sup>

If "it would be obviously opposed to any possible conception of justice that any one should be required to answer for a harm unless he

85. POLLOCK, *THE LAW OF TORTS* 374 (1st ed. 1886).

86. See text at note 19 *supra*.

87. Bohlen, *supra* note 13, at 253, 254. He quotes Lord Kenyon's remark, in 1789, that "when common prudence and caution of man are sufficient to guard him the law will not protect him in his negligence" (*id.* 253), seemingly as a statement, substantially, of the defense of contributory negligence.

88. *Id.* at 234-42.

89. *Id.* at 240.



had actually caused it"<sup>90</sup>—and no one, presumably, will assert the contrary—the bar of contributory negligence must with equal obviousness work an injustice in the vast majority of litigated cases, in which the plaintiff's contributory negligence is only a minor cause. In order to narrow its operation two devices were resorted to by the courts. These were more fundamental than various situational exceptions to the operation of the rule; they altered the meaning of negligence and the imputation of fault. Since both were plainly instrumentalities of a fuller justice they could not, even in their origin, have been properly characterized as evasions of the rule in a depreciatory sense of that word, and they long since became established limitations upon it.

Before considering these, mere reference may be made to certain devices which had the contrary effect of strengthening the bar of contributory negligence, and which were, at least originally and in the main, judicially established. They are known as specific-situation standards, and have played an important part in railroad and automobile litigation. Manifestly, a question whether plaintiff did as much to protect himself as an ordinarily prudent man would have done would be a question for the jury. But when the circumstances fell within some specific rule of caution ("stop, look, and listen" for example) the plaintiff might, on clear evidence, be ruled negligent as matter of law, and a verdict for defendant directed—assuming a decision, also, that plaintiff's negligence was a legally contributive cause (which is the court's function when not in doubt).<sup>91</sup> A student friendly to the defense of contributory negligence and to these devices has found evidence of their lessening use, or effectiveness.<sup>92</sup> Such standards, whether judicial or statutory (such as fixing the right of way at crossings) simplify litigation, and if they could be fixed with equality for both parties they might be very desirable.

As respects both defendant and plaintiff the court determines—from the facts admitted, found by special verdict, "or reasonably inferable from the evidence"—whether defendant's conduct was a substantial factor in causing harm to plaintiff, unless that is open to reasonable doubt, in which the question "is to be left" to the jury. The court also has power to determine as to each party whether there exists the causal relation necessary to impose liability on one or bar recovery by the other.<sup>93</sup> These are very great powers, and if it is fair to assume that

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90. *Id.* at 234.

91. RESTATEMENT, TORTS § 434 (1934).

92. R. M. Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP PROB. 476 (1936). He refers to them as rules "by which [a judge] might rescue the defendant from the fault judgment of a hostile jury"—at 481 (*italics added*).

93. RESTATEMENT, §§ 434-476.

judges will rarely be unduly distrustful of their opinions in exercising them, then restraint should certainly be exercised in any judicial action outside of them. The members of the American Law Institute, in approving what the authors of the *Restatement* wrote, tell us that:

“While the function of the court in dealing with negligence and contributory negligence is the same, it is often differently exercised. Courts frequently define the standard of self-protective care to which a plaintiff must conform to a degree of particularity to which they rarely define the standard to which a defendant must conform. Thus, in situations which frequently recur courts often declare that particular acts of a sort often done by plaintiffs amount to contributory negligence, although they leave to the jury the determination whether similar acts done by defendants are negligent.”<sup>94</sup>

This turning to duties, toward one's self or others, is obviously a turning toward emphasis upon fault. Moreover, let it be noted that such instructions, as understood by those who approved the *Restatement*, are judgments of comparative fault. Obviously, too, the specific situation rules themselves, though in form relating to acts, represent the same emphasis, for the acts are assumedly of a particularly reprehensible character. As respects the judicial charges to which the above quotation refers—in effect assuming that the plaintiff's duty (not merely his instinct) of self preservation is greater than defendant's duty to protect others—they raise various interesting problems. They are certainly not good ethics, and according to the *Restatement* they are not good law, for it declares that “It is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save a third person *or the land or chattels* of himself or a third person from harm.”<sup>95</sup> And it further provides, in general, that “in determining whether the conduct of a plaintiff amounts to contributory negligence, the fact that his only alternative is a course of conduct which involves a risk of harm to a third person is a factor to be considered.”<sup>96</sup> Even as a matter of fact it is not at all certain, fortunately, that emphasis upon thought for one's self, when danger is realized, fairly represents average human conduct; in many particular situations we all know that it does not.<sup>97</sup> But in the general run of contributory negligence cases no dan-

94. *Id.* Comment *a* on § 476. See also Mr. Bohlen's remarks on *Schlemmer v. R.R.*, 207 Pa. 198, 56 Atl. 417 (1903)—Bohlen, *supra* note 13 at 251 n.1.

95. § 472 (*italics added*).

96. § 471. The same provision is made as respects defendant's negligence—§ 295. See Comments on all three sections.

97. Mr Bohlen remarked that “The duty of care for others manifestly should be no higher than the duty of self-protection,” and added that to hold otherwise would “. . . unduly burden business—rob of self-reliance . . . enervate and emasculate and effect pauperize—everybody,” apparently since everybody (including busi-

ger to others is realized; plaintiff's conduct—like his conduct in accidents involving himself alone—is one of mere inadvertence, complete self-forgetfulness.<sup>98</sup> If relative duties and faults are to be considered—and if one considers the social interests involved, such as that of lessening accidents—how can a plaintiff's duty to protect himself possibly be regarded as approaching that which should rest upon a defendant whose business requires the constant operation of dangerous instrumentalities such as a street car or a railroad locomotive or an automobile?

Turning now to the two relatively fundamental devices that weakened the bar of contributory negligence, the first arose from the fact that the defense was never available to an intentional wrongdoer; not even when the plaintiff's negligence made defendant's wrongful act possible.<sup>99</sup> The courts, then, extended the meaning of intentional conduct to cover "wanton" or "willful" conduct. Sometimes, too, the phrase "gross negligence" was used with the same meaning—seemingly not with impropriety as a descriptive term of unusual fault.<sup>100</sup> So, in the *Restatement* negligence is now defined as "any conduct, except conduct recklessly disregarding of an interest of others, which falls below the standard established by law for the protection of others against unreasonable risk of harm."<sup>101</sup> Thus though reckless conduct is not brought under "intent," neither is it left under "negligence" by exclusion from intent, and plaintiff's contributory negligence is not a bar to recovery from a defendant who so acts.<sup>102</sup>

The other meliorative doctrine was that of last opportunity. With respect to removal of the bar of contributory negligence the rule introduced was: that notwithstanding contributory negligence of the plaintiff he might recover if the defendant had and neglected to utilize, a last opportunity by using ordinary care to avoid injuring plaintiff.<sup>103</sup>

This principle of last opportunity was not restricted to situations of threatened harm to the person of a human being. The leading case on the subject involved damage to property.<sup>104</sup> In the *Restatement* it is

ness men) would be the recipients of protection. He concludes that "it is only where there is equal ability, equal opportunity to avert the harm that this applies"—Bohlen, *supra* note 13 at 254-55, 256. But the final concession was limited in his mind to the situations of personal danger covered by the last clear chance doctrine of §§ 479-80.

98. Compare Comments *b* and *g* of § 466 of the *RESTATEMENT*.

99. *RESTATEMENT* § 481.

100. Cases are cited in BOHLEN, *CASES ON TORTS* 529 *et seq.* (3d ed. 1930) also in Bohlen, *supra* note 13 at 259, nn.1, 2.

101. *RESTATEMENT* § 282.

102. *Id.* § 482; compare §§ 500-03.

103. A large collection of cases is available in 92 A.L.R. 48 (1934). General reviews of the doctrine are available in the articles of James, *supra* note 34, and MacIntyre, *supra* note 75.

104. *Supra* note 25.

in words, limited under the name of last clear chance to personal injuries,<sup>105</sup> as the only portion of the doctrine established by general law. Since contributory negligence is in logic and practice as broad as negligence,<sup>106</sup> it is regrettable that the doctrine of last opportunity, which within its limited availability is to some degree<sup>107</sup> curative of the harshness of the bar of contributory negligence, should be less broad in scope. Moreover, even so far as it is recognized by the *Restatement* there is another marked restriction upon it which is not present in the contributory negligence that bars recovery. Mr. Bohlen, it has been noted, pronounced the latter doctrine wholly unexplainable by the rules of legal causation,<sup>108</sup> and it has also been noted that it completely ignores the comparative faults of the parties.<sup>109</sup> On the other hand, as will soon appear, the doctrine of last clear chance in the *Restatement* is an imperfect expression of a judgment of comparative faults. The imperfection derives from the inclusion of a requirement supposedly inherent in rules of legal causation—namely, that defendant's power to save plaintiff must not only be greater than plaintiff's power to save himself but also available later in time, though plaintiff's contributory negligence may precede, follow, or be contemporaneous with defendant's negligence.<sup>110</sup> Now, this aspect of the principle of contributory negligence is manifestly consistent with the nature of fault (which cannot depend on time), notwithstanding that the principle as a whole ignores the parties' comparative faults. As regards legal causation, if its general rules permit this disregard of time in contributory negligence, they cannot, logically, have required the time restriction in the doctrine of last clear chance. If, on the other hand, legal cause is a matter of precedent or special policy in each compartment of negligence,<sup>111</sup> it is to be hoped that (so long as the bar of contributory negligence remains in

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105. §§ 479-80.

106. *Id.* §§ 281-83, 463-64 and Comments *g* on § 281, *b* on § 463, *a* on § 464.

107. Mr. James has expressed the view that *Davies v. Mann* stands merely for the principle stated by Holdsworth, *supra* note 66: that plaintiff recovered because his negligence was not last in time, therefore not the "direct cause," and hence did not fall within the defense of contributory negligence. He then adds: "The rule"—of last opportunity—"is a limitation which inheres in the defense of contributory negligence itself (rather than one which avoids the effect of contributory negligence) and the limitation is a logical application of the medieval principle" of non-recovery. After thus adopting Holdsworth's ideas *in toto* he proceeds: "It is amusing to see how this faithfulness to an older orthodoxy was branded as novel and heretical by later writers who had come naively to assume that the defense of contributory negligence, in its unspoiled original simplicity, extended to any fault on the plaintiff's part, and necessarily was a total bar to his action"—James, *supra* note 34, at 707. He also borrows Bohlen's characterization of the last opportunity doctrine as "archaic."

108. See note 88 *supra*.

109. See text at note 62 *supra*.

110. RESTATEMENT § 478.

111. See text at note 13 *supra*.

the law) the recognition by the *Restatement* of the time restriction in last clear chance will not prevent the development of law to the contrary. Mr. Bohlen was convinced, years before he drafted the *Restatement*, that "it is the sequence in time of the successive negligences which is vital."<sup>112</sup> But he recognized frankly a few years later that jurisdictions not accepting that requirement were free to proceed with the elimination from the last-opportunity doctrine of another element which—along with the time restriction—prevents it from resting squarely on a judgment of relative faults.<sup>113</sup>

If last opportunity, whatever its limitation as respects the nature of the interest invaded, has as its objective the nullification of the bar of contributory negligence, the defendant would always be the party with whom it would be concerned. There was no reason in logic, however, why it should not have developed as merely a fault, of peculiar character and gravity, of which either party might be guilty, and with correspondingly serious consequences to the one guilty. Such, we have seen, was precisely what Baron Parke, with three decades of the cases involving contributory negligence and last opportunity in mind, understood the latter doctrine to be.<sup>114</sup> A Canadian lawyer, discussing the development of the doctrine in English law, has said that:

"the courts proceeded to apply it with impartiality to plaintiff and defendant alike, with the result that notwithstanding the negligence of *A*, *B* as defendant would be liable for the whole loss, or [*A*] as plaintiff would be unable to recover, if he"—whichever party—"could with ordinary care have avoided the accident. The step from this was easy to the cases where negligence prior in point of time was held not to have contributed; and the hunt for the ultimate negligence was now on . . . This search has been complicated . . . by decisions that negligence might remain ultimate, because continuing, although in fact originally antecedent . . . and the search for the proximate cause in this special sense is tending more and more to exclude from consideration all the other contributory causes which might fairly be thought to entail a share of the liability."<sup>115</sup>

This is a perfectly fair statement of the absurdities to which reliance upon legal causation leads in attempting to deal with the doctrine; it was written in defense of a bill providing for division of loss in contributory negligence cases.

112. Bohlen, *supra* note 16, at 243.

113. See *infra* page 606. Mr. Bohlen did not, to be sure, refer to the doctrine of fault. Nor is there anything to indicate that he had given thought to the confusion between act and fault in negligence liability.

114. *Supra*, note 27.

115. I take the quotation from GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 127, 128 (1936).

To appreciate how consideration of the fault elements in contributory negligence and last opportunity can be displaced by preoccupation with a rule of legal causation it is instructive to note Mr. Bohlen's attitude toward both doctrines. Reference has already been made to his suggestion that the introduction of the defense of contributory negligence was an "exhibition of the individualism of the common law, which exhibits itself in other fields in the doctrines of consent and voluntary assumption of risk."<sup>116</sup> There is indeed an individualism of "the law" in all these cases, and in the last two an actual individualism justifies the attribution of a willingness to bear the risk. In contributory negligence the individualism is peculiar, and wholly of judicial origin.<sup>117</sup> The suggestion, however, was very likely quite sound, though not elaborated. On the other hand, Mr. Bohlen argued that both the defense of contributory negligence and the principle of last opportunity were latent in another doctrine that was prevalent in the early 1800s and was applied in 1806 in *Vicars v. Wilcocks* by Lord Ellenborough.<sup>118</sup> The doctrine of last clear chance in that case made a third person whose supervening act was last in time solely responsible to plaintiff, the defendant being exonerated even though the third person's act was a normal response to the defendant's anterior act of which plaintiff complained—and therefore within the natural consequences of defendant's act.<sup>119</sup> Now, said Mr. Bohlen:

"The disability of the plaintiff whose negligence happened to be the *final* decisive cause of his harm, to recover is but an obvious application of the rule in *Vicars v. Wilcocks* to the facts of the case. Similarly the so-called Doctrine of the Last Clear Chance, whereby a defendant whose negligent act"—in not reasonably utilizing a last opportunity to save plaintiff from harm—"was the final decisive cause of the accident was liable to the plaintiff even though the latter had . . . earlier . . . been guilty of some default placing him within the reach of the defendant's act"—and final inaction—"is also a necessary result of that rule applied to such facts, and not, as it appears today, an anomalous exception, based on the hardship which would follow from the rigorous and logical application of the general principles of contributory negligence".<sup>120</sup>

116. Bohlen, *supra* note 13, at 258. See also Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 17 n.2 (1908).

117. The individualism in contributory negligence—the duty of self-protection—is very remarkable in other respects, as explained by Mr. Bohlen, and with one alteration it underlies the form in which the doctrine of last clear chance is stated in the *Restatement*. See text at note 131 *infra*.

118. 8 East (1806). Defendant slandered plaintiff, and the latter was in consequence discharged by his employer. Plaintiff's counsel insisted upon the actual causation. The court held that the harm must be "the legal and natural consequence" of defendant's act, and here it was "an illegal consequence."

119. See RESTATEMENT § 449, pronouncing view that legal causation may include acts of any quality.

120. Bohlen, *supra* note 13 at 238; and see last part of quotation *infra* note 130.

The word "final", obviously used as a temporal sense, was italicized by Mr. Bohlen because the principle in question—treating the latest act as the sole responsible cause—would only partially then explain the bar of contributory negligence, and obviously explains nothing today,<sup>121</sup> and Mr. Bohlen himself emphasized both those facts.<sup>122</sup> The principle of *Vicars v. Wilcocks* could be identical with that underlying the defense of contributory negligence only if (1) there was nothing more in that case than a "principle of limitation of liability, purely legal",<sup>123</sup> attaching liability to the latest negligent act alone, and if (2) there was nothing more to the bar of contributory negligence than the same liability of the later actor. But the problem in the *Vicars* case was not so narrow. In Mr. Bohlen's words it "added to a consideration of the actual sequence of events a scrutiny of the legality or illegality of the various steps therein"; and not only did Lord Ellenborough seem to emphasize this,<sup>124</sup> but so also does the special repudiation of the distinction in the *Restatement*.<sup>125</sup> Likewise as regards contributory negligence, there was negligence prior to, contemporaneous with, and subsequent to that of defendant. We have seen that Holdsworth, in order to explain the defense of contributory negligence by latest-act causation, limited the defense to the last situation alone.<sup>126</sup> To identify this with the causation formula of the *Vicars* case is to do the same thing. Mr. Bohlen himself pointed out this fact; his explanation assumes that it was overlooked by Lord Ellenborough. However, Mr. Bohlen's other explanation of contributory negligence as an expression of (imputed) individualism, actually covers the whole doctrine, and Ellenborough's own words in *Butterfield v. Forrester* seem to rest on that basis.<sup>127</sup> Moreover, the idea does seem fantastic that a principle governing a last act by a third person, and intervening in a causal relationship already existing between plaintiff and defendant, would have been applied by any judge—and particularly by Lord Ellenborough, who was a conservative above conservatives—to an earlier act by plaintiff himself which was part of the original causal relationship between plaintiff and defendant. Mr. Bohlen did not refer to any parallel in law to this phenomenon. On the whole, his theory seems unfair to Lord Ellenborough. The situation seems to be essentially the same when one considers the application of the suggestion to the doctrine of last opportu-

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121. *Id.* at 241, 259.

122. *Id.* at 236.

123. *Id.* at 240.

124. See note 108 *supra*.

125. § 449.

126. Note 66 *supra*.

127. "One person being in fault will not dispense with another's showing ordinary care for himself"—11 East 60, 61 (1809).

ity. Particularly as respects the last point made above, and even if the doctrine be confined (as in the *Restatement*) to the defendant, there would still be involved the same logical impediment, the same tremendous step from one set of facts to another.

Mr. Bohlen disliked the defense of contributory negligence, but seemingly, as indicated in a passage already quoted,<sup>128</sup> only because it violated the test of proximity in legal causation, or was unexplainable thereunder. Nowhere did he explain an aversion to it as working injustice. The individualism of a duty of self-protection manifestly appealed to him, and he ignored the distinction between its voluntary and involuntary forms. Had he felt any ethical objection to the defence he would probably have acknowledged some good in "the Doctrine of the Last Clear Chance". But he acknowledged none. The capital letters were not an obeisance to it; they were unquestionably derisory. And the only *stated* reason for this dislike was the doctrine's supposedly obsolete principle of causation.

"In many jurisdictions"—he said—"there has persisted in this one particular connection [with contributory negligence], that conception . . . which prevailed when the earliest cases on contributory negligence were decided, and which has become obsolete in other fields which regarded the last actor, him whose conduct supplied the final impulse, as the sole responsible cause, and this whether the plaintiff's peril was actually known to the defendant or could have been discovered had he exercised normal care. Nor is it strange that in this one particular class of case the archaic idea continues. The very tendency toward a fuller and more complete measure of responsibility on the part of those guilty of social misconduct which led to the repudiation of the rule in *Vicars v. Wilcocks* where it restricted liability, [of the original defendant in the three-party situation], naturally tended to retain it [in the two-party situation] where its abandonment would have restricted rather than enlarged the liability of a negligent defendant".<sup>129</sup>

It does not appear how old the rule was which Mr. Bohlen made the putative parent of the doctrine of last opportunity. The latter is not ancient. Nor is it antiquated or obsolete in its result of enlarging the liability of the negligent defendant whom the older doctrine wholly relieved; to that extent Mr. Bohlen's approval of it can be found by implication in his writings, despite the absence of explicit approval. On the other hand, his only complaint was that this result is reached by assuming that the older doctrine's rule of "last decisive impulse" is a rule of causation adequate to justify the result. But even though its

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128. Note 89 *supra*.

129. Bohlen, *supra* note 13, at 258-59.



origin, if it was what he suggests, would be nothing of which to boast, a condemnation of the doctrine for that reason must seem trifling to anyone who considers the rule justified by its occasional nullification of the bar of contributory negligence, and who finds a real causal explanation of it in the defendant's preponderant social fault of failing to utilize reasonably his superior power to save plaintiff from harm when the latter's power is known (or should be known) by the defendant to be less. That his fault *is* less follows plainly from Mr. Bohlen's own discussion of the duty to protect one's self and the duty to protect others, for he wrote:

"Where the right to recover is based on the idea that one should make good the harm caused by his social delinquencies, and where, as in all cases of contributory negligence, the defendant's delinquency would have caused no harm to the plaintiff save for his own misconduct in not caring for himself",—which obviously puts upon the latter originally an absolute duty of self-protection—"there is no reason that the law should regard one as the delinquent rather than the other. There is no reason to throw upon the one rather than the other the burden of preventing an accident actually preventable by proper care on the part of either, or of answering for the ensuing harm. It is . . . because the law will not aid a plaintiff who *having the power and consequent duty to protect himself* has failed to do so . . . that the defendant is relieved from liability by the plaintiff's contributory negligence.

"But it is only where there is equal ability, equal opportunity to avert the harm, that this applies. . . . When the plaintiff is for any reason impotent to protect himself, the defendant is bound, if he himself be able by care to avoid harming him, to do so".<sup>130</sup>

It is not clear in this passage when the absolute duty of plaintiff ends and the qualified duty of defendant begins; but the *Restatement*, which plainly adopted the above ideas, sets the latter at the moment when plaintiff's impotence becomes known to defendant. And therefore, plaintiff's duty having ended, *and likewise any possibility of continuing fault* in not saving himself, defendant's later omission is the only, and necessarily the preponderant, fault involved in the harm.

At the end of an article written as "an exploratory excursion into the power and mystery of common-law causation as that word has been used in last clear chance cases", Mr. MacIntyre concluded that "The whole last clear chance doctrine is only a disguised escape, by way of comparative fault, from contributory negligence as an actual bar".<sup>131</sup>

130. *Id.* at 256.

131. MacIntyre, *supra* note 75, at 1226, 1251.

That this is plainly suggested by the early cases on the subject has appeared from their examination.<sup>132</sup> That no theory of legal causation advanced to explain the doctrine is adequate to do so has been generally admitted.

The doctrine appears in two sections of the *Restatement*, limited to personal injuries. In § 479(a) plaintiff exposes himself to a risk potential in defendant's activity and "immediately preceding the harm" is helpless to escape it. Under these circumstances, (b) the defendant is liable if (owing a duty to the plaintiff to be alert) (i) he knows plaintiff's situation and realizes or (ii) a reasonable man would realize plaintiff's peril, or (iii) if a reasonable man would have discovered plaintiff's situation and peril, and (c) *thereafter* fails to exercise "with reasonable care . . . his then existing ability to avoid harming the plaintiff". Section 480 provides for cases in which plaintiff, by exercising reasonable care, "could have observed the danger in time to have avoided harm therefrom", and declares defendant liable under conditions substantially similar to those covered by § 479. There is no difference of moment in the causal problems of the two Sections. There is only one reference to cause in the Comments, none in the text of the Sections.

In discussions of these situations one finds, as in other situations in which this has already been merely incidentally adverted to, an entanglement of rules of causation with talk about fault. Negligence is a *social* fault—to follow Mr. Bohlen in using a word that avoids the objection that some writers raise in denying that some types of negligence, particularly mere inadvertence, are neither "culpable" nor immoral. There can be an earlier or a later fault of blameworthy *conduct*, but the consequences of all conduct involved in bringing about a harm must in fact (though often not so treated in legal causation) continue up to and merge in that result. There cannot be a "last" *cause*, or one separable in actuality from others.

The judges have commonly said that defendant is liable because his inaction is the sole cause of the harm. This plainly contravenes natural causation and discredits "legal" causation, since the consequences of plaintiff's wrongful act, as just said, clearly continue. Mr. Bohlen more cautiously said that his conduct "is to be regarded as the ultimate or final cause of the accident"<sup>133</sup>—which both impugns by intimation the rule stated, as one ignoring the preponderance of defendant's fault, and reiterates his explanation of the decisions as resting on the "archaic" rule discussed above. Judges have also often attempted

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132. See text at note 28 *supra*.

133. Bohlen, Case Note on the rule in *British Columbia Railway Company v. Loach*, 66 U. OF PA. L. REV. 73, 74 (1917).

to rationalize the decisions by saying that plaintiff's act merely creates a "condition", from which it is intimated, no harm will result until acted upon by defendant's later negligence—a new fault. This mixes doctrines of act-causation and fault. There *are* successive faults; defendant's negligence is a "fresh wrong", and the two faults are, as such, separable. On the other hand all this is inapplicable to acts considered as forces or causes. What else can be so plainly continuing as a stabilized "condition"? The vice in the error is that of employing figurative speech, already referred to in another connection. It invites one to infer from the passivity of the pole stretched across the road in *Butterfield v. Forrester*, or the stability of the state of helplessness involved in § 479, a halt in the consequences emanating from a wrongful act.

The truth is that beneath this talk about "condition" and "fresh wrong" lies the fact that the law is here laying aside the chain of act-and-consequence and basing liability on the comparatively greater fault of the defendant. That is, an attempt is made to do justice and then explain, as well as traditional language allows, the reason. To do this openly would be only a slightly greater repudiation of actual causation than the two preceding artifices of "legal" causation. A strengthening tendency to lay aside the act and consider the fault in dealing with the difficult ethical problems of the last-opportunity situation is discernible in other places. For example, Mr. Bohlen suggested that plaintiff's default in subjecting himself or property to a possibility of harm potential in defendant's conduct should be called a lack of "pre-caution" as contrasted with the lack of "caution" manifested by defendant in the later "crisis" in which he might still have averted the harm. And to this he added the opinions that when defendant's default is solely such lack of pre-caution a like default on plaintiff's part "will debar the latter", while absence of antecedent precaution to avoid danger "does not offset a lack of caution" when danger to plaintiff is known to defendant.<sup>134</sup> This is virtually a suggestion that at least a large portion of cases on contributory negligence and last clear chance be dealt with on the theory of comparative fault—quite inconsistently, to be sure, with other explanations of contributory negligence advanced in the same article and with the attack therein made on the doctrine of last clear chance.

Neither opinion of Mr. Bohlen, however, is free from difficulties. Comprehension in a "crisis" is likely to be confused, and reaction uncertain, as the *Restatement* recognizes in case of an "emergency".<sup>135</sup>

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134. Bohlen, *supra* note 13, at 257.

135. § 470. Compare § 457.

Again, looking solely at social faults, suppose defendant be in charge of a locomotive, street car, or motor car that is potentially and constantly a dangerous instrumentality threatening many people, and suppose that defendant has been guilty of neglecting the headlight or brakes for some time previous to an accident which, had they been in proper condition defendant could at the last moment have averted; or guilty before, and up into the time-setting of the accident, of improper speed, but for which he could have saved plaintiff notwithstanding the defective condition of the brakes. Such antecedent faults (with some fine distinctions—at least in the intent of the *Restatement* authors while it was being drafted)<sup>136</sup> are disregarded under §§ 479 and 480, as indicated above in the statement of their provisions. But would not everybody regard such lack of pre-caution, if its consideration be permitted, as more serious than a plaintiff's lack of precaution in inadvertently walking into danger? From a social point of view, which law should embody, is not the fact that defendant's negligence constantly threatens many people—whether the above continuing lack of precaution or the later negligence involved in the accident—reason for considering the negligence particularly grave? If justice is to consider relative faults, without constraint by artificial rules of legal causation, such antecedent negligence cannot be excluded.

In the *Restatement* it is wholly excluded as respects both parties. The plaintiff is helpless when unable to save himself "even though his inability is because of some antecedent lack of preparation", and defendant is required to exercise only "his then existing ability", regardless of whether his ability be slight because of "antecedent lack of preparation or a previous course of negligent conduct".<sup>137</sup> It seems probable that in many cases this equality is one of rule rather than of substance,<sup>138</sup> but that imperfection is perhaps inherent in the operation of any rule. At any rate, treating the matter as one of causation, plain-

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136. Mr. Lowndes discusses interestingly the distinction made by them between *British Columbia Ry. Co. v. Loach*, and *Dent v. Bellow's Falls & S.R. St. Ry. Co.*—Lowndes, *Contributory Negligence*, 22 Geo. L.J. 674, 706-07. His discussion is in terms of causation and duty. See especially the discussions in James, *supra* note 34, at 708 *et seq.* and in Green, *supra*, note 37, at 21-30. As to "dangerous instrumentalities" see RESTATEMENT § 307; Green, *supra*, at 31-32, and Lowndes *supra*.

137. Comments *a* and *f* on § 479.

138. When both parties are operating motor vehicles or other machines the equality is plainly one of substance. In factories there would doubtless have been innumerable situations in which the same would have been true, before legislation provided for industrial accidents. When a pedestrian is injured by the driver of a car there is involved no "lack of preparation" such as defendant's training in the operation of a machine, and it would be very unusual if any negligence could be involved other than that immediately incident to the accident. The requirement that plaintiff act as an average person covers the case with very rare exceptions. (As does—it may be added—the supposed requirement that defendant's last chance be "clear." Does it apply to plaintiff's "helplessness" under § 479, as it does to the requirement of defendant's action? Mr. James has asked why heed plaintiff's help-

tiff's helplessness continues as a fundamental factor in the accident, and defendant's inability to use his brakes effectively is equally a continuing factor that, in actuality, becomes a cardinal cause of the accident. Neither is certain to become such, but the reasonable possibility is potential in each. There seems to be no reason why consciousness of this potentiality should not enter into the negligence of which defendant is guilty: that is, no reason for excluding it (though internal) from the circumstances in view of which he is required to exercise reasonable care. An unreasonable risk of harm being present to someone in the class to which plaintiff belongs, negligence toward plaintiff exists before events identify him as an individual to whom a duty is specifically owed. Nor—putting aside for the moment the matter of the brakes, and assuming defendant negligent otherwise in the crisis—can reliance be placed upon the idea that defendant's causal contribution comes later and is therefore "direct" or "proximate". Since the so-called antecedent negligence is one of continuing inaction up to the moment of the accident it is causal in producing it, and may be the earliest factor therein—as it was in the *Loach* case. Even if latest, that is no reason for attributing to it a greater potency, or for implying that plaintiff's inaction has no close causal connection with his harm; and obviously even less excuse for referring to defendant's inaction as the sole cause of the harm. It can, however, be said—returning now to the matter of the brakes—that because of their bad condition defendant has, in a literal sense, no chance to save the plaintiff. Thus, by having been more negligent as a matter of social fault, and longer negligent—and possibly by having been doubly negligent, before and in the crisis—he wholly escapes liability under the doctrine of last clear chance.

At every step there are therefore impediments, all deriving from rules of legal causation, which obstruct justice in last clear chance situations as our law stands in the *Restatement*. The terminological difficulties standing in the way of the British court in the *Loach* case were perhaps even greater,<sup>139</sup> but they were not allowed to save the defendant. It simply refused to exclude the antecedent negligence, since otherwise the defendant company "would be in a better position where they had supplied a bad brake but a good motorman than where the motorman was careless but the brake efficient".<sup>140</sup>

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lessness and not defendant's inability, when both may be due to lack of the intelligence or reactions of a normal man—*supra* note 34. Defendant's situation is provided for under the average-person standard, plaintiff's seemingly not; but possibly a jury would instinctively seek to apply it to the latter.)

139. Since the British courts have, seemingly, been more bound by the last-actor doctrine than American courts.

140. [1916] 1 A.C. 719, 724, 727.

Difficulties disappear when the problem is approached as one of fault. The very name of the doctrine calls for identification of a last wrongdoer, and it is clear in the doctrine's history that primary emphasis was never on the "last" (though a contrary assumption was the only reason for Mr. Bohlen's aversion to the doctrine), but on the wrong. In all of the cases that mark its early development that was plain.<sup>141</sup> Unless plaintiff's fault has ended before the accident—as, of course, the consequences of his wrongful act have not—defendant cannot be a last *wrongdoer*. In fact, plaintiff's social fault of subjecting himself or another to an unreasonable risk is momentary, ending with his wrongful act, unless he has power thereafter to check its consequences by counteraction. This continuing fault of plaintiff ended with the advent of helplessness. On the other hand, defendant's inaction regarding the brakes is not merely antecedent to the accident; it exposes others to a continuing risk, and ultimately the plaintiff, to the moment of the accident. Defendant might also be guilty of the "fresh wrong" of failing to use with reasonable care his then existing ability to avoid the accident, but in the *Loach* case he was not. Had he been so, very evidently the preponderance of his fault would be much greater under Mr. Bohlen's explanation of the duties of the respective parties,<sup>142</sup> since the plaintiff's "power and consequent duty" of self-protection are wholly of the past. But even though the defendant actually has no power to save plaintiff, his fault respecting the brakes continues. That fault justifies judgment that he is liable. Justice Cardozo's test, applied in the *Palsgraf* case,<sup>143</sup> is one purely of fault: "the risk reasonably to be perceived defines the duty to be obeyed",<sup>144</sup> and carries far beyond the mere existence of a duty, undefined in limits, stated in Mr. Bohlen's explanation. The effect of Cardozo's principle, in Mr. Seavey's estimation, would be "that risk not merely creates the existence of liability but defines its limits both with reference to the person injured and to the harm."<sup>145</sup>

(to be concluded) \*

141. See text at note 28 *supra*.

142. Note 130 *supra*.

143. *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928). See L. Green, *The Palsgraf Case*, 30 Col. L. Rev. 789 (1930).

144. *Id.* at 344, 345.

145. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 381. Since the principles of liability were stated in the old terminology in the cases, and were not based on mere fault, it is difficult to see how the framers of the *Restatement* could have gone farther than they did—that is, in discarding the old terminology. But Mr. Seavey has expressed the opinions that in § 281 they "adopted the full theory of risk," but later recanted and introduced "a confusing series of 'superseding causes,' which may cut off the liability" (in §§ 440-42) *Id.* at 390.

\* In Part II, Professor Philbrick will discuss the history of comparative negligence in the United States and the feasibility of administering a rule of loss apportionment between negligent parties, with some suggestions respecting the remedial legislation required to do away with the present principles of contributory negligence.