

The Yale Law Journal

Volume 87, Number 4, March 1978

Contributory and Comparative Negligence: A Reappraisal

Gary T. Schwartz†

In cases of accidental harm, contributory negligence is one of the two affirmative defenses that tort law has traditionally afforded.¹ The contributory negligence defense came into English law at least as early as 1809² and was an integral part of American negligence doctrine as espoused in *Brown v. Kendall*.³ In its orthodox form, the defense completely bars the plaintiff's recovery.

The last ten years have been a time of turbulence for the contributory negligence defense. Although comparative negligence is an idea that has long appealed to scholars, as late as 1968 all but seven states still recognized the defense in its traditional form.⁴ Suddenly, however, comparative negligence attracted significant support;⁵ sometime during 1974

† Professor of Law, University of California, Los Angeles.

Earlier versions of this article were delivered at the Centre for Socio-Legal Studies at Oxford University and at the Law and Economics Workshop at UCLA. The author is grateful to his colleagues at UCLA.

1. The other, of course, is assumption of risk. Contributory negligence is concerned with the fact that the victim's conduct was *unreasonably* risky, assumption of risk with the fact that the victim's conduct was *deliberately* risky. See generally RESTATEMENT (SECOND) OF TORTS §§ 463-466, 496 A to 496 G (1965); 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1162-1209 (1956); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 416-27, 439-57 (4th ed. 1971). Assumption of risk retains an identity quite distinct from that of contributory negligence. See R. POSNER, ECONOMIC ANALYSIS OF LAW 123-24, 127-28 (2d ed. 1977); Mansfield, *Informed Choice in the Law of Torts*, 22 LA. L. REV. 17, 53-55 (1961); Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1, 39-43 (1974).

2. *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809).

3. 60 Mass. (6 Cush.) 292, 296 (1850).

4. W. PROSSER, *supra* note 1, at 436.

5. Auto liability insurers had traditionally resisted comparative negligence proposals. But by 1970, with auto no-fault plans looming, many insurers threw their support behind comparative negligence in an effort to expand the existing liability system so as to make it less vulnerable to the no-fault challenge. Compare the similar political analysis in Fleming, *Foreword: Comparative Negligence At Last—By Judicial Choice*, 64 CALIF. L. REV. 239, 239-40 (1976).

it became the "majority rule," and it now prevails in at least thirty-two states.⁶ Meanwhile, in cases involving strict products liability most courts, accepting the guidance of the *Second Restatement*, have ruled that inadvertent contributory negligence is no defense at all.⁷ Typically, these rulings have come prior to the adoption of comparative negligence. What happens when the rule of comparative negligence, which makes possible a new sort of compromise, is invoked in products liability cases is a question that the courts are just beginning to address.⁸

The 1970s have also witnessed the slow but steady legislative approval of no-fault plans for automobile insurance.⁹ These plans have often been watered down in ways that no-fault's academic sponsors find unacceptable.¹⁰ But even these diluted forms of no-fault provide that the victim's carelessness is irrelevant to his recovery.¹¹ Moreover, the debate about no-fault has served as a reminder that for one major

6. Sherman, *An Analysis of Pennsylvania's Comparative Negligence Statute*, 38 U. PITT. L. REV. 51, 55 (1976). Of the 32 states with comparative negligence as of late 1976, in 29 the change had been effected legislatively. *Id.*

Comparative negligence exists in "pure" and "modified" forms. Under the pure form, the plaintiff's recovery is reduced by the proportion of his negligence to the sum of his negligence and the defendant's. Under the modified form, the plaintiff's recovery is reduced in this way, but he receives no recovery at all either if he was more negligent than the defendant or, depending on the variant of the modified form, if he was equally negligent as the defendant. In most states, comparative negligence exists in one or the other of the modified forms. Comment, *The Pennsylvania Comparative Negligence Act: The Fifty-One Percent Solution*, 50 TEMPLE L.Q. 352, 356-58 (1977).

7. RESTATEMENT (SECOND) OF TORTS § 402 A, Comment n (1965); 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[5][f], at 3B-210 (1977). A few states, including New York, have resisted this trend and retained the defense in products liability cases. *See, e.g.,* Codling v. Paglia, 32 N.Y.2d 330, 342, 298 N.E.2d 622, 628-29, 345 N.Y.S.2d 461, 470 (1973). The *Restatement* recognizes an important exception to its general rule: when the plaintiff's contributory negligence "consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk," the defendant is entitled to a defense. RESTATEMENT (SECOND) OF TORTS § 402 A, Comment n (1965).

8. Compare *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974) (rejecting comparative negligence defense) and *Kinard v. Coats Co.*, 553 P.2d 335 (Colo. Ct. App. 1976) (same) with *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676 (D.N.H. 1972) (accepting comparative negligence defense) and *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976) (same). Jurisdictions like New York, which have ruled that contributory negligence applies as a complete defense in strict products liability, will need to reconsider this holding in light of subsequent enactments of comparative negligence. *E.g.,* N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976). This article will not discuss the strict liability question.

9. Massachusetts enacted the first no-fault insurance plan in 1970. Twenty-three other states have since enacted such plans. O'Connell, *Operation of No-Fault Auto Laws: A Survey of the Surveys*, 56 NEB. L. REV. 23, 26-27 (1977).

10. *See, e.g.,* O'Connell, Letter to the Editor, *Wall St. J.*, Feb. 12, 1976, at 16, col. 4. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965) launched the contemporary no-fault movement.

11. J. O'CONNELL & R. HENDERSON, TORT LAW, NO-FAULT AND BEYOND 278-84 (1975).

Contributory and Comparative Negligence

category of personal injuries—those incurred on the job¹²—the victim's carelessness has been irrelevant to his recovery for half a century by virtue, of course, of workers' compensation.¹³

In addition to these recent changes in the law, a new body of theoretical writing, examining tort law from an economic perspective, has both strongly endorsed the idea of a contributory negligence defense¹⁴ and highlighted important questions concerning the contributory negligence issue.¹⁵ Contemporaneously, England's most interesting tort scholar has proposed the complete elimination of the defense in all personal injury negligence cases.¹⁶

Instigated by these legal and scholarly developments, this article will attempt to reassess the question of the contributory negligence defense by taking into account its economic implications and its psychological and equitable implications as well. In the article the phrase "contributory negligence defense" will be used, in its English sense, to refer to any legal doctrine that affects the plaintiff's recovery on account of his unreasonable conduct. The phrase is thus broad enough to cover both the traditional contributory negligence rule and the rule that in this country is usually called comparative negligence.

The article will contend that economics, standing alone, furnishes no persuasive basis for any contributory negligence defense, but that such a basis is adequately provided by reasons of fairness; one of the article's purposes is to afford the fairness issues a precise formulation. The article will then proceed to argue that the relevant considerations of fairness, when combined with appropriate considerations concerning the psychology of accident prevention, suggest a rule that divides liability between the victim-plaintiff and the injuror-defendant. Comparative negligence is, of course, such a rule and seems the appropriate form of liability division.

I. Negligence Itself

Affirmative tort defenses operate within the framework of the liability rules against which the defenses are employed. Before discussing contributory negligence, therefore, it is useful to consider the

12. There were 11 million disabling injuries in the United States in 1974. Of these, 2.3 million (over 20%) were work related. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 3 (1975 ed.).

13. See I.A. A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 30 (1973).

14. E.g., R. POSNER, *supra* note 1, at 123-24.

15. E.g., Calabresi, *Optimal Deterrence and Accidents: To Fleming James, Jr.*, 84 YALE L.J. 656, 662-63 (1975).

16. P. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 138 (2d ed. 1975).

concept of negligence, which remains the basic standard of tort liability.¹⁷ Under Judge Hand's *Carroll Towing* formula,¹⁸ accepted by the *Restatement*,¹⁹ and, via the *Restatement*, by the courts,²⁰ a defendant's conduct is negligent if it creates a risk of harm that is greater than the cost of eliminating the risk. Judge Hand quite properly broke down the risk of harm into two elements: the probability of an accident and the severity of the injury should an accident occur. He referred to the cost of prevention as the expense of an appropriate safety device or "precaution"; it could also include the benefit forgone by giving up the risky activity in the first place. The Hand formula has often been flattered as a negligence "calculus."²¹ In fact, at its first level the formula is plainly algebraic and suggests nothing more than an ordinary cost-benefit analysis.²² In turn, that cost-benefit analysis can be seen, with the help of one assumption,²³ as a technique for achieving the

17. Ultrahazardous activity liability and strict products liability are exceptions, of course. Although ultrahazardous activity liability is interesting theoretically, it is of almost no practical importance. Ultrahazardous activity suits are extremely rare: it appears that not one has been decided by the California Supreme Court, for example, since *Luthringer v. Moore*, 31 Cal. 2d 489, 190 P.2d 1 (1948). Strict products liability does not involve as great a departure from ordinary principles of negligence as is sometimes supposed. After all, strict liability requires the showing of a product "defect." In suits against the manufacturer, a defect in the product almost always signifies the manufacturer's negligence. See W. PROSSER, *supra* note 1, at 644-49, 671-72 (discussing design defects, warning defects, and production defects). The issue of the application of comparative negligence to strict products liability calls for careful study. See note 7 *supra*.

18. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

19. RESTATEMENT (SECOND) OF TORTS §§ 291-293 (1965).

20. See, e.g., *Johnson v. Thompson*, 111 Ga. App. 654, 657, 143 S.E.2d 51, 53 (1965); *Gelinas v. New England Power Co.*, 359 Mass. 119, 124, 268 N.E.2d 336, 339 (1971).

The *Carroll Towing* opinion, celebrated as it is by academics, has had little real-world influence standing on its own; if Shepard's is correct, *Carroll Towing* has never been cited by a single state court.

21. See, e.g., C. GREGORY, H. KALVEN & R. EPSTEIN, *CASES AND MATERIALS ON TORTS* 102 (3d ed. 1977).

22. The Hand formula seems to assume that the "risk" is unitary. But in most cases there will be an indefinite number of possible outcomes. Thus, the runaway barge in *Carroll Towing* could damage one ship, two ships, three, or four; a ship that is so damaged might or might not sink; the value of its cargo can be high or low; and so on. Each of these possible outcomes has its own probability. The total expected risk is the aggregate of these individual risks, and the aggregating process might assume a calculus-like character.

23. This assumption is that information or transaction costs hinder a "bargain" between the parties to allocate the risk. Absent such a condition, the choice of liability rule makes no difference in accident prevention. See Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13, 25-28 (1972). In the personal injury situation, information and transaction costs are usually high enough to rule out such bargains. Indeed, it is difficult to point out any "artificial bargains" or "bribes" that have occurred in the real personal-injury world. Even in ongoing bargaining relationships, unequal information costs often make the liability rule quite relevant. See Calabresi, *supra* note 15, at 659; Chelius, *Liability for Industrial Accidents: A Comparison of Negligence and Strict Liability Systems*, 5 J. LEGAL STUD. 293, 297-98, 306 (1976).

Contributory and Comparative Negligence

economic goal of efficiency—a goal that is concerned with enhancing society's aggregate welfare. At least in circumstances in which other things are held equal,²⁴ it seems clear enough that efficiency is a positive social good. Hence economics can be seen to provide a policy basis for the rule of negligence liability.

The concept of negligence has, of course, been understood historically not only in normative but also in specifically moral terms. Thus, *Brown v. Kendall* spoke the morally laden language of "fault,"²⁵ and the identification of negligence with fault has been in the minds of generations of personal injury lawyers. In recent years, with the lawyer-economists discovering and expanding on the economic dimensions of the Hand definition of negligence, the impression may have been created that this definition somehow excludes any ordinary notion of moral fault.²⁶ But the Hand definition actually suggests a certain moral understanding of the negligence concept. The risk that makes the defendant's conduct negligent runs to persons other than the defendant himself. The cost of reducing or preventing the risk, by contrast, must usually²⁷ be borne by the defendant.²⁸

Assume that the risk can be valued at \$100 and that the cost of preventing the risk is \$60. When the defendant fails to incur this cost, his conduct is judged negligent. By hypothesis, conduct of this sort, objectively considered, attaches a greater weight to the defendant's own interests than to the interests of others. It can therefore be regarded as egoistical or antisocial.²⁹ Although negligence law does not require the

24. The "other things" can include the so-called "distribution of income" and more general questions of fairness.

25. 60 Mass. (6 Cush.) at 296.

26. *But see* Posner, *The Economic Approach to Law*, 53 *TEX. L. REV.* 757, 777 (1975) (suggesting that inefficiency is per se "immoral" in public mind).

27. For a case that is interesting exactly because it is unusual, see *Cooley v. Public Serv. Co.*, 90 N.H. 460, 10 A.2d 673 (1940) (alternative that would avoid risk of injury to plaintiff would endanger lives of third parties).

28. The extent to which the defendant can "pass on" the cost becomes a complicated economic question, theoretically and empirically.

29. *See, e.g.*, *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928) (Cardozo, C.J.) (negligence is "unsocial"); Seavey, *Negligence—Subjective or Objective?*, 41 *HARV. L. REV.* 1, 12 (1927) (negligence is "anti-social").

Whether the defendant's negligent conduct is psychologically as well as objectively antisocial may depend in part on the extent to which the risky conduct is undertaken advertently; the Hand formula itself seems to presuppose advertent risk-taking. A psychological assessment of negligent conduct also raises questions about the extent to which negligence law considers subjective elements. *See generally* Seavey, *supra*. Even Professor Edgerton, the leading "objectivist," agreed in principle that negligence "probably always involves some mental shortcoming." Edgerton, *Negligence, Inadvertence, and Indifference; The Relation of Mental States to Negligence*, 39 *HARV. L. REV.* 849, 858 (1926), although Edgerton would not equate "mental" with "moral" deficiencies.

defendant to be altruistic in the sense of self-abnegation,³⁰ he is required to place his own welfare and the welfare of others on an equal footing.³¹ The conduct that results from his failure to do so is negligent under the Hand formula. But this is a failure that is also plausibly reproachable on moral grounds.³² In this way the negligence standard—exactly as it is elucidated by the Hand formula—does possess a recognizable moral content.³³

Both the Rational Man of economics and the Reasonable Man of tort law are associated with the doctrine of negligence liability. Professor O'Connell has recently suggested, drawing on the work of Professor Carrington, that these two Men are similar artifacts.³⁴ Yet what impresses me most is how far apart these two Men stand. The Reasonable Man, according to the traditional tort literature, will ordinarily behave in a reasonable, nonnegligent way—that is, he will act with a fair regard for the welfare of others.³⁵ Negligent conduct, which

30. If the cost of risk prevention is \$130, the defendant may conclude that his \$130 is worth more than the victim's \$100; the defendant therefore is not negligent if he allows the accident to happen.

31. This analysis, while not necessarily limited to utilitarianism, is consistent with utilitarian ethics, which express "the sentiment not of altruism but of benevolence, the agent counting himself neither more nor less than any other person." Smart, *An Outline of a System of Utilitarian Ethics*, in J. SMART & B. WILLIAMS, *UTILITARIANISM: FOR & AGAINST* 3, 32 (1973).

32. This moral element in negligence has been derived here directly from Judge Hand's formal definition of negligence. But that element also finds some empirical confirmation. Motorists who cause a disproportionate number of road accidents have been found by psychologists to harbor an aggressive hostility toward the rules and mores of organized society. See D. KLEIN & J. WALLER, *CAUSATION, CULPABILITY AND DETERRENCE IN HIGHWAY CRASHES* 132-34 (1970); L.A. Times, Feb. 16, 1977, § III, at 9, col. 6 (reporting on research of Doctors James Weston and Louise Clark). Manufacturers who have been found guilty of negligence in the creation of unsafe local environments or in the design of their products have been described as pursuing corporate profit with an unseemly disregard for community and consumer safety. See G. STERN, *THE BUFFALO CREEK DISASTER* (1976). Compare *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968) with J. O'CONNELL & A. MYERS, *SAFETY LAST* 176-79 (1966) (both finding General Motors faulty in design of Corvair). The Corvair's design remains the subject of debate.

33. In suggesting that there is a fairness basis for negligence liability, I do not mean to rule out the possibility that there may be justifications for a liability rule that is stricter than negligence. The fairness aspects of strict liability have been interestingly discussed in recent years. See Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959); cf. Williams, *A Critique of Utilitarianism*, in J. SMART & B. WILLIAMS, *supra* note 31, at 77.

In considering negligence, Professor Ronald Dworkin reaches a moral conclusion similar to mine; he reasons that the Hand formula can be seen as properly balancing the defendant's interest in "autonomy" against the plaintiff's moral right to "respect." Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1077-78 (1975), reprinted in R. DWORIN, *TAKING RIGHTS SERIOUSLY* 81, 98-99 (1977).

34. J. O'CONNELL, *ENDING INSULT TO INJURY* 199-200 (1975) (discussing Carrington, Book Review, 1974 U. ILL. L. FORUM 187).

35. RESTATEMENT (SECOND) OF TORTS § 283, Comment e (1965).

Contributory and Comparative Negligence

departs from the Reasonable Man standard, is subnormal and deviant, and this deviancy helps to justify the imposition of the onus of liability.

By comparison, the Rational Man of economics seeks to maximize his own self-interest and in the usual situation is indifferent to the welfare of others.³⁶ There is nothing in economics that even intimates that this self-centered lack of concern is in any way improper. The Rational Man's lack of concern, however, may cause a divergence between private cost and social cost that can be economically disadvantageous from a social point of view. By establishing the rule of negligence liability, the law can divert ordinary self-interested conduct so that it flows in a socially beneficial direction; herein lies the economic justification for the negligence liability rule.³⁷ Assume that there were no liability for negligence. The Rational Man would behave negligently, and economics would afford no reason to consider him morally blameworthy for doing so; the Reasonable Man, by contrast, would conduct himself in a nonnegligent fashion. Although economic and traditional tort reasoning thus both reach the result of negligence liability, the courses of their reasoning, as well as the assumptions about human behavior in which that reasoning originates, stand in strong opposition.

II. The Supposed Accident-Prevention Rationale for a Contributory Negligence Defense

The justification that the new law-and-economics literature offers for a contributory negligence defense is not at all esoteric or highly technical; it is easy enough to understand and indeed had been anticipated by traditional tort writings.³⁸ By denying recovery, in whole or

36. Economists indicate that the "self-interest" that people pursue is not necessarily "selfish" in the lay sense; if an individual happens to derive satisfaction from helping others, then it is within his self-interest to provide such help. See A. ALCHIAN & W. ALLEN, UNIVERSITY ECONOMICS 24-25 (3d ed. 1972). However, economists generally relegate this possibility of caring about others to a special section on charity. See, e.g., *id.* at 148-50. The "caring" possibility has been essentially ignored in all the economic writings on personal injury law. See, e.g., R. POSNER, *supra* note 1; Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973); Calabresi, *supra* note 15; Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Chelius, *supra* note 23; Chelius, *The Control of Industrial Accidents: Economic Theory and Empirical Evidence*, 38 L. & CONTEMP. PROB. 700 (1974); Demsetz, *supra* note 23; Diamond, *Single Activity Accidents*, 3 J. LEGAL STUD. 107 (1974); Oi, *On the Economics of Industrial Safety*, 38 L. & CONTEMP. PROB. 669 (1974). By ignoring it, these writings implicitly assume that people are in fact indifferent to the injuries that their conduct causes others to suffer.

37. This is true if, as has been assumed, see p. 700 *supra*, information or transaction costs hinder a bargain between the parties to allocate the risk.

38. See, e.g., Mansfield, *supra* note 1, at 53-54, 64, 72. See also *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 858, 129 Cal. Rptr. 603, 611-12 (1976) (*per curiam*).

in part, to the victim who has been contributorily negligent, the law can discourage people from engaging in conduct that involves an unreasonable risk to their own safety.³⁹ Such "dysfunctional" victim conduct is a significant cause of accidents in virtually every major category of personal injuries with which the law is concerned. (The interesting exception is injuries resulting from medical malpractice.) Any legal rule that holds the potential of reducing the incidence of that conduct deserves our closest attention.

When given such attention, however, the safety-incentive rationale for contributory negligence becomes problematic. This is so for four reasons. The first reason is concerned with the difficulty of formulating an optimal contributory negligence rule; the second, with the limited effects of such a rule, no matter how formulated; the third, with the psychological complexities of the conduct that the law criticizes as unreasonably risky; and the fourth, with the opportunities of some defendants to prevent contributorily negligent conduct by potential plaintiffs.

A. *An Optimal Contributory Negligence Rule*

The economic justification for a contributory negligence defense runs as follows. Assume a \$100 risk that the defendant could prevent for \$60, but that the plaintiff could himself prevent for \$25. Although the defendant may be negligent, the plaintiff is the more efficient accident preventer. To give the plaintiff the incentive to spend this \$25, the plaintiff should be the party who is "liable"—that is, a doctrine of contributory negligence should require him to bear the \$100 loss.

Although hypotheticals of this sort seem to support some version of a contributory negligence rule, they clearly do not support the rule in its traditional form. Assume a reversal of the \$60/\$25 figures: the plaintiff can prevent the risk for \$60, the defendant for only \$25. Although the plaintiff is contributorily negligent, the defendant should be held liable, since the defendant is in the better position to eliminate the risk. These converse results can be reconciled into a single contributory negligence rule: the plaintiff's contributory negligence should bar his recovery if, but only if, the plaintiff's prevention costs were lower than the defendant's.⁴⁰ Although this rule contemplates a com-

39. See R. POSNER, *supra* note 1, at 123-24; Demsetz, *supra* note 23, at 27.

In light of this justification, workers' compensation has been questioned or criticized for its failure to attach legal consequences to the employee's contributory negligence. See Chelius, *supra* note 36, at 708-09; Oi, *supra* note 36, at 679.

40. See Calabresi, *supra* note 15, at 662-63; Calabresi & Hirschhoff, *supra* note 36, at

Contributory and Comparative Negligence

parison of the negligence of the plaintiff and defendant, it does not amount to customary comparative negligence, since it is an either/or liability rule that does not involve the division of damages between the two parties.⁴¹ It somewhat resembles the *Galena* rule, which flourished for a few years in nineteenth century Illinois,⁴² and for the sake of convenience, it will be referred to as the *Galena* rule hereafter.

Although the *Galena* rule avoids the problem of barring recovery by a plaintiff whose prevention costs were higher than the defendant's, it is beset by other problems, several of which it shares with the liability-dividing rule of comparative negligence. Consider, for example, the situation in which the defendant could prevent the risk for \$60, and the plaintiff for \$65—but in which the risk could also be prevented if the plaintiff and defendant took complementary measures that would cost the defendant \$9 and the plaintiff \$10. This combined cost of \$19 is the least expensive way to prevent the risk. Yet the *Galena* rule would give the plaintiff no incentive to take the \$10 measure, since pursuant to *Galena* the fact that the defendant's prevention costs are lower than the plaintiff's (under either prevention alternative) means that the defendant will bear the entire liability. A liability-dividing rule of comparative negligence would encourage the complementary measures:⁴³ the plaintiff and the defendant, each facing a liability in the vicinity of \$50, would be willing to spend \$10 and \$9 to avoid that liability.

When the cheapest means of prevention are independent rather than complementary, however, comparative negligence can sometimes be successful, but only on a fortuitous basis. When, for example, one party's prevention costs are \$25 and the other's \$60, the party with the lower costs will face an expected liability of either \$65 or \$70, depending on the method of calculation,⁴⁴ and will rationally spend \$25 to

1058; Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 40 (1972). See also Brown, *supra* note 36, at 329.

41. So-called "modified" comparative negligence is a compromise between pure comparative negligence and the rule discussed here. Under modified comparative negligence, the plaintiff recovers proportionately if he is "less" negligent than the defendant, but recovers nothing if he is "more" negligent. See note 6 *supra*. From the present discussion of the alternatives of pure comparative negligence and the rule discussed here, appropriate lessons can be drawn concerning the modified hybrid.

42. *Galena & Chicago Union R.R. v. Jacobs*, 20 Ill. 478 (1858).

Professor Chelius seems unaware that *Galena* is not the traditional rule of contributory negligence. Chelius, *supra* note 23, at 296-97.

43. Cf. G. CALABRESI, *THE COSTS OF ACCIDENTS* 158 (1970) (showing how similar result could be achieved under rule allocating liability by involvement in accident).

44. There are two ways in which the negligence of the plaintiff and defendant could be compared. First, one could compare prevention costs. For example, if one party could have prevented the accident for \$10 and the other party for \$40, the \$10 party would bear

prevent the risk. Meanwhile, the party with the \$60 costs, facing an expected liability of only \$30 or \$35, will not spend \$60 to prevent the risk. In such a case, comparative negligence produces the right result. But now assume that the risk can be prevented either by the plaintiff for \$70 or by the defendant for \$68. This is a risk that it would be efficient to eliminate. Yet under comparative negligence the do-nothing plaintiff and the do-nothing defendant each face a liability in the vicinity of \$50; each will therefore abstain from preventive measures and allow the risk to materialize.⁴⁵

Finally, assume that the risk could be prevented by one party for \$10 or by the other party for \$20. Since under comparative negligence both parties will face liabilities in excess of their prevention costs, either party would be impelled to engage in risk prevention, which would lead to duplication and hence to wasted expenditure.⁴⁶ Of course, if the \$20 party correctly predicts that comparative negligence will motivate the \$10 party to pay for prevention, the former party will neglect his own \$20 option, and the desired result will be obtained. But by the same token, if the \$10 party correctly predicts that comparative negligence will lead the \$20 party to incur the safety expenditure, the \$10 party will abstain. In this latter circumstance, duplication is avoided, but the more costly of the two "independent" solutions results. Worse yet, each party may predict that comparative negligence will induce the

a liability four times as great as the \$40 party. Each party's share of the total liability would then be determined by the formula:

$$\text{Party's share of liability} = \frac{(\text{total prevention costs}) - (\text{party's prevention costs})}{\text{total prevention costs}}$$

Alternatively, one could compare the net losses that the parties incurred by their failure to take preventive measures, that is, the differences between each party's prevention costs and the expected value of the risk that each allowed to materialize. Thus, if the expected value of the risk is \$100 and the respective prevention costs are again \$40 and \$10, those differences are \$60 and \$90, respectively. The \$40 party and \$10 party would then bear liability in the ratio of 60/90. The liability of each party would be determined by the formula:

$$\text{Party's share of liability} = \frac{(\text{expected value of risk}) - (\text{party's prevention costs})}{2 \times (\text{expected value of risk}) - (\text{total prevention costs})}$$

As these examples suggest, the two methods of comparison yield different results. The variation is especially dramatic when the difference between the prevention costs of the two parties is either a very great or a very small proportion of the prevention costs themselves. Thus, if the expected value of the risk is \$100, and the prevention costs are \$1 and \$4, the first method would divide liability 80%/20%, whereas the second method would divide liability 51%/49%. Similarly, if prevention costs were \$96 and \$98, the two divisions of liability would be 51%/49% and 67%/33%.

45. Cf. G. CALABRESI, *supra* note 43, at 158 (showing how similar problem would arise under rule allocating liability by involvement in accident).

46. R. POSNER, *supra* note 1, at 124.

Contributory and Comparative Negligence

other party to prevent; if so, neither will himself prevent, and the uneconomical risk will occur.⁴⁷ In fact, given this entire “prediction” procedure, each party has an incentive to “bluff” inaction so as to persuade the other that it is in his economic interest to incur the safety expenditure.

Thus comparative negligence, although appropriate in situations in which complementary accident prevention is desirable, offers no assurance of the right result in those situations in which independent prevention is required. Of course, the law could adopt a two-level rule that applies *Galena* to independent-action cases while retaining comparative negligence for complementary-action cases. But it would be extremely difficult to make these characterizations after the accident and more vexing still to make them before the event, which is of course the relevant time if the rule is to achieve its purposes in influencing the actors’ conduct.

In any event, several other problems afflict both *Galena* and comparative negligence and would remain even if the two rules could somehow be accommodated. In the \$60/\$25 hypothetical used to illustrate the *Galena* rule, assume that the opportunities to take preventive measures are sequential in time and that the \$25 opportunity occurs first. If the plaintiff is the \$25 preventer, the *Galena* rule would recognize his contributory negligence as a complete defense. But people often make mistakes, and the plaintiff may fail to incur the \$25 expense. Once the plaintiff has so erred, the goal of efficiency suggests that liability be returned to the defendant; with the plaintiff’s \$25 opportunity squandered, the defendant’s \$60 measure is the best way to prevent the risk. This suggests a rule akin to the rule of last clear chance—one that would eliminate all effects of the plaintiff’s contributory negligence. Now reverse the parties, so that the defendant’s \$25 opportunity precedes the plaintiff’s \$60 opportunity; the idea can here be developed of last clear chance running against the plaintiff,

47. To provide full incentives for both the plaintiff and the defendant, it has been suggested that the negligent plaintiff and the negligent defendant should *each* be held fully liable: the defendant should be required to make a full-damage payment, but the payment should be retained by the state rather than turned over to the plaintiff. See R. Knoeber, *Legal Penalties and Compensation for Auto Accidents* (unpublished Ph.D. thesis for the University of California, Los Angeles, 1976). An intriguing idea, this. But whatever it is, it is not tort law. (Knoeber would not disagree; indeed, he advances his proposal within a public-law rather than a tort-law framework.) And it is impossible to see how the proposal would not lead to excessive, redundant expenditures. For example, where one party could prevent a \$100 risk for \$60 and the other party for \$25, the proposal would encourage both of them to expend for prevention, in an unnecessary way.

thus reinstating his contributory negligence as a complete defense.⁴⁸ With either of these last clear chance rules, however, the party with the earlier opportunity, knowing of the rule, might deliberately err⁴⁹ so as to shift the safety expense to the party with the subsequent opportunity. Since the party acting first was assumed to have the lower safety costs, the possibility of such strategems perplexes the efficiency of the two-fold last clear chance rule. Moreover, in those situations in which complementary safety measures are most efficient and in which comparative negligence therefore has immediate appeal, there are related last clear chance issues that are equally complicated.⁵⁰

Additionally, if a two-fold last clear chance rule were adopted, there would be major difficulties in working out its elements. What fact would "trigger" the rule: simply that the first party has squandered his opportunity, or instead that the second party knows (or has reason to know) of this squandering? What if the first party's error, although commencing early, is of a continuing nature—that is, it consists of inattentiveness that remains capable of being corrected at any moment before the accident? Tort lawyers will of course find these questions familiar; they involve the variables that are incorporated into our existing and more limited rule of last clear chance. In this regard, it may be noted that the existing rule, because of the confusions that

48. The framework also fits the typical products liability case. When the consumer actually learns of the product defect before using it, the sequential considerations seem all the stronger. Products liability does recognize a hybrid contributory-negligence/assumption-of-risk defense when the consumer unreasonably continues to use the product after detecting the defect. See note 7 *supra*.

49. For example, trichinosis in pork can be prevented either by the farmer (by the proper feeding of pigs) or by the consumer (by cooking pork to an internal temperature of 137 degrees). See 29 RUTGERS L. REV. 466, 472 (1976). Should a rule of last clear chance running against plaintiffs be recognized, the farmer would be relieved of any tort incentive to engage in nonnegligent feeding. In general, such a rule would vastly weaken the safety incentive that tort law now places on product manufacturers, since a large percentage of all product accidents involves the carelessness of the product user.

The problem of the deliberate error could possibly be dealt with by giving the second party who is required to incur a safety expenditure (say, of \$60) a cause of action against a first party who has failed to expend a smaller sum (say, \$25). This cause of action—which, of course, would in no way depend on the risk materializing in an actual injury—would be for some figure no less than \$25 and no greater than \$60. The substantial public and private costs that would be involved in the processing of such small claims seem to rule them out as an effective solution to the deliberate error problem. In some cases, a single failure to spend for prevention by a first party (*e.g.*, a manufacturer) would impose prevention requirements on thousands of second parties (*e.g.*, consumers). To allow the second parties' suits against the first party, an elaborate class-action device would be required.

50. Assume that the \$100 risk can be prevented by sequential, complementary measures of \$10 or by either party acting alone at \$40. Once the first party has missed his \$10 opportunity, it becomes efficient to abandon comparative negligence and place full liability on the second party. Once again, the specter of the deliberate error haunts the scene.

Contributory and Comparative Negligence

those variables breed, has proven to be about the shaggiest and least satisfactory doctrine in all of tort law.⁵¹

A further problem afflicting both *Galena* and comparative negligence concerns their implicit assumptions about each party's awareness of the other's prevention possibilities. Assuming a party who could purchase safety for \$60, *Galena* would advise him to do so if, but only if, the other party's safety costs are greater than \$60. This is advice on which the party can take action only if he has knowledge of what the other party's safety costs actually are. Under comparative negligence, what each party is intended to do similarly depends on his knowledge of the other party's prevention costs. Now in some situations, one party has or can easily obtain adequate knowledge of the other party's safety circumstances; but in other situations, this knowledge will be difficult or impossible to acquire. Lacking this knowledge, neither rule can give the parties the guidance they need if they are to make the balanced, efficient decisions that the rules expect. In the economists' terms, the safety arguments on behalf of both *Galena* and comparative negligence presuppose that the cost of obtaining a certain kind of information is very low. In fact, however, this information often will be quite costly to obtain and frequently will simply be unavailable in any practical sense.⁵²

51. See, e.g., *County of Maricopa v. Maberry*, 555 F.2d 207 (9th Cir. 1977) (applying Arizona law); *Peterson v. Burkhalter*, 38 Cal. 2d 107, 237 P.2d 977 (1951).

In its comparative negligence decision, the California Supreme Court was eager to abrogate last clear chance. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 824, 532 P.2d 1226, 1240, 119 Cal. Rptr. 858, 872 (1975).

52. A related problem concerns the feasibility of the quantifications upon which all of the foregoing analysis depends. Even if the plaintiff and the defendant know that accidents can be prevented either by the plaintiff doing x or by the defendant doing y , they may not be able to calculate accurately the cost of x and y . Without this ability, neither *Galena* nor comparative negligence can accurately achieve its desired results. Of course, even the *Carroll Towing* definition of negligence assumes that the defendant can quantify both the risk and the cost of eliminating the risk. But any doctrine of contributory negligence adds to the number of quantifications that the parties must perform and to that extent is unattractive.

Two final complications are added by the use of the jury. First, to the extent that the jury estimates the costs of accidents and of prevention imperfectly, neither *Galena* nor comparative negligence can be fully successful. An ad hoc lay jury is more likely than a professional judge to allow perceptions to be distorted by the lens of hindsight; and according to the traditional understanding of lawyers, tort juries are swayed by a plaintiff bias. But see Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1063-66, 1072-74 (1964). Second, the decisions of juries may be erratic as well as inaccurate. Juries decide cases—often with the judge's encouragement by way of amorphous instructions—on the basis of lay instincts. To the extent that parties cannot predict how a jury will decide, they cannot shape their conduct in the way that will render it consistent with the jury's judgment. Of course, even the simple rule of negligence liability requires the jury to make up its mind on the issue of the defendant's negligence. But again, any contributory negligence rule increases the number of judgments that the jury will be required to reach.

What the previous analysis adds up to is this: in thinking about contributory negligence, the starting assumption is the negligence of the defendant—that is, that the defendant could efficiently have eliminated the risk. The point behind contributory negligence is that the plaintiff may have been an efficient risk preventer as well. This point is a relevant one, in the sense that insofar as the analysis has been accurate in its understanding of plaintiff conduct,⁵³ negligence law without any contributory negligence defense would fail to achieve full efficiency. However, the effort to develop a defense that will take the plaintiff's conduct into account runs up against a wide range of serious theoretical and practical obstacles. Although the absence of any contributory negligence rule may be inefficient, the traditional rule of contributory negligence as a complete defense seems equally inefficient. And when their numerous complications are duly considered, intermediate rules like *Galena* and comparative negligence cannot necessarily be counted on to produce any net reduction in this inefficiency.

To be sure, none of these assessments establishes that a contributory negligence defense decreases efficiency; rather, they weaken the claim that such a defense produces positive results. When recognition is given to relevant complexities of the accident situation, an economic analysis of the contributory negligence issue is unable to yield any determinate formula.

B. *Limited Effects of a Contributory Negligence Rule*

The rhetoric in the discussion above has referred to an accident that either of two parties may be able to prevent; liability rules were justified in terms of their ability to induce appropriate preventive measures. That rhetoric may have been misleading in its failure to make clear that the plaintiff is the biological victim of the accident. Hence the plaintiff has a strong "first-party" incentive to prevent the accident without regard to tort liability rules. Of course, to the extent that the injured victim can secure a recovery from a negligent defendant, he can transfer to another his original accident costs. It can therefore be argued that absent a contributory negligence defense, the victim's opportunity to collect in tort eliminates his original incentive to behave in a reasonably safe way. This argument, however, rests on several assumptions that are valid only in part.

To be deterred by a contributory negligence rule, the victim must first of all know and understand both the general rule and its relevant

53. That understanding is questioned at pp. 713-19 *infra*.

Contributory and Comparative Negligence

applications. Yet studies have shown that a substantial portion of the public lacks such an understanding.⁵⁴ Since victims tend to be private citizens who have never before been in a tort situation, this lack of understanding is not surprising.

Second, the original incentive to act carefully can be affected by tort rules only to the extent that the potential victim can predict that his injury will occur in circumstances indicating the tort liability of some other party. In some cases, this knowledge exists or can easily be obtained. Thus, the employee considering on-the-job carelessness knows or should know that his employer will be liable for an accident. But consider the pedestrian who jaywalks. This pedestrian may be hit by a car that is being driven negligently or that has been defectively designed. But for all the pedestrian knows, the colliding driver and car will be free of any basis for tort liability. To the extent that the victim cannot predict that his accident will involve the tort liability of another party, his original incentive for careful conduct remains fully in effect.

Now let us assume that the victim's injury is caused by the negligence of the defendant. Even if, despite his contributory negligence, the victim is given all the damages that the law allows, those damages will usually fall considerably short of compensating him for the full cost of his accident. For instance, whenever there is any real doubt about either the existence of liability or the quantum of damages, the victim will feel required to secure the services of a lawyer. Given the terms of the customary contingent fee arrangement, even the successful plaintiff thus goes uncompensated off the top, so to speak, for one-third of his legal loss. Moreover, the victim who files a tort claim subjects himself to the miseries of litigation, which can involve time costs and very real emotional costs.⁵⁵ Finally, for some victims tort damages rules do not even purport to be fully compensatory in the sense of leaving the victim "indifferent" to the fact of the original accident.⁵⁶ The victim who is subjected to intense pain and suffering, for example, can expect a substantial recovery, but not one large enough to leave him indifferent to his pain in all its intensity.⁵⁷ Tort law, mindful that any such

54. See J. O'CONNELL & W. WILSON, *CAR INSURANCE AND CONSUMER DESIRES* 12-13 (1969).

55. Consider Learned Hand's conclusion, based on "some dozen years of experience," that "as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." L. Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, reprinted in D. LOISELL & G. HAZARD, *CASES AND MATERIALS ON PLEADING AND PROCEDURE* 1294, 1295 (3d ed. 1973).

56. On the importance of an "indifference" standard for tort law's damage rules, see Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1, 32 (1960); Demsetz, *supra* note 23, at 27.

57. In many cases it would be vulgar to suggest that any sum of money could produce indifference. See, e.g., *Schwartz v. United States*, 230 F. Supp. 536 (E.D. Pa. 1964).

recovery would approach the infinite, has rather deliberately rejected the indifference measure for pain and suffering damages.⁵⁸ Likewise, when the accident threatens to take the life of its victim, that potential victim obviously holds no belief that he will be compensated, after the accident, in a way that will leave him indifferent to the fact of his death.⁵⁹

A potential victim thus faces a combination of factors: a contingent fee, other personal costs of litigation, the limits of tort law's damage rules,⁶⁰ and his frequent inability to predict a liability-bearing defendant. Given this combination, any potential victim will rationally conclude that, irrespective of any right of his to recover in tort, he will predictably end up burdened with a substantial fraction of the original cost of his accident. Assume the situation of a person confronting a \$100 risk, where there is a sixty percent chance of a defendant whom tort law would hold liable, where tort damages will compensate him for eighty percent of his expected loss, and where one-third of his recovery will be retained by his lawyer. In these circumstances, the real value of a recovery in tort is only \$32. If, therefore, the person can prevent the risk at a cost less than \$68, he will have a first-party incentive to do so, even if tort rules allow him to recover without regard to his contributory negligence. Thus even absent a contributory negligence defense, the potential victim retains a substantial incentive to abstain from contributorily negligent conduct.

This intermediate assessment rejects, as overstatement, the claim in many tort books that it is "irrational" for potential victims to take account of the implications of a contributory negligence rule.⁶¹ Also, the assessment does not profess to establish that a contributory negligence defense is actually inefficient. It rather suggests that the safety purposes that the defense is alleged to achieve can be achieved, at least to a substantial extent, without the defense.

58. See, e.g., *Horn v. Atchison, T. & S.F. Ry.*, 61 Cal. 2d 602, 609, 394 P.2d 561, 565, 39 Cal. Rptr. 721, 725 (1964); *Heddles v. Chicago & N.W. Ry. Co.*, 74 Wis. 239, 259, 42 N.W. 237, 243 (1889).

59. No criticism of the law is intended here. It is obviously impossible to design any mechanism that can provide after-the-fact compensation to the victim of a fatal accident.

60. Are there offsetting numbers of overcompensated tort victims? Studies finding that victims of minor accidents are "overcompensated" by the tort system reach this conclusion only by slighting the victim's nonmonetary losses. See, e.g., STATE OF NEW YORK INSURANCE DEP'T, AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT? 27 (1970). Many "soft tissue" victims whose out-of-pocket losses are low are probably grossly undercompensated. Additionally, the studies referred to are typically limited to highway accidents, with respect to which almost any claim has a monetary "nuisance value." It is by no means clear that similar patterns of recovery prevail among other classes of accident victims, e.g., those injured in medical accidents or by products.

61. See, e.g., P. ATIYAH, *supra* note 16, at 512; W. PROSSER, *supra* note 1, at 433.

Contributory and Comparative Negligence

C. *Psychological Aspects of Contributorily Negligent Conduct*

The weaknesses uncovered so far in the safety-incentive rationale for a contributory negligence defense have not impugned the usefulness of an economic analysis of the contributory negligence problem or of legal problems generally; they have suggested instead that the rationale is flawed even from a strictly economic perspective. A third reason for rejecting the rationale—which may suggest limitations on the value of economic assumptions—is concerned with the psychological implications of the widespread social phenomenon of contributorily negligent conduct, conduct that is unreasonably risky to the actor.

It is clear beyond doubt that such conduct has been extremely common in the past and remains quite common in those states in which contributory negligence continues as a complete defense to a suit in tort.⁶² Moreover, unreasonably risky conduct is extensive even in situations in which there is no conceivable tort defendant: consider all the people who injure themselves in countless ways around the house. Economics postulates the Rational Man—the man who acts intelligently to pursue his goals. But how can this model of the Rational Man cope with all the behavior that is unreasonably risky to oneself?⁶³ How can it explain motorists who drive across well-marked railroad crossings without slowing down, or looking, or listening;⁶⁴ people who, although entirely aware of the lethal danger, nevertheless allow themselves to come into contact with dangling power lines;⁶⁵ pedestrians who jaywalk into the path of cars that they know are approaching;⁶⁶ persons who walk into (or put their heads into) elevator shafts,⁶⁷ or who for no apparent reason enter strange rooms that are pitched in darkness;⁶⁸ motorists who drink themselves into inebriation;⁶⁹ auto passengers who involve themselves in drinking bouts with their driver-hosts;⁷⁰ persons

62. See, e.g., *West v. Baltimore & O.R.R.*, 528 F.2d 1148 (4th Cir. 1975) (applying West Virginia law).

63. In all of the cases cited in footnotes 64-72 *infra*, recovery was wholly denied because of the plaintiff's contributory negligence. Such cases are chosen to counter the idea that the availability of a tort recovery encouraged or explains the plaintiff's unreasonably risky conduct. Of course, I do not claim that just because the plaintiffs in these particular cases were not deterred, it follows that the rule of contributory negligence never deters.

64. *Newport v. Cincinnati, N.O. & T. Pac. Ry.*, 509 F.2d 1246 (6th Cir. 1975); *Perry v. Gulf M. & O. R.R.*, 502 F.2d 1144 (6th Cir. 1974).

65. *Dorough v. Alabama Power Co.*, 200 Ala. 605, 76 So. 963 (1917); *Thomas v. Gulf States Utils. Co.*, 128 So. 2d 323 (La. Ct. App. 1961).

66. *Baker v. Chrysler Corp.*, 55 Cal. App. 3d 710, 127 Cal. Rptr. 745 (1976).

67. *Schwartz v. Paul Tishman Co.*, 147 N.Y.S.2d 71 (Sup. Ct. 1955); *Hucaluk v. Clyde Realty Co.*, 378 Pa. 169, 106 A.2d 829 (1954).

68. *Gibson v. Lamesa Cotton Oil Co.*, 178 F.2d 959 (5th Cir. 1950); *Greelish v. New York Cent. R.R.*, 286 N.Y.S.2d 61 (App. Div. 1965).

69. *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976).

70. *Waltanen v. Wiitala*, 361 Mich. 504, 105 N.W.2d 400 (1960).

who accept a ride in a private airplane from an obviously drunken pilot;⁷¹ purchasers of a product who, realizing it lacks a vital safety device that supposedly comes with the product, use the product for years without even mentioning the matter to their local retailer?⁷²

The answer, I think, is that the economic model of the Rational Man can cope with this conduct only in part; much of this conduct resists being interpreted as entirely "rational" in economic terms.⁷³ If, however, economists find such conduct difficult to comprehend it poses few mysteries for the rest of us. As laymen, we readily accept the fact that people often behave in foolish ways with respect to risks they encounter. Among professional psychologists, the accident-causing behavior of accident victims has been a prime subject of research for a half-century.⁷⁴ This psychological literature, which is rich and diverse, has uncovered many significant correlations. With respect to age, for example, studies show that the work-accident rate is highest during the teens and early twenties; then, after a plateau in the mid-twenties, the rate declines until the mid-forties, when it begins a steady rise that lasts until retirement.⁷⁵ Correlations such as these must be carefully interpreted, of course; youth is in part a proxy for inexperience, age for declining physical dexterity.⁷⁶ Often, however, the correlations do indicate causation. Thus, it is established that "inattention" results in accidents—and there is a considerable psychological literature on the causes of inattention.⁷⁷ "Fatigue," for example, is naturally conducive to inattention;⁷⁸ hence conditions that produce fatigue can be regarded, at least in a general way, as causes of accidents.

In suggesting that psychology rather than economics may best help us to understand contributorily negligent conduct, I do not claim that

71. *Adair v. Valley Flying Serv.*, 196 Ore. 479, 250 P.2d 104 (1952).

72. *Baker v. Rosemurgy*, 4 Mich. App. 195, 144 N.W.2d 660 (1966).

73. See the statement of the economist Robert Solow that the economist's assumption of rational choice is "free of deep psychology, free of social institutions Naturally, it turns Freudians purple and sociologists green." Solow, *Science and Ideology in Economics*, PUBLIC INTEREST, Fall 1970, at 94. See also Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 474 (1974).

74. Extremely useful is A. HALE & M. HALE, *A REVIEW OF THE INDUSTRIAL ACCIDENT RESEARCH LITERATURE* (1972), a book that, its title notwithstanding, deals with all studies of road accidents as well as work accidents. See also M. SCHULZINGER, *THE ACCIDENT SYNDROME* (1956); L. SHAW & H. SICHEL, *ACCIDENT PRONENESS* (1971).

75. See A. HALE & M. HALE, *supra* note 74, at 33-34.

The evidence on vision is mixed. *Id.* at 40-41. What evidence there is on deafness suggests that it is associated with lower accident rates. *Id.* at 41. The relevance of sensorimotor performance is now unsettled. *Id.* at 43-45. And "above a very low minimum, there is no overall relationship between intelligence test results and accidents." *Id.* at 50.

76. *Id.* at 42.

77. See J. COHEN & B. PRESTON, *CAUSES AND PREVENTION OF ROAD ACCIDENTS* 55 (1968).

78. A. HALE & M. HALE, *supra* note 74, at 45.

such conduct is impervious to the influence of either legal rules generally or a contributory negligence rule in particular. The psychological literature does not now support the idea, once advanced by Professor Fleming James,⁷⁹ that a large percentage of all accidents is caused by a small number of accident-prone persons, who are identifiable in advance and whose accident proneness is due to stable and innate attributes, many of which are physical or quasi-physical.⁸⁰ Rather, what I mean to claim is that prevention may be a matter less of economic theory and more of applied psychology. Here, however, there is a misfortune to report: the question of how to *prevent* unreasonably self-risky conduct is one that applied psychologists have until now largely overlooked.⁸¹ In an effort to think about the question of prevention in a psychologically realistic way (though without much help from the psychological literature), it seems helpful to break up the whole of contributorily negligent conduct into two categories.

The first of these covers situations in which the individual is aware of the risk.⁸² But merely to describe such a category raises the question of why anyone would choose to engage in conduct of this sort. At least three reasons are identifiable.⁸³ First, on the basis of the facts as he perceives them, the person may have concluded that the risk involved in his conduct is reasonable.⁸⁴ He is wrong in his judgment because his facts are wrong; he has either undercalculated the risk or overcalculated the cost of abjuring the risky conduct.⁸⁵ Second, on the basis of the values that the individual holds, he may conclude that his con-

79. James & Dickenson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950). See also 2 F. HARPER & F. JAMES, *supra* note 1, at 3-4 (Supp. 1968).

80. See A. HALE & M. HALE, *supra* note 74, at 21-23; L. SHAW & H. SICHEL, *supra* note 74, at 420-21; U.S. DEP'T OF TRANSPORTATION, DRIVER BEHAVIOR AND ACCIDENT INVOLVEMENT: IMPLICATIONS FOR TORT LIABILITY 95-99 (1970).

It is unfortunate that the legal consideration of accident psychology was so early tied by Professor James's work to the dubious accident-proneness hypothesis.

81. See Hinrichs, *Psychology of Man at Work*, 21 ANN. REV. PSYCH. 519, 544 (1970).

82. In such situations contributory negligence "overlaps" with the assumption of risk defense. The discussion in the text deals with the contributory negligence aspect only.

83. These reasons are in addition, of course, to the economic reason that the actor's knowledge of the defendant's tort liability reduces the actor's foreseeable net costs to the point at which the risky conduct becomes rational from the actor's point of view. The possibility of conduct occasioned in this way can hardly be gainsaid; however, it is difficult to document the existence of any such conduct, even anecdotally.

The burden of the text is to establish that there are many explanations for deliberately and unreasonably self-risky conduct that are independent of the economic net costs argument.

84. See, e.g., *Froom v. Butcher*, [1975] 3 W.L.R. 379, 386 (C.A.) (plaintiff undercalculated safety benefits of wearing seat belts).

85. This may be due to information costs or to the fact that the plaintiff is not intelligent enough to calculate the risk accurately. Economic analysis often assumes—without providing justification—that people possess a high and uniform intellectual ability. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* 72-73 (1st ed. 1973).

duct is reasonable. If the law deems his behavior negligent, it does so because the community (*viz.*, the jury) adheres to a different set of values. Consider the victim who walks into a dark, unknown room because he is unusually curious⁸⁶ and places an unusually high value on the satisfaction of his curiosity, or the "risk-preferring" victim who is willing to jaywalk partly because he does not really mind (or even enjoys) dodging cars. Third, the victim may be one of those persons who are psychologically inclined to believe that accidents happen only to the "other guy," and who, in the face of known risks, are therefore likely to make decisions that are not genuinely consistent with their own real interests.⁸⁷

What happens when a contributory negligence defense is imposed on unreasonably and deliberately risky conduct that can be explained in any of these ways? For the victim with the wrong facts, it is not clear, as a matter of law, that his conduct entails contributory negligence at all. Even if the victim's factual perceptions are objectively incorrect, so long as they fall within the bounds of "reasonableness" the victim will perhaps be regarded as having behaved as a "reasonable man" and hence as not guilty of contributory negligence.⁸⁸ Next, in the case of the victim with atypical values,⁸⁹ it is hardly clear that his is conduct that society should really want to prevent. Certainly, the economist would not automatically argue in favor of prevention. Economics is keen on leaving to each individual the right to define and determine his goals; the economic assumption of rationality relates to choices that the person makes in pursuing his goals.⁹⁰ Finally, for conduct oc-

86. *E.g.*, *Carns v. Noel*, 364 Pa. 77, 70 A.2d 619 (1950).

87. Professor Calabresi refers to the tendency both to believe that accidents happen to "the other guy" and to overvalue current gratification that is gained at possible future cost. *See G. CALABRESI, supra* note 43, at 55-57. Professor Gerald Dworkin notices additional factors: human difficulty in translating "intellectual knowledge" about risks into knowledge that is "subjectively genuine," and lack of "will power," which prevents people from acting in ways consistent with their knowledge. Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 107, 120-22 (R. Wasserstrom ed. 1971).

88. *Compare Terry, Negligence*, 29 HARV. L. REV. 40, 42-43 (1915) with *Froom v. Butcher*, [1975] 3 W.L.R. 379, 384 (C.A.). If tort law does allow the jury to find contributory negligence in such cases, one cannot be terribly confident that the jury rather than the plaintiff has made the more appropriate assessment, especially since the jury's judgment is made with the detriment of hindsight. Also, unless the plaintiff is aware that his factual assessment is not shared by others, he will have no reason to believe that contributory negligence is even an issue.

89. For such a plaintiff, it seems clear that the community's values, rather than the plaintiff's, prevail. *See Seavey, supra* note 29, at 10-11. *See also Sullivan v. Creed*, [1904] 2 Ir. R. 317 (K.B.), reprinted in C. GREGORY, H. KALVEN & R. EPSTEIN, *supra* note 21, at 204 (on role of jury).

90. *See G. BECKER, ECONOMIC THEORY* 25-26 (1971). Of course, when justification for the plaintiff's risky conduct is couched in terms of the plaintiff's atypical values, it can be argued that an affirmative defense remains appropriate, on the grounds that the law

Contributory and Comparative Negligence

caused by psychological deficiencies, there is at least a possibility that an individual's knowledge of the contributory negligence implications of his behavior might reinforce his lagging self-discipline.⁹¹ The problem is that the magnitude of this possibility is very difficult to figure out; the incentive afforded by a contributory negligence rule may well be effective occasionally, but more than this one cannot say.

The second category of contributorily negligent conduct includes instances in which the victim, because of inattention or inadvertance, is not conscious of the risk. This category includes a large percentage of all contributorily negligent conduct. In some of these situations, the victim's conduct is barely even deliberate: consider the worker whose hand finds its way into a dangerous machine and who is utterly unable to explain how this came to pass.⁹² More commonly, the person's behavior will be intentional but undertaken without awareness of the risk: consider the person who momentarily forgets about a dangerous condition as he walks ahead.⁹³ Either way, the individual is mindless of the risk. Starting with this fact of mindlessness, the conclusion easily follows that liability rules like contributory negligence, which themselves appeal to the mind, will have little effect.⁹⁴ For that matter, such conduct, in light of its mindlessness, does not seem readily controllable by direct public regulation,⁹⁵ nor even by the supposedly all-powerful "instinct of self-preservation."

wishes to "keep the plaintiff honest" by denying him a recovery—*i.e.*, to rule out the possibility that the plaintiff finds his conduct reasonable only because he expects he can shift part of its cost to a tort defendant. This argument is unconvincing, so long as we start with the assumption of a negligent defendant. Given the assumed *certainty* of a defendant who is an efficient cost-preventer, it seems a mistake to deny or reduce the plaintiff's recovery because of the mere *possibility* that the plaintiff is an efficient cost-preventer as well.

91. If, for example, the failure to wear seat belts were deemed contributory negligence, I would be somewhat better able to discipline myself to wear them. Professor Gerald Dworkin describes his own seat belt behavior in similar terms. Dworkin, *supra* note 87, at 121.

92. *E.g.*, *Elder v. Crawley Book Mach. Co.*, 441 F.2d 771 (3d Cir. 1971) (applying Pennsylvania law).

93. *E.g.*, *Wood v. Richmond & D.R. Co.*, 100 Ala. 660, 13 So. 552 (1893); *Day v. Barber-Colman Co.*, 10 Ill. App. 2d 494, 135 N.E.2d 231 (1956).

94. Particular sub-doctrines of contributory negligence law seem consistent with this observation. "Momentary forgetfulness" is generally held not to be contributory negligence *per se*, but only a factor for the jury to consider. *See* Annot., 74 A.L.R. 2d 950, 953, 954-55 (1960). In England, "momentary inadvertence" is not contributory negligence at all in suits by employees against employers. J. MUNKMAN, *EMPLOYERS LIABILITY AT COMMON LAW* 586-87 (8th ed. 1971). *See* also the disqualification of ordinary contributory negligence as a defense in products liability cases, note 7 *supra*, as explained in 86 HARV. L. REV. 923, 929-31 (1973).

95. Professor Calabresi refers to some risky acts—for example, a driver's absentmindedly taking his eyes off the road—that cannot be dealt with by regulations, since they are acts that "individuals cannot control." G. CALABRESI, *supra* note 43, at 109-11.

It is possible, however, that conduct that is mindless in the immediate sense can be understood, from a longer-term perspective, as flowing from an individual's general decision about how much "care" or "attention" to exercise in his day-to-day affairs. Such a decision would balance the benefit of attention (that is, the reduction of risks) against its cost (that is, the disagreeability of requiring oneself to pay attention to potential risks). In this way, some "mindfulness" can be found in otherwise "mindless" conduct.

However, the element of rationality that can be so identified does have a rather special character. Most people do not abide by general attention decisions consciously rendered; when we do attempt such deliberate decisions they usually turn out to be meaningless New Year's resolutions. If there are any general attention decisions, they occur at a subconscious level. And when the inquiry extends into the subconscious, the very notion of "decision" becomes inaccurate; the most that can be said is that the attention problem is "dealt with" by the subconscious, and that a person's behavior can perhaps be evaluated "as if" a decision had been made.

Thus the preliminary finding of mindfulness in seemingly mindless conduct turns out to be attenuated—and attenuated in ways that carry significant implications for the deterrence rationale of a contributory negligence rule. An initial implication is that if the plaintiff's conduct, which immediately seems "unreasonable," can be understood as "reasonable" after all from a longer and more appropriate vantage point, then perhaps many of the law's contributory negligence findings are shortsighted and incorrect.⁹⁶ The broader implication is that human conduct that is determined by some subconscious process is the least likely to be governed by the narrowly rational influence of a liability rule like contributory negligence. It would be groundless to contend that a contributory negligence rule can have no effect on conduct of this sort; but there is good reason to conclude that this effect is partial and erratic.

Separate consideration has been given above to victim conduct that is deliberately risky and to that which is inadvertently risky. Yet the ensuing evaluations tend to converge. In either case, the results are reached, first, that some of this conduct perhaps should not be deterred after all, despite its appearance of "unreasonableness," and, second,

96. Cf. C. FRIED, *AN ANATOMY OF VALUES* 179-80 (1970) (in light of appreciable risk, driving to store for trivial purpose could be called unreasonable, but this would unduly disparage man's capacity for enjoying life's trivial pleasures).

Contributory and Comparative Negligence

that the deterrent potential of a contributory negligence rule is significantly limited. These evaluations, taken together, may confirm the "weak" economic argument that a contributory negligence rule has some consequence on the frequency of unreasonably risky conduct. But they fall short of verifying the "strong" economic argument that such a rule can control this conduct in a general, systematic way.

Empirical support for these evaluations can perhaps be found in the American experience with workers' injuries. A large—if somewhat uncertain—percentage of all such injuries is due, at least in part, to the worker's unreasonably risky conduct,⁹⁷ and much of that conduct is of the inattentive or inadvertent variety. Prior to workers' compensation, all such unreasonable conduct constituted contributory negligence, which barred the worker's tort suit against a negligent employer. Moreover, absent employer negligence, tort law withheld from the employee any claim for compensation. After workers' compensation, the worker's unreasonable conduct became irrelevant to his right to recover. Moreover, the worker was guaranteed a recovery regardless of his employer's negligence. If contributorily negligent conduct can be understood in wholly rational terms and if it is constrained in a meaningful way by a contributory negligence rule, the advent of workers' compensation should have occasioned a major outbreak of such carelessness.⁹⁸ Instead, the industrial accident rate declined sharply in the years after the adoption of workers' compensation.⁹⁹ Whatever the causes of this decline,¹⁰⁰ it seems clear that the elimination of the contributory negligence defense and the provision of automatic compensation did not result in any significant increase in the frequency of employee carelessness.

97. Estimates—and terminology—vary widely. According to Atiyah, 24% of all fatal work accidents in one study were "preventable" by the worker alone, and another 16% were preventable by both the worker and the employer (or another employee). P. ATIYAH, *ACCIDENTS, COMPENSATION AND THE LAW* 230 (1st ed. 1970). According to Larson, 29% of all work accidents are caused by the sole negligence of the injured worker, and an additional 5% by the joint negligence of the worker and the employer. I A. LARSON, *supra* note 13, § 4.30 at 27. Professor Heinrich has concluded that 88% of all work accidents are due to the "unsafe acts of persons," which are "preventable." H. HEINRICH, *INDUSTRIAL ACCIDENT PREVENTION* 20-21 (4th ed. 1959). Apparently, in the vast majority of these accidents, the unsafe act is that of the victim himself, rather than that of a fellow worker. I A. LARSON, *supra* note 13, § 4.30, at 27.

98. There is one offsetting consideration. Prior to workers' compensation, the employee who was free of contributory negligence could recover pain and suffering damages against a negligent employer, damages that are not now available under workers' compensation even when the employer has been negligent.

99. See H. SOMERS & A. SOMERS, *WORKMEN'S COMPENSATION* 207-09 (1954).

100. Compare W. DODD, *ADMINISTRATION OF WORKMEN'S COMPENSATION* 698 (1936) with Chelius, *supra* note 23, at 301-06.

D. *Prevention of Contributory Negligence by the Defendant*

The fourth reason for doubting the safety-incentive rationale is this: at least in some situations, the plaintiff's unreasonable conduct may effectively be prevented by the *defendant*. Indeed, given the elements of plaintiff psychology described above, the defendant may well be better able than the plaintiff to prevent conduct of this sort. This is most clearly true in the employment context.¹⁰¹ The employee who is not wearing his eye goggles might well wear them if he were more sternly instructed to do so by his supervisor.¹⁰² Or it may be that the goggles fit uncomfortably and that he would quite voluntarily wear a more comfortable pair were the employer to provide them.¹⁰³ Employee inattentiveness is produced, in part, by fatigue, and fatigue is, in turn, the consequence of working conditions that are established by the employer, including, for example, the speed of the assembly line¹⁰⁴ and the employer's requirements for overtime.¹⁰⁵ The employee is, after all, under the employer's legal control; by imaginative management and supervision, the employer can eliminate a large percentage of its employees' careless acts.¹⁰⁶

Products liability is another area in which the defendant may be able to exert some control over the victim's accident-causing conduct.¹⁰⁷ The manufacturer can issue strong warnings concerning product use and can design products in ways that reduce the opportunities for careless injuries. The manufacturer's leverage over the consumer is vastly

101. Negligence suits brought by employees against employers constitute the largest single class of cases tried in the High Court in England. See P. ATIYAH, *supra* note 16, at 200. A workers' compensation system exists, but it does not preclude the employee's tort suit against the employer. If the employee recovers from the employer in tort, he is merely required to surrender one-half of his workers' compensation entitlement. Workers' compensation payments come not from the employer or its insurer, but rather from the national government. The government program is financed by Social Security-like taxes on employers and employees. See generally F. BATT, *THE LAW OF MASTER AND SERVANT* 420-602 (1967).

102. See *Bux v. Slough Metals Ltd.*, [1973] 1 W.L.R. 1358 (C.A.) (holding employer negligent for failure to provide adequate eye-goggle instruction). See also *I.T.O. Corp. v. Occupational Safety & Health Comm'n*, 540 F.2d 543 (1st Cir. 1976).

103. See H. HEINRICH, *supra* note 97, at 36-37.

104. See Oi, *Workmen's Compensation & Industrial Safety*, 1 SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 41, 77 (1973).

105. See A. HALE & M. HALE, *supra* note 74, at 47.

106. See H. HEINRICH, *supra* note 97, at 400; Míami, *Action Research on the Development of Leadership Decision Making Processes and Organizational Performance in a Japanese Shipyard*, 18 PSYCHOLOGIA 187 (1975) (suggesting that 60% of accidents caused by employee carelessness could be prevented by tighter supervision). See also J. PAGE & M. O'BRIEN, *BITTER WAGES* 145-49 (1973) (describing management campaigns to discourage carelessness).

107. This may be what Professor Calabresi means to say in one cryptic passage. Calabresi & Hirschhoff, *supra* note 36, at 1060 n.19. See Professor Posner's puzzlement. Posner, *supra* note 43, at 213-14.

Contributory and Comparative Negligence

less, however, than the employer's power over the employee. And in other tort contexts, it is even less clear that the defendant is in a good position to control the victim's unreasonable conduct. Nevertheless, this fourth reason provides a further explanation of why the elimination of the contributory negligence defense in American workers' compensation systems has not created any significant problem in accident prevention.

Given its important goal, the safety incentive rationale for a contributory negligence defense should be taken seriously. This article has developed several reasons, however, that cast doubt on the idea that a contributory negligence defense can be successful in achieving its appropriate safety objectives. If these reasons are considered individually, none of them refutes the safety rationale entirely. When taken in combination, however, my view is that they deprive that rationale of just about all of its credibility. Indeed, the last two of these reasons, concerned with plaintiff and defendant psychology, suggest that the contributory negligence defense in its traditional form is probably counterproductive:¹⁰⁸ if the plaintiff's contributory negligence is often beyond his own control and is sometimes within the defendant's control, then the traditional rule seems less capable of achieving tort law's safety purposes than a direct, unencumbered rule of the defendant's negligence liability.¹⁰⁹ In sum, there is inadequate reason to believe that any contributory negligence rule is a good idea in safety terms; the traditional rule, moreover, appears to be a distinctly bad idea.

III. A Fairness Justification

As argued above, economics furnishes no persuasive rationale for any contributory negligence rule; indeed, it suggests if anything the unwisdom of the rule in its traditional form. Can an adequate rationale for a contributory negligence rule be found somewhere outside economics? A few commentators believe that efficiency should be the sole determinant of liability rules.¹¹⁰ Most disagree with this view and insist that appeals to other norms be given their due. Even among most economics-oriented scholars, there is an understanding that "justice"

108. The same conclusion does not hold for such alternatives as comparative negligence, which does seem capable of taking psychological considerations into account. See the *Bux* case, discussed in note 102 *supra* and note 117 *infra*.

109. I am unaware of any economic writings that have supported the traditional rule.

110. *E.g.*, Demsetz, *supra* note 23, at 28.

or "fairness" is such a norm.¹¹¹ For me, at least, the language of justice is well suited to larger questions of societal organization, while the language of fairness may relate to the kinds of issues that typically arise in ordinary private litigation; accordingly, it is fairness language that will primarily be employed below.

In fairness terms, contributory negligence starts out with a clear intuitive appeal. If the defendant is being held liable because of his "faulty," "unreasonable," or "wrongful" behavior, the fact that the plaintiff himself has likewise been guilty of "faulty" conduct seems clearly something that the law should take into account, either by reducing the plaintiff's damages¹¹² or by entirely denying the plaintiff's right to sue on the theory that a faulty plaintiff should not be heard to complain about a defendant's fault. For the law to fail totally to take the plaintiff's conduct into account would seem unfair because it would involve an uneven application of the fault standard.¹¹³

What this obvious argument in defense of a contributory negligence rule rests on is the moral equivalency of the plaintiff's and defendant's "fault." But the appearance of this equivalency is quite misleading. The objectively egoistical or antisocial character of the defendant's negligence has been described above.¹¹⁴ With contributory negligence, however, the conduct in question is conduct that runs an unjustified risk to the actor himself, rather than to others.¹¹⁵ Given this difference, the conduct that establishes contributory negligence cannot be regarded as egoistical or antisocial; instead it is behavior that, from the actor's or others' perspective, is merely foolish¹¹⁶ or stupid. This assessment undermines the supposed moral parity between the "fault" of negligence and the "fault" of contributory negligence.¹¹⁷ Foolish

111. *E.g.*, G. CALABRESI, *supra* note 43, at 24-26. *See also* Posner, *supra* note 26, at 777.

112. "Liability in proportion to fault" is the slogan of sorts for comparative negligence. *See* *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 810, 532 P.2d 1226, 1230, 119 Cal. Rptr. 858, 862 (1975).

113. *See* *Nucci v. Warsaw Constr. Co.*, 12 N.Y.2d 16, 186 N.E.2d 401, 234 N.Y.S.2d 196 (1962); *Meade v. Sanders*, 151 Va. 636, 144 S.E. 711 (1928); P. ATIYAH, *supra* note 16, at 133, 135.

114. *See* pp. 701-02 & notes 29-33 *supra*.

115. *See* W. PROSSER, *supra* note 1, at 418.

116. *E.g.*, *Shade v. Bay Counties Power Co.*, 152 Cal. 10, 13, 92 P. 62, 63 (1907) ("foolhardy"); *Gibby v. East Grinstead Gas & Water Co.*, [1944] 1 All E.R. 358, 360 (C.A.) ("an act of folly").

117. Existing law, in various limited ways, is responsive to the view of contributory negligence put forward here. The law is rather gentle, for example, in dealing with plaintiffs who have been merely "momentarily inadvertent" or "momentarily inattentive" as they approach a known or visible hazard. *See* note 94 *supra*. In comparative negligence jurisdictions, plaintiffs tend to fare quite well in the reduction of damages when their unreasonable conduct is merely foolish in the sense described. *See, e.g.*, *Bux v. Slough Metals Ltd.*, [1973] 1 W.L.R. 1358 (C.A.). In particular, pedestrians typically suffer only a

Contributory and Comparative Negligence

behavior is of course disadvantageous to the actor, but it is difficult to identify any clear moral principle that it contravenes;¹¹⁸ the language of "wrongfulness" seems largely out of place in the contributory negligence context. To state the matter in the formal legal parlance of Lord Denning, "negligence depends on a breach of duty, whereas contributory negligence does not."¹¹⁹

Thus the standard fairness argument adduced in support of a contributory negligence rule, depending as it does on the supposed equivalence of the plaintiff's and defendant's fault, does not deserve to be accepted. There are, however, two other fairness considerations that may support some contributory negligence rule.

The first of these builds on the fact that contributory negligence, though defined in terms of an unreasonable risk to self, involves conduct that in an individual case may also run an unreasonable risk to others. If so, such conduct involves elements of negligence as well as contributory negligence. Although such an overlap between negligence and contributory negligence is technically fortuitous,¹²⁰ in the real world it can occur, and it does occur regularly in one major class of accidents: those involving motor vehicles. The motorist who drives at night without lights creates an unreasonable risk to himself and to others at the same time.¹²¹ When the plaintiff is suing a negligent defendant and when the plaintiff's conduct was itself negligent in the sense of running an unreasonable risk to others, it could be argued that a fair application of the fault principle requires the recognition of an affirmative defense. The defense in question would be one that asserts the plaintiff's negligence, rather than his contributory negligence, as a limit on the plaintiff's own negligence claim.

small reduction in damages in their suits against negligent motorists, *see* Fleming, *supra* note 5, at 249. One can even cast an eye at workers' compensation: the carelessness of the worker, which the law ignores, is generally misbehavior threatening the worker alone. It is true that in a number of jurisdictions, the worker's recovery is either reduced or eliminated if he has willfully failed to observe a safety rule. I.A. A. LARSON, *supra* note 13, § 33.00. In such cases, however, the worker's conduct is morally improper in the special sense that it implicates him in the disobedience of authority.

118. Some religions find acts of intentional self-destruction morally objectionable on grounds that they violate God's rights in the individual—a belief not applied to accidental harms. One can also imagine a moral complaint about foolish acts of contributory negligence as impugning the high moral value that all persons should place upon human welfare, even their own. In my view, such a moral objection is too uncertain and slender to serve as the predicate for an official liability rule.

119. *Froom v. Butcher*, [1975] 3 W.L.R. 379, 383 (C.A.). *See generally* Honoré, *Causation and Remoteness of Damage*, in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 99-101 (1969).

120. *See* W. PROSSER, *supra* note 1, at 418.

121. *See* *Martin v. Herzog*, 228 N.Y. 164, 126 N.E. 814 (1920).

Although the somewhat novel idea of a negligence defense¹²² is not without some initial appeal, when examined more carefully the idea is not persuasive. Assume a person whose conduct involves both negligence and contributory negligence. The most direct and appropriate way to respond to the negligence in his conduct is to render him liable in tort for any injury to another that his negligence produces. And this, of course, is a liability that tort law does firmly impose. Given this unquestioned negligence liability, it would entail an inappropriate form of double-counting for the law to go farther by relying on the negligent aspect of the person's conduct as a reason for disparaging his recovery for an injury that he has suffered as a result of some other person's negligence. Putting the matter in causal terms, even if the victim's conduct has contained a negligent aspect, it is not this aspect of his conduct that has caused his own injury.¹²³

The second fairness consideration in favor of a contributory negligence defense begins with a distinction between our evaluation of the plaintiff's original conduct and our evaluation of the issues in his eventual lawsuit. With respect to a tort defendant, it is now widely agreed that even if the defendant's conduct has not been morally improper, there may be sufficient reasons of fairness to hold him liable for the harm that his conduct has occasioned.¹²⁴ This basic, correct distinction between the moral aspects of original conduct and the fairness aspects of the consequent lawsuit applies on the plaintiff's side as well. The plaintiff's original act of contributory negligence may not have been morally improper, since it created a risk only to the plaintiff himself. When that risk eventuates in an injury to the plaintiff, however, and when the plaintiff then seeks to collect in tort for that injury against a negligent defendant, at the time of this lawsuit the harm involved in the plaintiff's original conduct "reaches" the defendant, another person. The defendant, concededly, has engaged in negligent conduct that has contributed to the plaintiff's accident. Nevertheless, that accident would never have occurred had the plaintiff himself not behaved in a foolish way. In these circumstances, it would be basically

122. *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809), the origin of the contributory negligence defense, was itself a highway case, in which the plaintiff, riding his horse "violently," clearly created a risk to others as well as to himself. But in explaining the contributory negligence defense, the court dealt exclusively with the risk to self.

123. Cf. Fletcher, *supra* note 33, at 537, 548-49 & n.44 (discussing negligence-type defense within framework of nonnegligence "reciprocity" liability theory). Professor Fletcher now tells me that for causal reasons of the sort discussed in the text, he no longer supports such a defense.

124. See Epstein, *supra* note 33, at 157-60; Fletcher, *supra* note 33, at 568-69; Kecton, *supra* note 33, at 427-28.

Contributory and Comparative Negligence

unfair¹²⁵ for the law to ignore entirely the plaintiff's conduct by imposing full liability on the negligent defendant.¹²⁶

If this idea of fairness thus calls on tort law to take some account of the plaintiff's contributory negligence in ascertaining the liability of a negligent defendant, the question arises of what appropriate form the legal doctrine should assume. As presented, the fairness idea is entirely satisfied by a liability-dividing rule like comparative negligence. Should the idea be carried further, however, so as to disqualify the foolish plaintiff from receiving any recovery from a negligent defendant?¹²⁷ The contributory negligence idea does not seem to be one of those that presses itself to its logical extremes;¹²⁸ when stated as above, in a moderate form, the idea is both intelligible and stable. There is nothing in its logic that would be impaired or compromised were it deployed in support of a liability-reducing rule rather than a liability-denying rule. Moreover, as we have seen, the rule of negligence liability itself has a satisfactory moral basis, one that is based on our disapproval of antisocial or egoistical conduct.¹²⁹ To negate altogether a plaintiff's lawsuit against a negligent defendant would be to allow the fairness idea associated with the contributory negligence defense to extinguish the moral idea that predicates negligence liability.

The law frequently encounters tension between alternative principles. Occasionally, the law concludes that one of the principles simply is much more important than the other, or that since the tension between the principles entails an outright conflict, one of them should

125. Cf. E. CAHN, *THE SENSE OF INJUSTICE* (1949) (arguing that it is easier to recognize instances of "injustice" than to prescribe general, affirmative rules of "justice").

126. This finding of unfairness arises from a commonsense judgment, rather than being deduced from any comprehensive fairness principle. When such principles are ventured, they are typically expressed in general terms that are quite without relevance to particular tort issues like contributory negligence. See, e.g., J. RAWLS, *A THEORY OF JUSTICE* 114-17 (1971) ("duty not to harm or injure others" is fundamental to principle of justice). Most people rely on commonsense moral judgments most of the time; even the notion that economic efficiency is in the public interest can be justified only in a commonsense way. See also Thayer, *Public Wrong and Private Action*, 27 *HARV. L. REV.* 317, 318 (1914) (insisting that all doctrines within negligence system "respond to the test of common sense"). Since, however, commonsense judgments do not carry the power of deductive proof, the article's analysis can be understood as proposing and recommending to its readers a certain justification for a contributory negligence defense. See the discussion of consensus-seeking in Feinberg, Book Review, 81 *YALE L.J.* 1004, 1018-21 (1972).

127. The reasoning of the California Supreme Court on this important fairness issue is scant and inadequate. The court merely quotes Prosser to the effect that the "clean hands" rationale for the traditional rule "is no explanation of the many cases, particularly those of the last clear chance, in which a plaintiff clearly at fault is permitted to recover." *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 811 n.4, 532 P.2d 1226, 1231 n.4, 119 Cal. Rptr. 858, 863 n.4 (1975) (quoting Prosser, *Comparative Negligence*, 41 *CALIF. L. REV.* 1, 3-4 (1953)).

128. Cf. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (on tendency of legal rights to extend themselves absolutely).

129. See pp. 701-02 & notes 29-33 *supra*.

be vindicated even at the other's total expense. When possible, however, the law's preferred course is to seek an accommodating rule or result that is able to reduce, or if possible to resolve, the original tension. In the contributory negligence context, a liability-dividing rule like comparative negligence is one obvious form of accommodation or reconciliation. The fairness idea behind contributory negligence is not clearly superior to the moral idea supporting negligence liability, and, as indicated, those ideas can quite properly be stated in terms that avoid any element of necessary conflict. That American juries, instructed on the traditional rule, have so clearly striven in a liability-dividing direction¹³⁰ and that virtually every other common law and civil law jurisdiction has adopted some form of comparative negligence¹³¹ are elements that can be taken at least somewhat into account in reassuring ourselves of the fairness of a liability-dividing rule.

There is, moreover, another factor. The earlier discussion of tort law's safety objective concluded that, while it was not clear that any contributory negligence rule is an effective technique for accident prevention, there are important psychological considerations indicating that the traditional contributory negligence rule is peculiarly likely to be counterproductive.¹³² By now, the appropriateness of some contributory negligence rule has been affirmed on fairness grounds, and considerations of fairness have been seen to suggest a preference for a liability-dividing rule over the traditional rule. At this stage, the earlier accident-prevention conclusion can be introduced for purposes of reinforcing this suggested preference. Lurking in the background is the vexing question of whether the accident-prevention goal can ever justify a legal rule that would otherwise be regarded as unfair. That question can remain quite in the background, since accident-prevention considerations are here being employed to support a liability-dividing result that is independently supported by fairness values.

Assuming, then, the advisability of a liability-dividing rule, which version of such a rule is the most appropriate? The basic choice is apparently between comparative negligence and *Galena* (which entails the division of liability, but only in a rather aggregate manner). Since *Galena* would allow certain plaintiffs to recover all their damages despite their contributory negligence, while other plaintiffs would recover nothing despite the defendants' negligence, it raises something

130. See Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 506 (1962).

131. The United States has been "the last hold-out." Fleming, *supra* note 5, at 242.

132. See p. 721 *supra*.

Contributory and Comparative Negligence

of a fairness problem. But more than that, one becomes very uncomfortable with the fairness implications of *Galena's* "break-point" feature—the feature that allows the entire liability to turn on a slight difference in the assessed negligence of the parties. To distinguish in an all-or-nothing way between the party, whether plaintiff or defendant, who is deemed forty-five percent negligent and the party who is deemed fifty-five percent negligent is substantially unfair—especially when the relevant judgments are imprecisely and unpredictably rendered after the event by an ad hoc lay jury.¹³³ The risk of treating basically equal litigants in a dramatically unequal manner is simply too great. Moreover, the breakpoint creates a certain prospect of inefficient accident prevention. That feature exacerbates three of the problems already mentioned—each party's inability to know the other party's situation, the parties' possible inability to make the relevant quantifications, and the inherent uncertainty of the jury's findings.¹³⁴ A rule that divides liability within each case eliminates both the fairness and the accident-prevention problems that accompany the breakpoint. Thus for reasons of fairness, reinforced by our concern for safety, the liability-dividing rule of comparative negligence seems clearly preferable to *Galena*.

Conclusion

In light of all the complicating circumstances, a contributory negligence defense cannot affirmatively be justified by economic reasoning relating to efficient accident prevention. Indeed, in encountering the contributory negligence problem, the economic model of human conduct discernibly falters. The most persuasive justification for a contributory negligence defense is to be found in notions of fairness. The fairness reasoning, which is more subtle than many have supposed, is concerned with the implications that should be drawn from the foolishness of the victim's conduct. Somewhat supported by psychological considerations pertaining to the goal of accident prevention, the fairness criterion establishes a preference for a liability-dividing rule rather than the traditional rule and, among liability-dividing rules, for comparative negligence rather than *Galena*. Comparative negligence is thus the proper rule.

133. Modified comparative negligence, as an amalgam of *Galena* and pure comparative negligence, contains a *Galena*-type breakpoint. The arbitrary results that this breakpoint produces are commented on in W. PROSSER, *supra* note 1, at 438.

134. See p. 709 & note 52 *supra*. For example, assume both parties know that each of their prevention costs is in the vicinity of \$30; under *Galena*, given its all-or-nothing character, what they know leaves them extremely uncertain as to their potential liability.

The Yale Law Journal

Volume 87, Number 4, March 1978

Peter J. Kalis
Editor-in-Chief

William N. Eskridge
Note & Topics Editor

Richard H. Klapper
Managing Editor

Matthew T. Heartney
Edward P. Krugman
Mark C. Rahdert
Note Editors

David J. Grais
Charlotte G. Meriwether
David O. Stewart
*Article & Book Review
Editors*

Scott D. Baskin
Wendell R. Bird
Scott A. Boorman
David M. Brewer
Donald K. Cawley
Gandolfo V. DiBlasi

James C. Francis IV
Edward E. Honnold
Daniel L. Koffsky
Michael D. Lowe
William L. Lynch
Margaret P.P. Mason

Mark L. Pelesh
Bradley S. Phillips
Carl L. Reisner
Edward L. Rubin
David M. Skover
Emily G.H. Sullivan

Secretaries to the Editors M. Olive Butterfield, Pamela Willmott

Student Contributors to This Issue

Scott A. Boorman, *A Spreading of Receipts Formula for Creating a Capital Gains/Ordinary Income Brightline: Contract Termination Payments and Business-Versus-Investment Assets*

Donald K. Cawley, *At Variance with the Administrative Exemption Procedures of ERISA: A Proposed Reform*

Gandolfo V. DiBlasi, *CBS v. ASCAP: Performing Rights Societies and the Per Se Rule*

Edward E. Honnold, *Thaw in International Law? Rights in Antarctica under the Law of Common Spaces*