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THE EMERGENCE OF COST-BENEFIT BALANCING IN ENGLISH NEGLIGENCE LAW

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INTRODUCTION

The subject of this symposium—negligence in the courts—turns out to be surprisingly difficult to investigate. Most American negligence cases are tried to a jury that receives only a general instruction equating negligence with failure to behave like a reasonably prudent person,[1] delivers a general verdict without disclosing its reasoning, and is accorded great deference by trial and appellate judges in applying the negligence standard. Consequently, in the United States, much of what negligence means in operation is hidden behind the jury's general verdict—and most of what American judges have to say about negligence is said in the context of directed verdict practice or on appeal.

In England, by contrast, the jury has been essentially defunct in civil cases since 1933.[2] English trial judges instruct themselves on the law of negligence, and apply that law as finders of fact—all in the form of opinions explaining their verdicts. And while English appellate courts give some deference to the fact finding of trial judges, the level of deference seems considerably lower than that

* Professor of Law, Quinnipiac University School of Law. Thanks to Interim Dean David King for summer research support, to Richard Wright for conceiving and organizing this Symposium, and to Anita Bernstein, Ellen Bublick, John Goldberg, Patrick Kelley, Linda Meyer, Kenneth Simons, Richard Wright, and Benjamin Zipursky for helpful comments. I began working on this Article almost a decade ago, but abandoned it after writing a preliminary draft. That 1992 draft, which has never been published, but which I circulated in manuscript form to a handful of readers, has occasionally been cited in law reviews. *See, e.g.*, Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 431 n.264 (1994) (citing my unpublished manuscript entitled "Cost-Benefit Analysis in Modern English Tort Law"). I am especially grateful to the late Gary Schwartz for encouraging me to return to and complete this Article, which extensively reworks the preliminary draft and substantially revises some of my initial conclusions. Last but not least, belated thanks to William Landes, Geoffrey Miller, Stephen Perry, and Richard Posner for comments on the 1992 draft.

1. *See* Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015 (1994).

2. *See* D.J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 188–89 (1999).

extended to American civil juries.[3] The appellate review of negligence issues in England is accordingly both freer and—because the appellate tribunal is confronted with a judge's explanatory opinion, rather than a jury's delphic verdict—better informed. There is consequently good reason to think that the study of English negligence cases can shed interesting light on how courts in a common law system actually employ the negligence standard.

Moreover, English law has figured prominently in the descriptive debate between those, like Richard Posner and William Landes, who think negligence entails cost-benefit balancing and those, like Ernest Weinrib and Richard Wright, who think the concept of negligence sounds in corrective justice and makes relatively little use of cost-benefit balancing. Both Weinrib and Wright rely heavily on English cases for ammunition against Posner's positive claim that the Hand Formula constitutes the meaning of negligence in Anglo-American tort law.

Accordingly, this Article examines modern English negligence cases to determine what standard of negligence English judges employ and what if any role cost-benefit balancing plays in their decisions. My approach is practical, descriptive, and historical. I sometimes take note of the possible theoretical implications of what I find in the case law, and I critique the descriptive accounts offered by Weinrib and Wright on one side, and Landes and Posner on the other. But I do not try to determine which of the many competing theoretical conceptions of negligence best explains the reasoning and results of the English cases. This omission is attributable both to limitations of time and space, and to my belief that puzzling out the doctrinal nuances of the cases in their own terms is a worthwhile enterprise that too often is subordinated to the working out of theory. My focus, then, will be on the meaning of negligence as English judges (and lawyers) understand it.[4]

Part I sets the stage for an examination of English negligence doctrine by outlining the three competing conceptions of negligence

3. *See, e.g.*, R.V.F. HEUSTON, SALMOND ON THE LAW OF TORTS 449 (13th ed. 1961) ("The powers of the Court of Appeal are wider in the case of a judge . . . sitting alone (and the vast majority of civil actions today are so tried) than in the case of an appeal from the verdict of a jury."). In cases tried to a judge, "though the appellate court will accept the judge's findings of primary fact, it will decide for itself the conclusions or inferences to be drawn from them." W.V.H. ROGERS, WINFIELD AND JOLOWICZ ON TORT 96 (11th ed. 1979).

4. Many English reports include a fairly detailed summary of the arguments made by each party's counsel. These arguments often furnish valuable clues to the profession's thinking about the standard of care in negligence at the time in question.

that have plausible claims to be the prevailing English approach. These are (1) the substantial foreseeable risk approach, which deems actors negligent—regardless of the difficulty of taking additional precautions—for creating substantial, reasonably foreseeable risks of harm to others; (2) the cost-benefit balancing approach, under which the actor is negligent only if the burden of avoiding a reasonably foreseeable risk is outweighed by the benefits of doing so; and (3) the disproportionate-cost balancing approach, under which the actor is negligent unless the burden of precautions to avoid a reasonably foreseeable risk would have been "disproportionate" to the risk. Each of these conceptions can be (and has been) offered as an account of how the canonical English template for determining negligence—the reasonable man—makes decisions about how much care to take against the risks to others associated with his conduct.

Part II then examines the leading English negligence cases during the era, which extends from the 1930s through the mid-1960s, in which this issue emerged and was gradually settled. In a nutshell, the story runs as follows. During the first decades of the twentieth century, there was no clear doctrine governing the relevance of precaution costs to determining negligence. The threshold for reasonable foreseeability was quite high, and relatively few plaintiffs surmounted it. When they did, it was often obvious that some straightforward precaution would have avoided the harm. The reasonable man standard was applied without explicit discussion of the limits (if any) on the duty to take reasonable care against foreseeable risks.

Cost-benefit balancing began to get a foothold in English law in the 1930s and '40s. Surprisingly, the first decisions making extensive, explicit use of a balancing approach were not common-law negligence cases. Rather, they were cases alleging breach of statutory duties to take "reasonably practicable" precautions in mines, factories, and other workplaces. In these contexts, the courts construed "reasonably practicable" to mean that employers must take precautions unless the costs of doing so would be disproportionate to the risk in question.

As the 1950s dawned, the House of Lords continued to avoid a definitive resolution of whether the balancing approach to negligence at common law was appropriate. The judgments in *Paris v. Stepney Borough Council*[5] (1950) seem to engage in balancing, but stop well

5. Paris v. Stepney Borough Council, [1951] A.C. 367 (1950) (appeal taken from Eng.).

short of formally adopting a balancing test. In *Bolton v. Stone*[6] (1951), by contrast, Lord Reid's judgment appeared to reject balancing in favor of the substantial foreseeable risk approach. But Lord Reid did not explain whether balancing was always inappropriate, or inappropriate only in non-contractual "stranger" cases such as *Bolton*. Moreover, a majority of the Law Lords in *Bolton* ruled in the defendant's favor on the ground that the risk was not reasonably foreseeable, and thus never reached the issue of reasonable care.

Whatever Lord Reid's intentions, during the roughly fifteen years between *Bolton v. Stone* and *Wagon Mound No. 2* the House of Lords endorsed and employed a balancing approach to negligence on no fewer than six separate occasions, which are examined in Part III. Four of these decisions involved alleged negligence by an employer. Of these, three relied on negligence at common law, while the fourth involved a workplace statute requiring the employer to take "reasonably practicable" precautions. The other two cases involved alleged negligence in non-employment contexts. Remarkably, while one or more of the other Law Lords employed cost-benefit balancing in most of these cases, Lord Reid did so in *each* of them.

Against this background, Part IV considers the significance of Lord Reid's judgment for the Privy Council in *Wagon Mound No. 2*. I agree with Professors Weinrib and Wright that close exegesis of Lord Reid's judgment shows that he remained committed to the substantial foreseeable risk approach, while accepting cost-benefit balancing in cases of foreseeable but small risks. I argue, however, that this subtle attempt to strike a compromise between the substantial foreseeable risk approach and the cost-benefit balancing approach must be assessed in light of the line of House of Lords cases employing cost-benefit balancing. None of those cases had restricted the use of balancing to "real" but not "substantial" risk.

In any event, Lord Reid's attempt to cabin the use of cost-benefit balancing failed. The judgment in *Wagon Mound No. 2*, insofar as it implicitly endorsed the substantial foreseeable risk approach, has had virtually no influence on English law. Indeed, I have found not a single case in which an English judge has relied on *Wagon Mound No. 2* as support for the substantial foreseeable risk approach. More generally, in the years since *Wagon Mound No. 2*, English judges have continued to employ cost-benefit balancing in negligence cases.

6. Bolton v. Stone, [1951] A.C. 850 (appeal taken from Eng.).

In workplace cases, English judges routinely employ cost-benefit balancing. In other contexts, ranging from automobile accidents to product liability cases to slip-and-fall cases, judges sometimes use cost-benefit balancing, and sometimes simply apply the reasonable person standard. And in *no* category of negligence cases—not even cases involving escaping cricket (or other) balls—have I found any authority indicating that English judges are *forbidden* to balance.

Yet it would be wrong to infer from this pattern that English judges are *required* to balance in negligence cases of every stripe. That may well be true in the workplace setting, where cost-benefit balancing is a settled practice. But in other contexts, an English judge who prefers not to balance has a simple alternative: apply the reasonable person standard imaginatively, by asking whether a reasonable person would have acted as the defendant did. Balancing thus constitutes an important—but not the exclusive—understanding of how a reasonable person approaches issues of accident avoidance.

Granting, then, that cost-benefit balancing is now a major (but not dominant) feature of English negligence law, which version—straight cost-benefit balancing or disproportionate-cost balancing—predominates? Perhaps surprisingly, the cases do not explicitly answer this question. When safety statutes require "reasonably practicable" precautions, judges tend to use disproportionate-cost language. At common law, the picture is more mixed: some decisions use disproportionate-cost language (or speak in terms of what is "reasonably practicable"), while others simply describe and apply the factors to be balanced.

In the Conclusion, I suggest that this uncertainty is itself significant. English judges use cost-benefit balancing intuitively and qualitatively, without attempting to make the evaluative dimension of balancing rigorous or even explicit. For that very reason, the difference between simple cost-benefit balancing and disproportionate-cost balancing may make little practical difference in the run of negligence cases. Nonetheless, if forced to choose one formulation to describe balancing in English negligence law, I would say that actors must take reasonably practicable precautions, that is, precautions whose costs are not disproportionate to their benefits.

This answer, of course, requires qualifications that will be supplied in due course. In addition, however, I want to underscore at the outset that this Article is not simply about which test for avoidability English law employs. Given that English judges engage (more or less

frequently) in cost-benefit balancing in many contexts, it is also important to ask how they go about that enterprise, and how balancing fits with the other tools in the kit of reasonable care. Here a number of themes emerge, including: (1) the gradual development of a norm requiring plaintiffs (except in res ipsa cases) to specify what precautions the defendant should have taken to avoid the accident; (2) the extension of the idea of balancing to include both ordinary precautions such as improving the safety of a factory's floors, and more drastic ones such as temporarily shutting down the factory if conditions cannot otherwise be made safe; (3) the use of the balancing approach to challenge conduct that is in compliance with custom; (4) the idea that if the precaution the plaintiff relies on should have been taken in the case at bar, it should have been taken in all similar cases, and hence that balancing should be looked at in the aggregate rather than simply in the individual case; and (5) the idea that defendants must consider not just the expected risks to an ordinary person, but to the range of persons whom they can reasonably foresee may be exposed to risk from their activity.

Cutting across these themes is a simple but fundamental point about *how* English judges balance: intuitively, qualitatively, verbally, impressionistically, and on the basis of their largely tacit assessments of what is fair and socially valuable. A typical judgment runs like this: the risk was small, especially assuming the plaintiff behaved carefully; but if an accident happened, the consequences were likely to be very serious. The untaken precaution X advocated by the plaintiff would have increased costs significantly but not exorbitantly, and would not have interfered with the work. Under these circumstances, the defendant employer should have taken precaution X. A typical judgment coming out the other way reads—except for the conclusion, and perhaps some qualifiers and intensives (the risk was "quite small," the costs "very significant")—almost identically. All of which is to say, this informal approach to balancing certainly leaves plenty of room for discretion and judgment (on a sympathetic account), or arbitrariness and indeterminacy (on a skeptical one).

I. THREE COMPETING CONCEPTIONS OF NEGLIGENCE: "REASONABLE FORESEEABILITY," "COST-BENEFIT BALANCING," AND THE "DISPROPORTIONATE-COST" APPROACH

What has been the paramount doctrinal understanding of negligence in English law over the past century, and has that understand-

ing changed over time? In one sense, this question is easily answered. Baron Alderson's famous description of the reasonable person standard for negligence is still good law today: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."[7]

But how does the reasonable person decide which accident risks to guard against, and to what lengths to go in reducing or eliminating them? As this question suggests, negligence law implicitly distinguishes two aspects of reasonable care: foreseeability (recognizing risks) and avoidability (taking steps to avoid recognized risks).[8] The negligence standard thus has two branches, and each of them is susceptible of a range of meanings.[9]

Let us take foreseeability first. English judges have long held that a reasonable person is not bound to guard against risks that are not "reasonably foreseeable."[10] What counts as "reasonably foreseeable"? At one extreme, some decisions suggest that only a narrow category of risks that are "likely" or "probable" or "natural" are reasonably foreseeable.[11] Other expressions suggest that even a highly unlikely risk is reasonably foreseeable if it would occur as a possibility to the mind of a reasonable person.[12] As we shall see, the trend in modern English law has been away from the narrower meaning toward the broader one. That trend has helped increase the prominence of the avoidability issue, which is often moot in a regime that routinely allows defendants to escape liability on the grounds that the risk was not reasonably foreseeable.

Suppose now that an actor's conduct *does* give rise to a reasonably foreseeable risk of harm to others. What is the extent of the actor's obligation to guard against that risk? Setting aside cases

7. Blyth v. Birmingham Waterworks Co., 156 Eng. Rep. 1047 (K.B. 1856).

8. This distinction has a long history in English tort law. It was implicit in the inevitable accident and Act of God defenses, which excused actors who could show that some other cause made the accident inevitable *either* because that cause was unforeseeable or because avoiding it was impracticable. *See* Stephen G. Gilles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, 78 VA. L. REV. 1291, 1366–70 (1992).

9. American law also treats the presence of reasonably foreseeable risk as a necessary (but not sufficient) condition for liability in negligence. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 289 (1965).

10. *See* Donoghue v. Stevenson, [1932] A.C. 562 (appeal taken from Scot.).

11. *See, e.g.*, Bolton v. Stone, [1951] A.C. 850 (appeal taken from Eng.).

12. *See, e.g.*, Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co., [1967] A.C. 617 (P.C. 1966) (popularly known as *Wagon Mound No. 2*).

governed by safety statutes or regulations,[13] there are three leading general answers to this question—each of which has some explicit support in English cases and authorities: the reasonably-foreseeable risk approach, the cost-benefit "balancing" approach, and the disproportionate-cost approach.

Under the reasonably-foreseeable risk approach, the requirement of reasonable foreseeability is *sufficient* as well as necessary for negligence liability. An actor is seen as at fault—as negligent—for imposing a risk on others that a reasonable person would have foreseen, without regard to how difficult it would have been to guard against that risk. On this view, then, the actor's obligation to guard against reasonably foreseeable risks is an unlimited one. The strictness of this approach, however, is sometimes softened by adding the further qualification that the unlimited obligation to guard against reasonably foreseeable risks only applies to risks that are "*substantial.*" I will call this important variant the "substantial risk" approach.

Under the cost-benefit balancing (or Hand Formula) approach, by contrast, an actor is liable only if the costs of avoiding a reasonably foreseeable risk are outweighed by the benefits of doing so. On this approach, an actor is *not* negligent merely because the risk associated with the actor's conduct was reasonably foreseeable (even if it was also "substantial"). Instead, the actor is negligent only if the costs of taking additional precautions are outweighed by the risk of harm to others if those precautions are not taken.[14] The balancing approach

13. In American law, such cases are dealt with under the rubric of "negligence per se." In English law, they are described as actions at common law for "breach of statutory duty." *See, e.g.*, X (Minors) v. Bedfordshire County Council [1995] 2 A.C. 633.

14. Just how this balancing should be conducted is a different question—and one to which a variety of different answers can be given. *See* Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, The Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 816–21 (2001); Kenneth W. Simons, *The Hand Formula in the* Draft Restatement (Third) of Torts*: Encompassing Fairness as well as Efficiency Values*, 54 VAND. L. REV. 901, 906–25 (2001). So it is that some critics of the Hand Formula nonetheless accept that some form of "balancing" the advantages and disadvantages of precautions is appropriately integral to the negligence standard. John Fleming, whose focus is primarily English and Commonwealth tort law, is a good example. He finds it

> a bizarre distortion of the common law to postulate that the calculus of negligence calls for striking a purely economic balance between benefits and losses, the losses being assessed solely in the cold-blooded terms of the damages that would be awarded to the victim or his survivors. While it is true that risks are sometimes worth taking and therefore considered reasonable either because the benefits or the cost of avoiding the risks are wholly disproportionate, the judgment is social, not economic.

John G. Fleming, *Is There a Future for Tort?*, 44 LA. L. REV. 1193, 1200 (1984). I think the contrast between social and economic judgments about costs and benefits is much less sharp than Professor Fleming appears to believe, but a full exploration of that question is outside the

thus significantly limits the actor's obligation to guard against reasonably foreseeable risks.

The disproportionate-cost approach takes an intermediate position between the other two. It allows balancing, but puts a thumb on the scales in favor of safety: if the risk was reasonably foreseeable, the actor is negligent unless the burden of precautions to avoid the risk would have been "disproportionate" to the risk. Thus, the fact finder need not determine that the risk was actually greater than the costs of avoidance. It suffices if the fact finder concludes, as it were, that the risk was not "way out of line" with the costs of avoidance—i.e., that it was not grossly and obviously smaller.

Each of these understandings of the obligation to guard against reasonably foreseeable risks can readily be recast as a claim about how reasonable, prudent persons should and do behave. In *Bolton v. Stone*, Lord Reid—the architect of the substantial risk approach—did precisely that:

> In the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others. What a man must not do, and what I think a careful man tries not to do, is to create a risk which is substantial. . . . In my judgment the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants, considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent the danger.
>
> In considering that matter I think that it would be right to take into account not only how remote is the chance that a person might be struck but also how serious the consequences are likely to be if a person is struck; but I do not think that it would be right to take into account the difficulty of remedial measures. If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all. [15]

Contrast that formulation with the following endorsement of the cost-benefit approach—also by Lord Reid—in the context of an employee's common-law negligence claim against his employer:

> Apart from cases where he may be able to rely on an existing practice, it is the duty of an employer, in considering whether some precaution should be taken against a foreseeable risk, to weigh, on the one hand, the magnitude of the risk, the likelihood of an accident happening and the possible seriousness of the consequences if an

scope of this Article. For present purposes, the issue is simply whether (and if so how) the English courts "balance" costs and benefits in negligence cases.

15. *Bolton*, [1951] A.C. at 867.

> accident does happen, and, on the other hand, the difficulty and expense and any other disadvantage of taking the precaution.[16]

As for the disproportionate-cost approach, consider this language from the judgment of Asquith, L.J. in the statutory-negligence case of *Edwards v. National Coal Board*:[17]

> "Reasonably practicable" is a narrower term than "physically possible" and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it be shown that there is a gross disproportion between them—the risk being insignificant in relation to the sacrifice—the defendants discharge the onus on them.[18]

English law presents us, then, with three competing accounts of how a reasonably prudent person behaves. Moreover, each of these accounts reflects widely held popular attitudes about what individuals may reasonably and fairly expect of one another. Many people think it is unreasonable for one person to impose a substantial foreseeable risk of physical harm on others, and that if a person does run such a risk he or she should be held responsible if harm results. Many others think that we are all better off limiting responsibility for risk-imposition to unreasonable risks, defined as risks that are more costly to avoid than to tolerate. Finally, many people think that it is better to be safe than sorry when it comes to physical injury—and hence reject marginal cost-benefit balancing—yet accept that this presumption in favor of taking precautions must be qualified so that it does not require inordinate expense.[19]

Which of these three conceptions of negligence best captures how English judges actually employ the standard of care? Professor William Landes and Judge Richard Posner argue for the cost-benefit balancing approach. Landes and Posner are the leading proponents of the positive economic theory of negligence, which holds that the Hand Formula merely makes explicit the implicit economic logic judges have long used to decide negligence cases. They recognize that judges often use the language of justice and fairness in negligence cases, but in their view economic principles are "encoded" in that

16. Morris v. W. Hartlepool Steam Navigation Co., [1956] A.C. 552, 574 (appeal taken from Eng.).

17. [1949] 1 K.B. 704 (C.A.).

18. *Id.* at 712.

19. *See* Mark Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle that Safety Matters More than Money*, 76 N.Y.U. L. REV. 114, 166–67 (2001).

"ethical vocabulary."[20] In arguing that the Hand Formula explains negligence cases, Landes and Posner rely extensively on English as well as American cases.[21] It seems fair to say, then, that in their view the Hand Formula supplies the basic meaning of negligence in the common law of both England and the United States.

As to England, that claim has been sharply challenged by Professor Ernest Weinrib. In *The Idea of Private Law*, Weinrib argues that the statements I have already quoted from Lord Reid's judgment in *Bolton*, along with his later judgment for the Privy Council in *Wagon Mound No. 2*, show that English law normally rejects cost-benefit balancing in favor of the substantial foreseeable risk approach.[22] Weinrib accepts that the Hand Formula, with its balancing of B (precaution costs) against PL (the probability and severity of harm if the precaution is not taken), is "the classic formulation of the American approach."[23] According to Weinrib, however, "the English and Commonwealth approach to reasonable care ignores B almost completely and focuses narrowly on the risk, consisting in the combination of P and L."[24] On this view, English law divides reasonably foreseeable risks into two categories: (1) "real" risks that are "fairly small";[25] and (2) "real" risks that are "substantial."[26] Says Weinrib, "for a real risk that is not small . . . the cost of precautions is irrelevant."[27] Thus, English law assigns only a "modest role" to the Hand Formula's B: it is relevant to reasonable care *only* when the risk, although reasonably foreseeable, is "very small."[28] Although Weinrib thinks even this concession to cost-benefit balancing may be a mistake, he is prepared to tolerate it as an exception to the dominant English and Commonwealth approach, in which "the conclusion that a particular risk is unacceptable generally reflects not a comparison with the cost of taking precautions but a casuistic judgment concerning the magnitude of the risk."[29]

20. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 23 (1987).

21. *Id.* at 86–88, 96–107.

22. ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995).

23. *Id.* at 148. Weinrib is also a vigorous normative critic of the Hand Formula approach.

24. *Id.*

25. *Id.* at 150.

26. *Id.* at 149.

27. *Id.*

28. *Id.* at 150.

29. *Id.* at 150–51.

Nor is Weinrib alone in thinking that Landes and Posner greatly overstate the role of cost-benefit analysis in English tort law. Indeed, Professor Richard Wright argues that the Hand Formula plays only a minor role even in *American* negligence law.[30] As to English law, Wright's complex account does leave room for balancing in some categories of negligence cases. But he appears to agree with Weinrib that the substantial risk approach is the norm, and balancing the exception(s).[31]

In my view, none of these accounts is correct. The evidence I will present in Parts II, III, and IV of this Article shows that Weinrib and Wright greatly underestimate the frequency with which English judges balance costs and benefits in negligence cases. Moreover, I find no evidence of a rule forbidding balancing in cases of "substantial foreseeable risk." Lord Reid may have favored that approach, but it has had almost no discernible influence on English judges.

On the other hand, English judges do not routinely and overtly balance B against PL except in employment cases, and when they do they often use the "disproportionate-cost" approach. English judges continue to use the reasonable man standard to imagine and predict, sometimes without resort to balancing, what conduct would have been proper in the circumstances. Thus, Landes and Posner's account, in which Hand Formula balancing is always conducted at the margins, and in which the reasonable man is merely a stand-in for the proposition that the costs of care should be calculated on the basis of the *average* person,[32] deviates substantially from actual English practice.

What, then, is the correct answer to the riddle of the standard of care in English negligence law? The general answer, in my view, is best captured in this proposition: an actor whose conduct gives rise to a reasonably foreseeable risk must take all *reasonably practicable precautions* to avoid harm to others—and precautions are reasonably practicable unless the burden of taking them plainly outweighs the risk. The trophy thus goes to a relatively relaxed version of the disproportionate-cost approach.

30. *See* Richard W. Wright, *Negligence in the Courts: Introduction and Commentary*, 77 CHI.-KENT L. REV. 425 (2002) (in this issue); Richard W. Wright, *The Standards of Care in Negligence Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 249, 260–74 (David G. Owen ed., 1995) [hereinafter Wright, *The Standards of Care in Negligence Law*].

31. *See* Wright, *The Standards of Care in Negligence Law*, *supra* note 30.

32. *See* LANDES & POSNER, *supra* note 20, at 126.

II. COST-BENEFIT BALANCING IN ENGLISH NEGLIGENCE LAW: THE FORMATIVE YEARS

In Parts II and III, I undertake a detailed examination of the series of common-law and statutory negligence cases in which the Court of Appeal and the House of Lords worked out the basic features of the English balancing approach. After summarizing where matters stood in the early twentieth century, I present an in-depth study of the important cases during the formative period from the late 1930s to the late 1960s. During this period, the English bench and bar made increasing—and increasingly sophisticated—use of cost-benefit balancing in negligence cases. There was some resistance to the balancing approach, but in no context did a settled rule forbidding cost-benefit balancing take hold.

Part II traces the first part of this story, which includes the initial decisions employing balancing and ends with Lord Reid's attempt in *Bolton v. Stone* to carve out an important place for the substantial foreseeable risk approach. Part III then demonstrates that the leading negligence cases of the 1950s and early 1960s repeatedly confirmed the propriety and centrality of balancing, especially but not only in employment cases.

A. The Unsettled Status of Cost-Benefit Balancing in Early Twentieth-Century English Negligence Law

Some scholars have suggested that the substantial foreseeable risk approach was the dominant conception of negligence in Anglo-American law until well into the twentieth century.[33] While I cannot enter fully into this controversy here, the evidence of which I am aware suggests that the question was an unsettled one: there were relatively few decisions on point, and they provided some support for each of our three approaches.[34] The limited research I have done on

33. *See* Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1279 n.168 (2001) (arguing that Holmes subscribed to "the 'non-balancing' interpretation of negligence that was usual in his day, and that is still advocated by many, as a proper interpretation of what should count as culpable behavior"); *cf.* Patrick J. Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. 315, 345 (1990) (arguing that only after (and as a result of) "Holmes's brilliant redescription of the negligence standard in terms of danger foreseeable by the ordinary reasonable man did foreseeability become part of the common explanation of the negligence standard").

34. The claim that early twentieth-century negligence law embraced the substantial foreseeable risk approach is also in tension with the history of inevitable accident and the rise of the tort of negligence. As I have argued elsewhere, the pre-nineteenth century inevitable accident defense excused actors who had done everything practicable—that is, everything

English law in the period 1860–1930 discloses some cases in which courts balanced precaution costs,[35] and a smaller number of others in

possible, practically speaking—to avoid the accident. *See* Gilles, *Inevitable Accident in Classical English Tort Law*, 43 EMORY L.J. 575, 630–34. Thus, prior to the emergence of an explicit negligence standard, the test for avoidability essentially required actors to take all practicable precautions. This standard is stricter even than the disproportionate-cost approach, because it involves no comparison between costs and benefits, and focuses instead on whether it was feasible for the actor to take additional precautions that would have avoided the accident. Nevertheless, the original understanding of inevitable accident enabled some defendants to avoid liability despite having created a substantial foreseeable risk of harm to others.

In the nineteenth century, courts began reinterpreting inevitable accident to require only that actors take ordinary, reasonable care to guard against external causes. *See, e.g.*, Nugent v. Smith, [1876] 1 C.P.D. 423 (C.A.). In so doing, it appears that courts *lowered* the implicit standard of care to bring the inevitable accident defense into line with the newly ascendant doctrine of reasonable-care negligence. *See* The Schwan–The Albano, [1892] P. 419 (C.A.) (Lord Esher, M.R.) (arguing that inevitable accident, properly defined, refers to an occurrence "over which [the actor] had no control, and the effect of which could not have been avoided by the greatest care and skill," and must therefore be "distinguished from mere negligence—that is a mere want of reasonable care and skill"). According to the substantial foreseeable risk approach, however, an actor who creates such a risk is liable for failing to take reasonable care, should harm result, even if avoidance was *not* practicable. Thus, under the substantial foreseeable risk approach "reasonable care" entails a *higher, stricter* standard for avoidability than the original "inevitable accident" defense. If that was the effect of adopting a general standard of reasonable-care negligence, it is surprising, to say the least, that no contemporaneous observer appears to have noticed it.

35. Between 1860 and 1866 English judges explicitly employed cost-benefit balancing in several railroad cases. *See* Fremantle v. London & N.W. Ry. Co., 175 Eng. Rep. 1086 (Q.B. 1860); Ford v. London & S.W. Ry. Co., 175 Eng. Rep. 1260 (C.P. 1862); Dimmock v. N. Staffordshire Ry. Co., 176 Eng. Rep. 907 (Staffordshire Assizes 1866); *see also* David Kretzmer, *Transformation of Tort Liability in the Nineteenth Century: The Visible Hand*, 4 OXFORD J. LEGAL STUD. 46, 79 & n.136 (1984) (citing these cases for "the first . . . explicit reference to the idea that negligence is a function of three variables: (1) the cost of avoiding the loss; (2) the probability that a loss will occur; (3) the gravity of the loss if it should occur"). In *Fremantle*, an escaping spark case, the judge instructed the jury that

> if the danger to be avoided were insignificant, or very unlikely to occur, and the remedy suggested were very costly or troublesome, or such as interfered materially with the efficient working of the engine, then the jury would have to say whether it could reasonably be expected that the defendants should adopt such a remedy for such an evil.

175 Eng. Rep. at 1087. On the other hand,

> if the risk were considerable, and if the expense or trouble or inconvenience of providing a remedy were not great in proportion to the risk, then they would have to say whether the company could reasonably be excused from availing themselves of such a remedy, because it might to some extent be attended with cost or other disadvantage to themselves.

Id. at 1088. In *Ford*, a derailment suit brought by a railroad passenger, Erle, C.J., instructed the jury that the railroad was

> entrusted with most important interests, with human lives, and a jury may reasonably require an amount of care proportioned to those interests. At the same time a jury would not be entitled to expect the utmost care that could possibly be conceived, or the highest possible degree of skill. . . . It is sufficient if they use every precaution in known practical use, for the safety and convenience of the passengers. Both objects must be looked to. It is easy to conceive a precaution, for example, a slower rate of speed, which would add a very small degree of security, while it would entail a very great degree of inconvenience. And a company ought not to be found guilty merely because they possibly might have done something more for safety, at a far greater sacrifice of convenience.

which they refused to do so.[36] The authorities from this period are split—but more importantly they are few and far between.[37] The impression one is left with is that there was no clear doctrinal answer to the question how, if at all, the difficulty of avoiding an accident affected the determination of negligence.[38] The meaning of negli-

Ford, 175 Eng. Rep. 1261. In *Dimmock*, another escaping spark case, the trial judge quoted approvingly from the instructions given in Fremantle, and instructed the jury that "the test is the comparative degree of the risk on the one hand, and the expense or practical inconvenience on the other." 176 Eng. Rep. at 909.

36. In *Henderson v. Carron*, the Scottish Court of Session rejected a costly-precautions argument couched in the form of an "inevitable accident" defense. (1889) 16 R. (Ct. of Sess.) 633. Two steelworkers were burned, one fatally, in separate accidents while loading a furnace whose interior had become encrusted with "scaffolds" that occasionally fell, causing a rush of flame out of the charging doors. Other ways of removing the scaffolding had been tried unsuccessfully, and workers could not be shielded at the charging doors. The only other known remedy was to blow out the furnace, clear away the scaffolding, and restart the furnace. This remedy, however, was "somewhat expensive." Indeed, the employer estimated that it had cost £700 when the furnace was extinguished after the second accident (far more than the damages awarded (£100 in one case, and £50 in the other)). The plaintiffs argued that the defendants "were not entitled to expose life to a danger which was capable of being remedied, merely because the remedy might be expensive. At any rate, if they wished to avoid that expense they must take the responsibility of the accidents which were induced by their avoiding it." The court appeared to agree, though it did not directly address the issue of expense. Because the "danger" was "considerable," the court held that the defendants were bound to employ "the admittedly competent method of blowing out the furnace." *Id.* at 636–37.

37. Neither the railroad cases cited in note 35, *supra*, nor *Henderson* (cited in note 36, *supra*) were relied on in subsequent cases or by treatise writers as approving (or disapproving) cost-benefit balancing. When they were mentioned at all, it was for other points. For example, in 1895 Thomas Beven cited *Henderson* only for the proposition that a worker does not ordinarily assume the risks of nonrepair of machinery. 1 THOMAS BEVEN, NEGLIGENCE IN LAW 783 (2d ed. 1895). Beven's treatment of *Ford* is even more remarkable: he ignored *Ford*'s evident cost-benefit dimension, while criticizing Erle for leaving "too much to the province of the jury and too little to that of the judge." 1 BEVEN, *supra*, at 11. Beven went on to define negligence as "fixed by the law with reference to the ordinary and usual diligence which a man of ordinary sense, knowledge, and prudence is used to shew in his own affairs." *Id.* (Ironically, this single-owner standard has an inherent cost-benefit logic of its own: persons of ordinary prudence—in matters affecting the safety of their own persons and property—generally consider the costs of additional precautions as well as their benefits. *See* Gilles, *supra* note 1, at 1034–37 (discussing the single-owner standard)).

38. A look at the turn-of-the-century treatises confirms the impression that balancing risks against the costs of precautions had no salience in English law at that time. For Clerk and Lindsell (1896), "[t]he reasonableness of any conduct must be considered with reference to the probability not only of its causing damage to others at all, but further of causing damage in a particular way and to a particular person." J.F. CLERK & W.H.B. LINDSELL, THE LAW OF TORTS 13 (2d ed. 1896). In Street's formulation (1906), "conduct is said to be negligent when a prudent man in the position of the tortfeasor would have foreseen that a harmful effect was sufficiently probable to warrant his foregoing the conduct or guarding against its consequences." THOMAS A. STREET, 1 THE FOUNDATIONS OF LEGAL LIABILITY: A PRESENTATION OF THE THEORY AND DEVELOPMENT OF THE COMMON LAW 96 (1906). Addison (1906) simply recited the *Blyth* reasonable man test, adding the notion that increased risk requires increased care, but never mentioning the difficulty of precautions. C.G. ADDISON, A TREATISE ON THE LAW OF TORTS; OR WRONGS AND THEIR REMEDIES 701–03 (8th ed. 1906). Salmond wrote that "[h]e who ventures on dangerous activities is bound, save in special cases, to take care that he does no harm thereby," but conversely that the negligence standard allows small, familiar "danger to be knowingly created." JOHN W. SALMOND, THE LAW OF TORTS: A TREATISE ON THE ENGLISH

gence seems to have been supplied primarily by the reasonable man standard and by reliance on custom and practice, safety statutes, and judicial rules of thumb about care in certain recurring circumstances.[39] It may well have been open to defendants to argue to juries that avoiding the accident in question would have been unreasonably burdensome.[40] But they would have done so under the aegis of the reasonable man standard rather than by invoking an established subsidiary rule that reasonable men balance the costs and benefits of precautions.

In the first few decades of the twentieth century, some American torts professors and lawyers began advocating a balancing conception of negligence.[41] The proponents of negligence-as-balancing achieved a major breakthrough in 1934, when the American Law Institute's Restatement of Torts, under the direction of Professor William Bohlen, adopted a conception of negligence as "unreasonable risk," to be determined by balancing the risk against the utility of creating

LAW OF LIABILITY FOR CIVIL INJURIES 23–25 (1907). On balance, these formulations seem more consistent with the substantial foreseeable risk approach. Pollock (1887) is perhaps closer to cost-benefit balancing when he writes that "[t]he caution that is required is in proportion to the magnitude and the apparent imminence of the risk." FREDERICK POLLOCK, THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW 353 (1887). However, as I discuss at Section IV.D., *infra*, the proposition that increased risk requires increased care is also consistent with the foreseeable risk approach.

39. Michael Green reaches a similar conclusion concerning early twentieth-century Anglo-American negligence law. He finds that the treatises of that era "almost exclusively define negligence in terms of ordinary or reasonable care under the circumstances and rarely make reference to the differing degree of danger, probability of harm, or burden of precaution as the variables to be considered in the assessment of negligence or reasonable care," and that "[t]he dominant explanation of negligence in judicial opinions, as in the treatises, is that it entails exercising 'reasonable care' or that which a 'reasonable or prudent man' would employ." Michael D. Green, *Negligence=Economic Efficiency: Doubts*, 75 TEX. L. REV. 1605, 1618–19 (1997). Green's findings are consistent with Patrick Kelley's claim that, even before Holmes threw his weight behind a version of the substantial foreseeable risk approach, the dominant understanding of negligence was "the breach of a duty to use due care, with due care understood as the *conduct* of an ordinary reasonable and prudent man." Kelley, *supra* note 33, at 344.

40. If cost-benefit balancing had been a settled feature of English negligence law during this period, one would expect the issue to have arisen with some regularity, as defendants tried to escape liability by arguing that the precautions on which plaintiffs built their cases were unreasonably burdensome or expensive. The infrequency of cases in which precaution costs are alluded to thus tends to support the view that the foreseeable-risk approach was prevalent in the late nineteenth and early twentieth centuries.

41. The seminal article is Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40 (1915) [hereinafter Terry, *Negligence*]. Terry had proposed a similar test as early as 1884. *See* HENRY T. TERRY, LEADING PRINCIPLES OF ANGLO-AMERICAN LAW EXPOUNDED WITH A VIEW TO ITS ARRANGEMENT AND CODIFICATION 170–90 (1884). For discussion of the roles of Terry, Bohlen, and other American academics in advancing the balancing conception of negligence, see Gilles, *supra* note 14, at 822–42, and Green, *supra* note 39, at 1622–29.

that risk.[42] Perhaps partly as a result of American influence, the role of precaution costs in determining negligence seems gradually to have become more salient in English legal materials during this period.[43] These years also saw the demise of the English civil jury.[44] The latter development helped bring the issue of precaution costs to the fore, by giving English judges increasingly frequent occasion to discuss whether and how a reasonable man decides which precautions to take. Initially, the question of precaution costs received more attention in English cases involving alleged breach of safety statutes than in cases of common-law negligence. By the 1940s, however, the question of precaution costs was becoming more salient in common-law negligence cases as well.

As we shall see, there were important differences of opinion about whether precaution costs were relevant to negligence at all, and, if so, about how costs and benefits were to be balanced. Finally, throughout this period, English judges and lawyers were mastering

42. Restatement (First) of Torts § 291 (1934). To balance the risk against the utility of creating that risk is just a backhanded way of balancing the risk against the utility of avoiding that risk, whether by refraining from the activity in question or taking additional precautions when engaging in that activity.

43. American tort law and scholarship seem to have influenced English law indirectly, by influencing some of the English treatise writers. For example, in his famous 1915 *Harvard Law Review* article, Henry Terry formulated a test for negligence that called for balancing the risk against the disadvantages entailed in avoiding it. Terry, *Negligence*, *supra* note 41, at 40–47 (defining negligence as "conduct which involves an unreasonably great risk of causing damage," and setting forth five factors for determining whether a risk was unreasonable: the "magnitude of the risk," the "value or importance of that which is exposed to the risk," the "value or importance" of the defendant's "collateral object" in creating the risk, the probability that the defendant could achieve that object by creating the risk, and the probability that the defendant could achieve it without taking the risk). Terry's influence is apparent in the fifth edition of Salmond's treatise on torts (1920), in which Salmond adopted the following test for due care:

> [T]here are two chief matters for consideration. The first is the magnitude of the risk to which the defendant exposes other persons by his action. The second is the importance of the object to be attained by the dangerous form of activity. The reasonableness of the defendant's conduct will depend upon the proportion which the risk bears to the object to be attained. To expose others to a risk of harm for a disproportionate object is unreasonable, whereas an equal risk for a better cause may be lawfully run without negligence. By running trains at the rate of fifty miles an hour, railway companies have caused many fatal accidents which could quite easily have been avoided by running at ten miles an hour. But this additional safety would be attained at too great a cost of public convenience, and therefore, in neglecting this precaution, the companies do not fall below the standard of reasonable care and are not guilty of negligence.

Sir John Salmond, A TREATISE ON THE ENGLISH LAW OF LIABILITY FOR CIVIL INJURIES 28–29 (5th ed. 1920). The third edition (1912) contains no mention of this test. The only authority Salmond cited in the 1920 edition, however, was the English *Ford* case from 1862. *Id.* at 29.

44. Beginning in the mid-nineteenth century, a series of statutes gradually whittled away at the prevalence of juries in English civil actions. Apparently, however, as late as 1913 actions in tort were still predominantly tried by juries. *See* IBBETSON, *supra* note 2, at 188–89 & n.4.

the rudiments of cost-benefit analysis. An English lawyer preparing a negligence case in 1965 would find much more guidance in the case law concerning what evidence to introduce concerning the costs and benefits of precautions—and what inferences to ask the court to draw from that evidence—than his counterpart in 1935 or 1945.

B. The Ambiguous Negligence Decisions of the 1930s and '40s

The House of Lords decided several negligence cases in the 1930s and '40s, but none of them unambiguously addressed the issue of precaution costs. One can find language that seems to favor balancing, and other language that seems more consistent with the foreseeable-risk approach. In the former category, I would put Lord Atkin's famous judgment in *Donoghue v. Stevenson*,[45] which is generally seen as a watershed case in the development of the modern tort of negligence:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. *You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.*[46]

Of course, the question for decision in *Donoghue* was whether the manufacturer owed the consumer of its product a duty of care, not whether the manufacturer was in breach of that duty. Still, the italicized language suggests that the presence of a reasonably foreseeable risk is a necessary but not sufficient condition for liability in negligence. The duty to guard against reasonably foreseeable risks is not absolute—it is a duty to take "reasonable care."

Now consider Lord Macmillan's formulation in *Bourhill v. Young*:[47]

> The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.

45. [1932] A.C. 562 (appeal taken from Scot.). Throughout this Article, I do not distinguish between English and Scottish decisions on negligence because, as Lord Reid (himself a Scot) said in *Home Office v. Dorset Yacht Co.*, [1970] A.C. 1004, 1028, "the Scots and English laws of negligence are the same."

46. *Id.* at 580 (emphasis added).

47. [1943] A.C. 92 (1942) (appeal taken from Scot.).

> There is no absolute standard of what is reasonable and probable. It must depend on circumstances and must always be a question of degree.[48]

By its terms, this passage (1) sets a high threshold for what constitutes a reasonably foreseeable risk, and (2) suggests that conduct that creates such a risk—without more—constitutes a breach of the duty of care.[49] But a high threshold for reasonably foreseeable risk also has the effect of making the issue of avoidability (and hence of precaution costs) unimportant in many cases, because defendants prevail on the issue of reasonable foreseeability.[50] *Glasgow Corp. v. Muir*[51] is a good example. In *Muir*, the manageress of a public tearoom allowed two members of a picnic party to carry an urn containing several gallons of boiling tea through the dessert shop that led to the tearoom. For unknown reasons, one of the men carrying the urn lost his hold so that tea was spilt and scalded several children who were standing at the shop counter buying sweets. The children sued the owners of the premises.

On appeal to the House of Lords, the crucial question, as Lord Macmillan formulated it, was whether, when the manageress was asked to allow the tea urn to be carried in, she "ought to have had in mind that it would require to be carried through a narrow passage in which there were a number of children and that there would be a risk of the contents of the urn being spilt and scalding some of the children."[52] He (and the other Law Lords) concluded that the risk was not reasonably foreseeable:

> [The manageress] had no reason to anticipate that such an event would happen as a consequence of granting permission for a tea urn to be carried through the passage way where the children were congregated, and, consequently, there was no duty incumbent on her to take precautions against the occurrence of such an event. I think that she was entitled to assume that the urn would be in charge of responsible persons (as it was) who would have regard for

48. *Id.* at 104.

49. *See, e.g.*, PHILIP S. JAMES & D.J. LATHAM BROWN, GENERAL PRINCIPLES OF THE LAW OF TORTS 69 (4th ed. 1978), where *Donoghue* is said to stand for "the rule that you must not cause foreseeable harm to your neighbour," and linked to a general principle that "[o]ne of the things that a reasonably prudent man will not do is to inflict injury if he can *foresee* that it will result from his conduct." *Id.* at 67, 69. James and Brown recognize later in their exposition, however, that this obligation is not unqualified—foreseeable harm may be inflicted if the costs of avoidance would be "disproportionately great." *Id.* at 72.

50. Conversely, even if a costly-precautions defense *is* available, it will usually be of no use to a defendant who has created a risk that will *reasonably and probably* injure someone.

51. [1943] A.C. 448 (appeal taken from Scot.).

52. *Id.* at 457–58.

> the safety of the children in the passage (as they did have regard), and that the urn would be carried with ordinary care, in which case its transit would occasion no danger to bystanders.[53]

To the American lawyer, this standard for reasonable foreseeability seems artificially restrictive because it classifies risks as not reasonably foreseeable even though a reasonably careful person certainly *could* foresee them. In any event, given this high threshold for reasonable foreseeability, Lord Macmillan never reached the question of breach. The manageress was not bound to take precautions against the risk because it was not reasonably foreseeable. And thus we do not know whether, if Lord Macmillan *had* regarded the risk as reasonably foreseeable, he would have regarded the duty as unqualified or subject to some form of balancing.

Lord Macmillan's judgment in *Read v. J. Lyons & Co.* is similarly inconclusive.[54] In *Read*, an inspector was injured when a shell exploded in a munitions factory. In addition to relying on *Rylands v. Fletcher*,[55] she argued more broadly that persons who engage in "operations dangerous in themselves" are strictly liable. Lord Macmillan rejected that contention, reasoning that persons are adequately protected from dangerous activities by the negligence standard:

> The more dangerous the act the greater is the care that must be taken in performing it. This relates itself to the principle in the modern law of torts that liability exists only for consequences which a reasonable man would have foreseen. One who engages in obviously dangerous operations must be taken to know that if he does not take special precautions injury to others may very well result. . . . Strict liability, if you will, is imposed upon him in the sense that he must exercise a high degree of care, but that is all. The sound view, in my opinion, is that the law in all cases exacts a degree of care commensurate with the risk created.[56]

The proposition that the law exacts a degree of care commensurate with the risk created is deeply ambiguous. On the one hand, it can readily be given a cost-benefit interpretation: due care (the optimal level of B in the Hand Formula) increases as the risk (PL) increases. On the other, a proponent of the substantial foreseeable risk approach can endorse the same conclusion on the ground that as the risk increases the care necessary to reduce that risk below the "substantial" level will also increase. Thus, although Lord

53. *Id.* at 458 (Lord Macmillan).
54. [1947] A.C. 156 (1946) (appeal taken from Scot.).
55. 3 L.R. E.&I. App. 330 (H.L. 1868).
56. *Read*, [1947] A.C. at 172–73.

Macmillan's judgment in *Read* seems more consistent with a balancing approach to negligence than his judgment in *Bourhill*, it remains ambiguous. As of the mid-1940s, then, English negligence law offered no clear answer to the simple question, "to what lengths does a reasonably prudent person go to avoid creating a reasonably foreseeable risk to others?"

C. *The First Explicit Cost-Benefit Test: The Statutory Duty to Take "Reasonably Practicable" Precautions*

The initial breakthrough for cost-benefit analysis in English tort law came, not in common law negligence, but in suits for breach of safety statutes. Beginning in the late nineteenth century, Parliament repeatedly employed the technique of specifying the duties of employers and occupiers in various industries concerning the safety of workers. Occasionally these duties were unqualified, and thus absolute. Others were qualified only by the proviso "so far as practicable,"[57] which came to mean that all feasible precautions must be taken, and that cost-benefit balancing was excluded.[58] More often, they were qualified by a different proviso—"so far as reasonably practicable." It was this language, with its implication that defendants were *not* expected to take every possible precaution, that provided the initial vehicle for cost-benefit balancing.

57. There is a close kinship between the "practicability" test and the defenses of inevitable accident and the Act of God, which had long served to limit strict prima facie liability in trespass actions. *See* Stephen G. Gilles, *Inevitable Accident in Classical English Tort Law*, 43 EMORY L.J. 575 (1994). For example, in *Nichols v. Marsland*, L.R. 10 Ex. 255, 258–59 (1875), Baron Bramwell employed a test for the Act of God defense that required the defendant to take care unless it was "*practically* impossible" to do so. As Bramwell also made clear, a defendant might be able to escape liability by showing that it would have been extremely burdensome to prevent the effects of the Act of God in question. But that is not a matter of balancing—it is a matter of feasibility, given that defendants have limited resources.

58. The contrast between reasonable care and "reasonably practicable" statutory provisions on the one hand, and statutory provisions requiring that "all practicable" precautions be taken, was very clearly drawn in *Haigh v. Charles W. Ireland Ltd.*, 1974 S.L.T. 34 (H.L.) (Lord Diplock):

> In contrast to his duty at common law where, in determining whether he has taken reasonable care the cost, time and effort involved in taking any suggested precautions may be balanced against the degree of risk of personal injury to the employee, the subsection requires the occupier of a factory to take all steps which are physically practicable . . . however great the cost in time, money and effort that may be involved in taking the necessary steps.

Id. at 41.

1. *Coltness Iron v. Sharp* (1938)

The issue of the scope of the "reasonably practicable" defense came before the House of Lords in 1938, in *Coltness Iron v. Sharp*.[59] *Coltness* was a suit for breach of section 55 of the Coal Mines Act of 1911, which provided that all exposed and dangerous parts of machinery used in a mine "shall be kept securely fenced"[60] (meaning "securely shielded"). This duty was qualified, however, by a proviso relieving the mine owner of liability for breach of any provision of the Act "if it is shown that it was not reasonably practicable to avoid or prevent the breach."[61] The plaintiff in *Coltness* was injured when he accidentally put his hand in moving machinery that was being tested by an engineer who had just finished repairing it. The engineer had removed the guard from the machinery in order to complete the repairs and test the machine to see that it was working properly. The plaintiff, who had come over to see what the engineer was doing, was injured on his way back to his nearby work station.[62]

Because the guard was not in place, the defendant conceded that it was in breach of its statutory duty to securely fence the machinery. But the defendant argued that it was not reasonably practicable to avoid this breach because the machine could not be repaired or tested without removing the guard.[63]

In the courts below, the plaintiff successfully argued that it would have been reasonably practicable temporarily to fence off the area *around* the machine, thereby preventing workers other than the engineer from having access to it while it was unguarded.[64] A majority of the Law Lords (Lords Thankerton, Macmillan, and Wright) rejected this reasoning on the ground that although a temporary fence would have avoided the *accident*, it would not have avoided a breach of the statute.[65] Under the majority's broad interpretation of the statutory duty, it was not physically possible—let

59. Coltness Iron Co. v. Sharp, [1938] A.C. 90 (1937) (appeal taken from Scot.).
60. *Id.* at 92 n.1.
61. *Id.*
62. *Id.* at 90–92.
63. *Id.* at 94–95.
64. *Id.* at 92.
65. *Id.* at 99 (Lord Macmillan) ("This might no doubt have avoided or prevented the accident, but it would not have avoided or prevented a breach of the statutory duty to keep the gearing securely fenced. The gearing would have remained unprotected and a danger to the engineer or any one else who had to be beside the machine inside the fenced-off passage-way.")

alone reasonably practicable—to keep the machinery "fenced" (that is, guarded) while undergoing repairs.[66]

In what proved to be a very important judgment, Lord Atkin took a different route to the same result. He assumed that temporarily fencing off access to the machinery would have satisfied the statutory duty, and did not question that this precaution would have been practicable (that is, feasible). Nevertheless, he argued that it would not have been *reasonably* practicable:

> In the facts of this case where the dangerous machinery was exposed for only a few minutes as the only means of effecting necessary repairs in a part of the mine where it was unlikely that any workman would be exposed to risk of contact with the machine other than the engineer engaged in the work of repair, I am unable to take the view that it was reasonably practicable by any means to avoid or prevent the breach of s. 55. The time of non-protection is so short, and the time, trouble and expense of any other form of protection is so disproportionate that I think the defence is proved.[67]

In Lord Atkin's view, then, a precaution is not reasonably practicable if it is disproportionately burdensome in comparison to the risk it would avoid. Obviously, a judge cannot apply this approach without identifying and comparing the costs and benefits of the precaution in question. Yet on the other hand, Lord Atkin did not suggest that balancing or weighing could be done with any precision. Quite the contrary, by stating that the "time, trouble, and expense" must be "disproportionate" to—rather than merely marginally greater than—the risk, he implied that balancing would involve a rough judgment, not an attempt to measure and quantify.[68]

66. *Id.* Lord Macmillan went on to emphasize that he was reserving judgment on whether the plaintiff might have a common-law negligence claim based on the defendant's failure to prevent access to the machinery by other employees while it was in a dangerously unfenced condition. *Id.* at 99–100.

67. *Id.* at 93–94.

68. Interestingly, the trial court's judgment alluded to the cost of fencing off access to the machine while it was unguarded, but reached the opposite conclusion from Lord Atkin. The trial judge (Lord Wark) ruled in the plaintiff's favor, because "it would have been an easy matter to fence the dangerous part of the machine otherwise, so as to avoid danger to workmen in the vicinity. . . . A couple of trestles or planks would have done it with sufficient effect to have made it plain that passage along the road on that side was for the time being prohibited." Sharp v. Coltness Iron Co., [1937] S.L.T. 589, 591 (H.L.) (judgment of the Lord Ordinary (Lord Wark)). To put it in Hand Formula terms, whereas for Lord Atkin the decisive point was that PL is very small (because the machine was unguarded for only a short time), for Lord Wark the decisive point was that B is small (a matter of erecting a simple, temporary wooden fence).

2. *Edwards v. National Coal Board* (1949)

Although Lord Atkin spoke for himself alone in *Coltness*, his view proved influential a decade later, when the Court of Appeal decided *Edwards v. National Coal Board*.[69] In *Edwards*, a mineworker was killed while walking along a mine road when a large part of the roadside fell on him. The fall was attributable to a latent defect known as a "glassy slant."[70] The plaintiff sued for negligence at common law, and also for breach of section 49 of the Coal Mines Act, 1911, which requires that "[t]he roof and sides of every travelling road and working place shall be made secure," so far as "reasonably practicable." The plaintiff's theory was simple: the road in question, parts of which had been "timbered" (that is, reinforced with timbers), should have been fully timbered, and had that precaution been taken the accident would not have happened.[71]

In response, the defendants argued that timbering was not reasonably practicable, "because there was nothing to indicate the existence of this latent defect," and

> to expect them to prop and/or line every road in every mine would be to impose on them an altogether impossible burden. . . . [I]t is not reasonably practicable to prop or line every roadway, including those which are in fact perfectly safe, in case somewhere there may be some unknown and unascertainable defects.[72]

This was clearly a disproportionate-cost argument, predicated on the impossibility of identifying which mine roads might contain latent defects of this type.

The plaintiff replied that this interpretation of the reasonably-practicable excuse was wrong as a matter of law: the defense did not apply "where the Coal Board deliberately refrain from supporting the walls for economic reasons. It is only meant to apply where there has been some unforeseen accident or some interference by an unauthorized or irresponsible person, rendering a breach of duty impossible of prevention."[73] Indeed, the plaintiff went so far as to claim that

69. Edwards v. Nat'l Coal Bd., [1949] 1 K.B. 704 (Eng. C.A.).

70. A "glassy slant" consists of "hard, shiny and slippery material that does not bind properly with the adjacent material" and is "likely to slide off if pressure from any quarter is put upon it." *Id.* at 704. The slant that killed the miner in *Edwards* was actually a fossilized tree. *Id.*

71. *Id.* at 704–07 & n1.

72. *Id.* at 709 (Tucker, L.J.).

73. *Id.* at 705–06. This was plainly an appeal to the inevitable accident defense, with its heavy reliance on intervening causes that cannot be foreseen or resisted.

"evidence as to the cost in labour and material would be inadmissible on the issue of reasonable practicability."[74]

With the precaution-cost question thus squarely presented, the trial judge held that the defendants were not negligent at common law because the glassy slant was not reasonably foreseeable and could not have been detected by inspection.[75] He also ruled for the defendants on the statutory claim, reasoning that (1) lining and timbering the road would have made it more secure, but (2) there was no special reason to timber this particular road, and (3) it would not be reasonably practicable to line and timber every traveling road in every mine.[76]

Although the Court of Appeal unanimously reversed, all three judges acknowledged that the disproportionate cost of a precaution could constitute a defense. The basis for reversal was not that precaution costs were *irrelevant*, but rather that the defendants had failed to prove that precaution costs were disproportionately great. The judges took divergent views, however, of the structure and scope of this disproportionate-cost defense. Asquith, L.J., said:

> The construction placed by Lord Atkin on the words "reasonably practicable" in *Coltness Iron Co. v. Sharp* seems to me, with respect, right. "Reasonably practicable" is a narrower term than "physically possible" and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it be shown that there is a gross disproportion between them—the risk being insignificant in relation to the sacrifice—the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner at a point of time anterior to the accident.[77]

This passage makes three key points: (1) the "reasonably practicable" defense entails weighing or balancing the risk against the cost of avoiding that risk; (2) this balancing must reveal a "gross disproportion" for the defendant to escape liability; and (3) the balancing must be conducted on the basis of what the defendant knew or should

74. *Id.* at 706. Alternatively (and quite correctly) the plaintiff pointed out that "[i]f the court takes into account the economic basis it must also take into account the number of miners for whose safety these provisions are enacted." *Id.* at 707.

75. Glassy slant was a known risk in mines, and indeed there was evidence that glassy slants had been seen in the road on which the accident occurred, "though they were rare." *Id.* at 711 (Tucker, L.J.). So the risk was not reasonably foreseeable only if the test for reasonable foreseeability incorporated a threshold of likelihood.

76. *Id.* at 705.

77. *Id.* at 712.

have known *prior* to the accident. It was presumably point (3) that led Asquith to agree with the trial judge that, because it was impossible to predict where a "glassy slant" would occur, the relevant computation concerned timbering *all* the traveling roads in the defendants' mines. Nevertheless, he concluded that the defendants had failed to offer sufficient evidence "as to the relative quantum of risk and sacrifice involved, on the basis either that the mines as a whole, or this particular roadway, should be taken as the unit. . . ."[78]

Tucker, L.J., took Lord Atkin's judgment in *Coltness* to mean that "in every case it is the risk that has to be weighed against the measures necessary to eliminate the risk."[79] He qualified this, not with Atkin's disproportionality test, but with the dictum that "the greater the risk, no doubt, the less will be the weight to be given to the factor of cost."[80] As to the proper frame of reference for conducting this balancing, Tucker suggested that the court should "look primarily at the particular part of the particular mine," but should also consider "the totality of obligations resting on the mine-owner."[81]

With regard to the narrow focus, the defendants had failed to offer evidence of the costs of timbering the particular road.[82] As to the broader question of securing all traveling roads, Tucker pointed out that the defendant National Coal Board had taken over the nation's coal mines less than a year before the accident, and had inherited a situation in which some roads were lined and timbered while others were not. In these circumstances, he suggested that the Board could "lead evidence that it had a scheme or plan for rendering all such roads secure, that certain areas had priority, and that it was not reasonably practicable for them to have carried out the remedial work at the particular pit by the time of the accident."[83] But this the defendants had not done.[84]

As an original matter, it seems clear that Singleton, L.J., would have rejected the proposition that "cost and expense can be used to establish that it is not reasonably practicable" to avoid a breach of

78. *Id.* at 712–13.
79. *Id.* at 710.
80. *Id.*
81. *Id.* at 709.
82. *Id.* at 711.
83. *Id.* at 709–10.
84. *See id.* at 710–11.

statutory duty.[85] "Prima facie," he suggested, the defense "was intended to cover a case in which everything *reasonably possible* had been done to make roof and sides secure, but through a fault, or the like, something happened and an accident took place."[86] Nevertheless, while noting "it is by no means clear how far expense was considered as an element in [*Coltness*]," he accepted that "the words of Lord Atkin form a most useful guide."[87] In applying the disproportionate-cost test, however, Singleton focused solely on the road on which the accident happened, concluding that the defendants had failed to show that it would not have been reasonably practicable to timber the entire road.[88]

The litigation in *Edwards* strongly suggests that both the lawyers and the judges were newcomers to cost-benefit analysis. The fact that the lawyers offered so little cost-benefit evidence suggests that they were on unfamiliar terrain. The judges' inability to agree on which costs and benefits were relevant suggests that the question was a novel one, and their failure to cite any authority other than *Coltness* confirms that they were treating this as essentially a case of first impression. To be sure, there is at least a technical (and possibly a substantial) difference between the statutory "reasonably practicable" test and the standard of care at common law. But surely the judges would at least have considered common law precedents, had there been any, as providing useful analogies on issues such as the frame of reference for cost-benefit comparisons.[89]

85. *Id.* at 714 ("It is true to say that if the National Coal Board have to make secure the roofs and sides of every travelling road a heavy burden will be placed upon them. Hallett, J. said it would be a stupendous undertaking. I do not think the court is concerned with that: indeed, it seems to have been the practice in some cases, in which it has been considered that roof and sides are safe, to take the risk of a civil action.").

86. *Id.* at 714–15 (emphasis added). This formulation, emphasizing as it does practicability rather than reasonableness, is reminiscent of the original inevitable accident defense.

87. *Id.* at 715.

88. *Id.* at 715 ("In the present case, the time, trouble and expense involved must be examined in relation to the road on which the fall took place. The owners had taken steps to secure the sides along one half of its length approximately. I see no reason why the whole length could not have been similarly secured as and when the road was being made.") The road was only four hundred yards long. *Id.* at 711 (Tucker, L.J.).

89. Recall that the defendants prevailed in the trial court at common law, and the plaintiff did not press that claim in the Court of Appeal. The judge had reasoned that the defect was not reasonably foreseeable and could not be detected by inspection. But of course the thrust of the defendants' case was that every road should be timbered to guard against the possibility of this and other types of latent defects. The then-prevailing understanding of reasonable foreseeability, however, was restrictive enough to eliminate a low-probability risk like glassy slant. *Edwards*, then, arguably implies that the statutory "reasonably practicable" defense does *not* allow defendants to argue that the risk was not reasonably foreseeable. Rather, defendants must argue that the risk was not reasonably avoidable.

D. *One Step Forward, One Step Back for Cost-Benefit Balancing:* Paris v. Stepney Borough Council *and* Bolton v. Stone

We come next to a pair of famous cases, decided within a year of each other, that on first reading seem to point in opposite directions. Cost-benefit balancing is pretty clearly at work in *Paris v. Stepney Borough Council*,[90] whereas in *Bolton v. Stone*[91] Lord Reid seems to disapprove of cost-benefit balancing and the other Law Lords avoid taking a position on it. In hindsight, it seems apparent that English judges are more comfortable formulating the duty of care in balancing terms in contractual settings, such as the employer-employee relationship in *Paris*, than in "stranger" cases such as *Bolton*. As we shall see, however, this is a question of degree, not an all-or-nothing contrast.

1. *Paris v. Stepney Borough Council*

There was considerable uncertainty in *Edwards* over whether the statutory reasonably-practicable defense should focus on the risk to the particular plaintiff, or alternatively on all similar risks associated with the defendant's activities. *Paris v. Stepney Borough Council* (decided by the Court of Appeal only a few months after *Edwards*) raised a similar question at common law. The plaintiff, who had previously lost the use of one eye due to a cataract, was employed in the defendants' garage as a mechanic. The plaintiff was removing a piece from the axle of a vehicle, using a hammer to knock out the bolt fastening it, when a piece of metal flew off the bolt into his good eye. He was left blind by the accident.[92]

The plaintiff's claim was that his employer was negligent for failing to provide him with goggles to do his work. The trial judge (Lynskey, J.) found for the plaintiff, seemingly on the grounds that even if reasonable care did not require the employer to furnish goggles to *all* its mechanics, the greater potential loss to the plaintiff required that goggles be provided to him.[93]

The Court of Appeal (Lord Goddard, C.J., Asquith, L.J., and Vaisey, J.) unanimously reversed. The judges reasoned that the employer had no greater duty to the plaintiff than to any other

90. [1950] 1 K.B. 320 (C.A. 1949).
91. [1951] A.C. 850 (appeal taken from Eng.).
92. *Id.* at 320–21.
93. *Id.* at 321.

worker because the plaintiff's disability did not increase the chance that he would be injured, although it did increase the loss he would suffer if an accident occurred. Asquith famously said, "A greater risk of injury is not the same thing as a risk of greater injury; the first alone is relevant to liability."[94]

In Hand Formula terms, this is tantamount to saying that B should increase with P, but not with L. That is odd reasoning—especially coming from the same judge who in *Edwards* had argued that the "quantum of risk" should be weighed against the costs of precautions that would have avoided the risk. As in *Edwards*, one gets the impression that the "calculus of risk," as we nowadays call it, was not yet familiar territory for the judges, and that there were many questions about the emerging balancing conception of negligence for which English law had as yet no well-established answers.

In any event, although the Law Lords divided 3-2 in reversing the Court of Appeal, they were unanimous in rejecting Asquith's claim that a risk of greater injury does not increase the employer's duty of reasonable care. As Lord Normand put it, in deciding what precautions to take, "the ordinary reasonable and prudent man" would be "influenced not only by the greater or less probability of an accident occurring, but also by the gravity of the consequences if an accident does occur."[95]

The dissenting judges (Lord Simonds and Lord Morton of Henryton) had no quarrel with the majority on this point. Instead, they argued that although the risk was foreseeable, the chance of an accident was so small that there was no need to provide goggles, even to a one-eyed worker.[96] In support of this contention, they also relied on evidence that mechanics engaged in this kind of work did not customarily wear goggles.[97]

94. *Id.* at 324.

95. Paris v. Stepney Borough Council, [1951] A.C. 367, 380–81 (1950). Lord Normand quoted various authorities in support of this assertion, including the statements in *Mackintosh* and *Northwestern Utilities* to the effect that reasonable care will be proportionate to the seriousness of the risk. He also quoted W.T.S. STALLYBRASS, SALMOND'S LAW OF TORTS: A TREATISE ON THE ENGLISH LAW OF LIABILITY FOR CIVIL INJURIES 438 n.(q) (10th ed. 1945) (stating that "[t]here are two factors in determining the magnitude of a risk—the seriousness of the injury risked, and the likelihood of the injury being in fact caused."). *Id.* at 381. As previously noted, Henry Terry appears to have influenced Salmond's formulation. *See supra* note 43.

96. *See id.* at 378 (Lord Simonds) (arguing that the "degree of risk" was not "appreciable" and was "rightly regarded" as a risk that could "reasonably be run").

97. *Id.* at 375–79, 386–87.

Rather than disputing that P was small, Lord Oaksey and Lord Macdermott argued that it would have been simple, obvious and inexpensive to eliminate this risk by providing goggles. That argument, of course, shifts the focus to B in the Hand Formula, and suggests a balancing approach to the standard of care. And indeed, both judgments employed the metaphor of "weighing" the various considerations.

In Lord Macdermott's view, "the provision of suitable goggles would have been a sensible and obvious way of keeping falling dirt and flying particles out of their eyes," and "a jury weighing these considerations would not be perverse in finding that it was the duty of the employers to make such provision."[98] It followed *a fortiori* that the employers should have given the one-eyed plaintiff goggles.

Lord Oaksey's judgment was even more explicit:

> The risk of splinters of steel breaking off a bolt and injuring a workman's eye or eyes may be and, I think, is slight and it is true that the damage to a two-eyed workman if struck by a splinter in the eye or eyes may be serious, but it is for the judge at the trial to weigh up the risk of injury and the extent of the damage and to decide whether, in all the circumstances, including the fact that the workman was known to be one-eyed and might become a blind man if his eye was struck, an ordinarily prudent employer would supply such a workman with goggles. It is a simple and inexpensive precaution to take to supply goggles, and a one-eyed man would not be likely, as a two-eyed man might be, to refuse to wear the goggles. Lynskey, J., appears to me to have weighed the extent of the risk and of the damage to a one-eyed man and I am of opinion that his judgment should be restored.[99]

Lord Normand's judgment had a different focus—the interplay between custom and reasonable care. He made the astute point that although the evidence showed that mechanics customarily did not wear goggles, "[i]n the nature of things there could scarcely be proof of what was the usual precaution taken by other employers if the workman had but one good eye."[100] He then argued—without referring to the cost of supplying the plaintiff with goggles—that the significant chance of a very grave injury to the one-eyed plaintiff

98. *Id.* at 390. Lord Macdermott also noted that wearing goggles "would not have hampered the work in question"—a consideration that goes to the overall costs of adopting that precaution. *Id.*

99. *Id.* at 384–85. Notice that Lord Oaksey takes into account the chances that the precaution would actually avoid the accident, as well as the cost of the precaution.

100. *Id.* at 383.

made it "obviously necessary" to do so.[101] However, in the portion of his judgment dealing with the "risk of greater injury" issue, he went out of his way to endorse the proposition that the difficulty of avoiding a risk is relevant to evaluating its reasonableness.[102]

It seems fair to say, then, that a majority of the Law Lords who decided *Paris* employed (or otherwise signaled their acceptance of) a balancing approach to negligence. On the other hand, none of the judgments purports to formulate a general balancing test that would apply across the board in every negligence case.

2. *Bolton v. Stone*

We come now to the famous case of *Bolton v. Stone*,[103] on which the House of Lords ruled only five months after its decision in *Paris*.[104] A cricket ball that passed over the defendant cricket club's fence struck the plaintiff while she stood in the road outside her house. Cricket balls had gone over the fence on several occasions over the years, but there was also evidence that this ball cleared the fence by a very wide margin. The trial judge ruled for the defendants, finding that the cricket ground was "quite large enough for all practical purposes of safety, particularly having regard to the height of the fence above the pitch; it cannot be forgotten that in 38 years' experience no one has ever been injured before."[105]

a. The Court of Appeal

On appeal, the plaintiff's central argument was that it was reasonably foreseeable that cricket balls could escape (several had escaped over the years), and that the defendants were therefore obliged to take all reasonable precautions to prevent such escapes.

101. *See id.* at 383 (citing "the known risk of metal flying," "the position of the workman with his eyes close to the bolt he was hammering," and "the disastrous consequences if a particle of metal flew into his one good eye").

102. *Id.* at 382 ("To guard against possible misunderstanding it may be well to add here that the seriousness of the injury or damage risked and the likelihood of its being in fact caused may not be the only relevant factors. For example, Asquith, L.J., in *Daborn v. Bath Tramways Motor Co. Ld.* pointed out that it is sometimes necessary to take account of the consequence of not assuming a risk." (citations omitted)). The phrase "the consequence of not assuming a risk" refers to the benefits that would be lost if the actor refrained from creating a risk.

103. [1951] A.C. 850.

104. *Paris* was decided in December 1950, *Bolton* in May 1951.

105. Stone v. Bolton, [1950] 1 K.B. 201, 208 (Eng. C.A. 1949) (quoting the judgment of Oliver, J., at trial). This finding shrewdly framed the issue of reasonable foreseeability in terms of the chances that a ball would both clear the fence and hit someone.

The plaintiff did not focus on the specifics, let alone the costs, of what precautions the defendants should have taken.[106] Instead, she argued that the defendants were negligent because they had done nothing.[107] For their part, the defendants did not assert that it would have been unduly costly, say, to erect a higher fence. Instead they simply invoked the trial judge's finding that the cricket ground was safe for "all practical purposes."[108] Thus, as the parties framed the litigation in the Court of Appeal, the issue in *Bolton* was whether the risk was reasonably foreseeable.

By a 2-1 majority (Singleton, L.J., Jenkins, L.J., and Somervell, L.J., dissenting), the Court of Appeal ruled for the plaintiff. None of the judges, however, took the position that the defendants were liable solely because it was reasonably foreseeable that a cricket ball would be hit over the fence into the road.

Singleton argued that, because the defendants were aware that balls were occasionally driven into the road, they had "a duty to take reasonable steps to reduce a danger which could be foreseen."[109] Yet Singleton did not suggest that the defendants' duty was to eliminate this foreseeable danger no matter how difficult that would have been. Indeed, he thought it "most undesirable that a high standard should be applied in a case of this kind. If the defendants had considered the matter, and decided that the risks were very small and that they need not do very much, there might have been something to be said for them."[110] For example, if the defendants had erected a higher fence, they might not have been negligent.[111] But because they had done

106. The plaintiff alleged in her particulars of negligence that the defendants had put the cricket pitch too near the road, failed to erect a high enough fence, and generally "failed to ensure that cricket balls would not be hit into the said road," but apparently put in no evidence on these points. Bolton v. Stone, [1951] A.C. 850, 852 (appeal taken from Eng.).

107. Stone v. Bolton, [1950] 1 K.B. 201, 203 (Eng. C.A. 1949) (summary of argument for plaintiff).

108. *Id.* at 205 (summary of argument for defendant).

109. *Id.* at 208.

110. *Id.* at 207.

111. *Id.* Singleton acknowledged that even a higher fence might not have avoided the injury to the plaintiff. In effect, his position was that the defendants' negligence made them liable for any balls that escaped, including balls that would have escaped had they taken reasonable care. As we shall see, Somervell disagreed with Singleton, reasoning that a negligent defendant should only be liable for harms that reasonable care would have avoided. This issue remains an unsettled one in Anglo-American tort law and theory. *See* Simons, *supra* note 14, at 904 n.12; Marcel Kahan, *Causation and Incentives to Take Care Under the Negligence Rule*, 18 J. LEGAL STUD. 427 (1989); Mark F. Grady, *A New Positive Economic Theory of Negligence*, 92 Yale L.J. 799, 822–23 (1983).

nothing, they were liable. It seems fairly clear, then, that Singleton was engaged in some form of balancing.

Jenkins took the position that the defendants could escape liability by "showing either that the event was one which they could not reasonably have foreseen as a consequence of their use of the ground for cricket, *or that the event was one which they had taken all reasonably practicable steps to prevent.*"[112] But the defendants had failed to make out either defense:

> The hitting of a ball into the road *was* a reasonably foreseeable event, and no steps at all had been taken to prevent it beyond the erection and subsequent maintenance in its original form of the fence put up in or about 1910, which had been shown by experience to be inadequate.[113]

Having said this, Jenkins ended his judgment on a superficially stricter note:

> It was also, I think, suggested that no possible precaution would have arrested the flight of this particular ball, so high did it pass over the fence. This seems to me an irrelevant consideration. If cricket cannot be played on a given ground without foreseeable risk of injury to persons outside it, then it is always possible in the last resort to stop using that ground for cricket. The plaintiff in this case might, I apprehend, quite possibly have been killed. I ask myself whether in that event the defendants would have claimed the right to go on as before, because such a thing was unlikely to happen again for several years, though it might happen again on any day on which one of the teams in the match included a strong hitter. No doubt as a practical matter the defendants might decide that the double chance of a ball being hit into the road and finding a human target there was so remote that rather than go to expense in the way of a wire screen or the like, or worse still abandon the ground, they would run the risk of such an occurrence and meet any ensuing claim for damages if and when it arose. But I fail to see on what principle they can be entitled to require people in Beckenham Road to accept the risk, and, if hit by a ball, put up with the possibly very serious harm done to them as damnum sine injuria. . . .[114]

If one reads this passage in isolation, it is tempting to conclude that Jenkins believes foreseeable risk is a sufficient condition for liability in negligence. As we have seen, however, Jenkins had plainly stated earlier in his judgment that the defendants were obliged only to take "all reasonably practicable steps" to avoid accidents of this kind. Thus, when Jenkins characterizes as "irrelevant" the defen-

112. *Stone*, [1950] 1 K.B. at 211–12 (emphasis added).
113. *Id.* at 212.
114. *Id.* at 212–13.

dants' contention that no possible fence could have prevented this accident, his point is not that the difficulty or expense of a higher fence is irrelevant *in principle*, but rather that it is irrelevant *in this instance* because it would have been reasonably practicable to stop playing cricket on that ground.

But what did Jenkins mean by the term "reasonably practicable"? Recall that the Court of Appeal had decided *Edwards* in March 1949, less than a year before the Court of Appeal's decision in *Bolton*. Given that the Court of Appeal had unanimously accepted Lord Atkin's disproportionate-cost test as the benchmark for reasonable practicability in *Edwards*, it seems probable that Jenkins had a similar meaning in mind in *Bolton*.[115]

On this interpretation, Jenkins is not employing a foreseeable risk approach when he argues that the defendants might well decide to run the risk of liability rather than abandon this cricket ground, but that they should remain liable nevertheless. Because that argument implies that the defendants may be negligent even if the costs of abandoning the cricket ground are greater than the expected accident costs, it is plainly inconsistent with a Hand Formula balancing approach, in which costs and benefits are compared at the margin. But it is *not* inconsistent with the disproportionate-cost understanding of negligence, which requires actors to take practicable precautions even if they may be marginally greater than the risk, so long as they are not obviously and disproportionately greater. It may not be disproportionately costly to move to a different cricket pitch rather than, as Jenkins puts it, to take a chance of killing someone.[116]

Somervell dissented. He argued that although the defendants had not explored "whether any reasonable steps could be taken" to prevent the occasional ball from being hit into Beckenham Road, that omission alone did not suffice to make them liable in negligence. In addition, "the plaintiff had to establish that if reasonable steps had been taken this accident would not have occurred."[117] Here the

115. The only plausible alternative is a test along the lines Singleton had flirted with in *Edwards*, namely one of physical practicability, in which everything physically possible must be done. *See* Edwards v. Nat'l Coal Bd., [1949] 1 K.B. 704, 715 (C.A).

116. It might, however, be disproportionately costly to shut down a munitions factory in time of war rather than take a similar chance. As this example illustrates, reasonable practicability is not the same as strict liability for reasonably foreseeable risks: the costs of abandoning or shifting the activity are relevant.

117. *Stone*, [1950] 1 K.B. at 215. Somervell also raised an important point about the plaintiff's prima facie case at common law. As he read the record, instead of specifying a precaution that would have avoided the accident, and trying to show that it would have been

crucial fact was the evidence that the ball that hit the plaintiff cleared the fence by a good many feet. That suggested that this hit would have escaped even if the defendants had built a fence adequate to catch the balls that had previously gone into the road.[118] In the end, therefore, the plaintiff had failed to show "that the damage which she suffered was due to the failure of the defendants to take due and reasonable care."[119]

In form, this is a causation argument: the defendant's negligence was not a but-for cause of the accident, because even if the reasonable precaution (a somewhat higher fence) had been taken, the accident would still have occurred. The predicate for that argument, however, is Somervell's premise that reasonable care does not require doing everything physically possible to eliminate the reasonably foreseeable risk of escaping cricket balls. Indeed, he prefaced his analysis with the proposition that the duty of care would vary with the circumstances and be proportioned to the risk.[120] As noted earlier, that proposition does not necessarily entail a balancing approach. But when it is used as Somervell used it, one can reasonably infer that the judge is looking for the point at which greater care would be disproportionate to the risk.[121]

b. The House of Lords

In the House of Lords, the parties continued to focus primarily on the issue of reasonable foreseeability. The defendants pinned their hopes on a restrictive test for what is reasonably foreseeable, arguing that they were not bound to guard against the chance of a ball

reasonable for the defendants to have taken that precaution, the plaintiff had "in the main pleaded and argued on the basis that the fact that this ball came into the road and, after the defendant's evidence, that on rare occasions other balls had entered the road, was sufficient to establish liability." *Id.* at 215. In effect, the plaintiff was framing the case using the inapposite res ipsa model rather than the untaken-precautions model. As we shall see, this issue surfaced in the House of Lords a few years later in *Latimer v. AEC, Ltd.*, [1953] A.C. 643 (appeal taken from Eng.).

118. *Stone*, [1950] 1 K.B. at 215 (noting one witness' evidence that this hit "cleared the fence by many, many feet" and another's testimony that this was "the biggest hit" he had ever seen on that cricket ground).

119. *Id.*

120. *Id.* at 214–15.

121. To be sure, a judge who took the substantial foreseeable risk approach could construct a parallel argument as follows: the foreseeable risk here was that cricket balls would occasionally go over the existing fence, as they had in the past. Had the fence been raised high enough to contain such hits, it might still have allowed the "tremendous" hit in *Bolton* to escape. But the risk of a hit of that magnitude, though not impossible, was not reasonably foreseeable. So the argument would go. Somervell, however, did not make the argument in those terms.

hitting a person in the road because there was no "reasonable probability" that would happen.[122] The plaintiff rejoined that the prior escapes had given the defendants "warning that one might land in the road and that it was likely to cause injury to anyone standing there."[123]

The plaintiff, however, also renewed her untaken-precaution claims that the fence should have been raised or the pitch moved further from the road.[124] Perhaps because (as Somervell had pointed out) this hit would have gone over even a significantly higher fence, the plaintiff stressed the latter precaution. In doing so, her counsel used a technique we will repeatedly encounter in subsequent cases—the argument that the *ease* of taking a precaution tends to show that reasonable care requires it:

> When one is considering the safety of a system of work in a factory the cost of the precautions is a relevant factor. But this accident was very easy to avoid. If the wickets had been placed in the centre of the field equidistant from the north and south boundary edges it could not then have been said that the defendants had taken no precautions against a foreseeable danger. The ball would not then have been hit onto the highway and the accident would not have occurred.[125]

Thus, far from denying that precaution costs were relevant to reasonable care, the plaintiff in *Bolton* relied on and sought to make offensive use of that proposition.[126] Counsel for the defendants, in turn, replied that "[t]he suggested change in the position of the wickets was too slight to make any difference,"[127] thus denying that the precaution would have been effective, rather than arguing that it was unreasonably difficult.[128]

122. Bolton v. Stone, [1951] A.C. 850, 852.

123. *Id.* at 854. This invites the retort that it was very unlikely that anyone would be standing in the road at the very place where a ball landed.

124. *Id.* (argument for the plaintiff).

125. *Id.* at 855 (argument for the plaintiff).

126. There is a nice irony here. One would expect plaintiffs to prefer the substantial foreseeable risk approach to a cost-benefit balancing approach. But if the law is unsettled as between these two approaches, some plaintiffs will find it advantageous to argue that, even under a cost-benefit balancing approach, they should win because the defendant could easily have avoided the risk. The more often plaintiffs make such arguments, the more they legitimate the balancing approach, and thereby disadvantage future plaintiffs.

127. *Id.* at 856 (reply argument for the defendants).

128. This exchange has an unreal air about it. Changing the location of the wickets would have made it less likely a ball would have escaped to the south, but more likely one would escape to the north. To be sure, it would have avoided the accident—but so would moving the pitch *closer* to Beckenham Road. That is to say, avoidance would merely be coincidental. *See* Berry v. Sugar Notch Borough, 43 A. 240 (Pa. 1899).

(i). The Majority Approach: No Reasonably Foreseeable Risk

A majority of the Law Lords—Lord Porter, Lord Oaksey, and Lord Normand—ruled in the defendants' favor on the ground that the risk of an escaping cricket ball was not reasonably foreseeable. In order to reach that conclusion, they had to adopt a high threshold for reasonable foreseeability: "[A]n ordinarily careful man does not take precautions against every foreseeable risk. . . . He takes precautions against risks which are *reasonably likely* to happen."[129] Given that test, the trial judge's finding that "a reasonable man would not anticipate that injury would be likely to result to any person as a result of cricket being played in the field in question" was dispositive.[130]

Because they based their judgments on the absence of reasonably foreseeable risk, these judges had little occasion to indicate their views on the issue of avoidability. Lord Porter thought that the defendants would be in a "stronger position" if the risk had never occurred to them than if they had "decided that the risks were very small and that they need not do very much," because in the latter case it could be said that they had taken "too optimistic" a view.[131] This may suggest that Lord Porter would have looked unfavorably on a costly-precautions defense, with its overtones of conscious choice to impose a foreseeable risk on others.

Lord Normand, by contrast, thought that because "the consequences of failing to consider the risk and of considering this risk but deciding to do nothing are the same," they should have the same legal effect.[132] Rejecting the plaintiff's untaken precautions as ineffective, he suggested that "the only practical way" to avoid the risk would have been to cease playing cricket on that ground. Unfortunately, rather than address that alternative on the merits, Lord Normand suggested that the plaintiff was not entitled to rely on it because it was not within her "particulars of negligence."[133] Although one

129. *Bolton*, [1951] A.C. at 863 (Lord Oaksey) (emphasis added); *see also id.* at 858 (Lord Porter) ("It is not enough that the event should be such as can reasonably be foreseen; the further result that injury is likely to follow must also be such as a reasonable man would contemplate, before he can be convicted of actionable negligence."); *id.* at 861 (Lord Normand) (stating that the standard is "the reasonable man of ordinary intelligence and experience contemplating the reasonable and probable consequences of his acts").

130. *Id.* at 859 (Lord Porter).

131. *Id.*

132. *Id.* at 862.

133. *Id.*

cannot say for sure that Lord Normand favored a balancing approach, his insistence that the plaintiff must plead specific (and "practical") untaken precautions suggests that he thought the creation of a reasonably foreseeable risk was not a sufficient condition for negligence liability.

(ii). Lord Radcliffe's Implicit Balancing Approach

Lord Radcliffe's understanding of reasonable foreseeability was broader than that of Lords Normand, Porter, and Oaksey. But Lord Radcliffe did not rule out balancing, nor did he endorse Lord Reid's "substantial risk" formulations. He suggested that the risk in *Bolton* was not just foreseeable, but "reasonably foreseeable," because "there would have been nothing unreasonable in allowing the imagination to dwell on the possibility of its occurring."[134] He juxtaposed that with the fact that there was "only a very remote[] chance of the accident taking place at any particular time."[135] The latter consideration was decisive:

> It seems to me that a reasonable man, taking account of the chances against an accident happening, would not have felt himself called upon either to abandon the use of the ground for cricket or to increase the height of his surrounding fences. He would have done what the appellants did: in other words, he would have done nothing.[136]

One cannot be sure that Lord Radcliffe is taking the burden of precautions into account. But his meaning seems to be that because the risk was so small, and because either of these precautions would have involved a significant burden on the defendants, it was reasonable for them to do nothing. Radcliffe's reasonable man is apparently a balancer.

(iii). Lord Reid's Substantial Foreseeable Risk Approach

This brings us to Lord Reid's well-known judgment. He began with foreseeability, characterizing *Bolton* as a case in which the accident was "readily foreseeable," although the chance of its occurrence was "very small."[137] *Bolton* therefore posed a choice between two approaches to "the nature and extent of the duty of a person who promotes on his land operations which may cause

134. *Id.* at 868.
135. *Id.*
136. *Id.* at 869.
137. *Id.* at 864.

damage to persons on an adjoining highway."[138] Under the first approach, the duty of care attaches to every foreseeable risk, however improbable. Under the second, the actor is "only bound to take into account the possibility of such damage if such damage is a likely or probable consequence of what he does or permits, or if the risk of damage is such that a reasonable man, careful of the safety of his neighbour, would regard that risk as material."[139]

Lord Reid endorsed the second approach, which includes foreseeable risks that are *likely* (the position taken by Lords Porter, Oaksey, and Normand)—but which also extends to foreseeable risks that, although *not* likely, are sufficiently serious that a reasonably careful man would regard them as "material." This formulation clearly broadened the notion of reasonable foreseeability[140] to encompass risks that are foreseeable and material, even though not likely to cause damage.[141] Substantively, Lord Reid's position departed significantly from the majority's view.

Then follows the crux of Lord Reid's judgment, in which he explains why "foreseeability alone" is not the test:[142]

> It would take a good deal to make me believe that the law has departed so far from the standards which guide ordinary careful people in ordinary life. In the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others. What a man must not do, and what I think a careful man tries not to do, is to create a risk which is substantial. . . . In my judgment the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants, considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent the danger.
>
> In considering that matter I think that it would be right to take into account not only how remote is the chance that a person might

138. *Id.*

139. *Id.*

140. Lord Reid does not himself call this doctrine "reasonable foreseeability," but rather speaks of it in terms of the scope of the duty of care (i.e., to which risks does the duty of care extend). I am using "reasonable foreseeability" as convenient shorthand for the doctrine that a reasonable person is not expected to guard against every risk that could possibly be foreseen.

141. Citation to *Paris* would have seemed appropriate. *See supra* pp. 516–19. *Paris* could fairly be described as a case in which an accident was not likely, but in which the severity of the possible injury made the risk "material" and required provision of goggles to a one-eyed workman. (Indeed, one could argue that *Paris* illustrates one of the dangers of linking reasonable foreseeability to the *likelihood* of accidental injury: that linkage may be what led Asquith to insist that the *severity* of the potential injury was irrelevant.) Yet, oddly enough, Lord Reid made no mention of *Paris*.

142. *Bolton*, [1951] A.C. at 866.

> be struck but also how serious the consequences are likely to be if a person is struck; but I do not think that it would be right to take into account the difficulty of remedial measures. If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all.[143]

On its face, this passage adopts the "substantial foreseeable risk" approach. Actors inevitably create some risks to others, but they must not create substantial risks—which is to say, they must take all necessary steps to guard against substantial risks. It becomes critical, then, to know whether a risk is "substantial" or not. Lord Reid's criteria are simple: the chance of an accident and the seriousness of the injury should an accident occur. The "difficulty of remedial measures" is irrelevant, because the actor should refrain from engaging in the activity rather than impose a substantial risk on others.

If we take this elaboration of a substantial risk test as foreshadowing a general approach to negligence at common law, Lord Reid seems to have ruled out balancing—even balancing of the disproportionate-cost kind. Above the threshold for substantial risk, defendants must do everything *possible*; below that threshold, the risk is one defendants can reasonably disregard. Moreover, he posits that risks to others are to be deemed "substantial" unless they are "extremely small."[144] Thus, his position appears to be equivalent to holding that actors must take *all* practicable precautions, not merely all *reasonably* practicable precautions, to guard against substantial risks. This is essentially the interpretation favored by Professors Weinrib and Wright.

Let us now consider an alternative interpretation of Lord Reid's judgment, according to which he is really saying that actors must do everything "reasonably practicable"—that is, not disproportionately costly—to avoid substantial foreseeable risks. On this interpretation, Lord Reid reasoned as follows: because there are many places where cricket can be played without creating substantial foreseeable risks, it is reasonably practicable to forego playing cricket where that is not

143. *Id.* at 867.

144. Lord Reid suggested that determining whether a risk is substantial is "a question not of law but of fact and degree." He thought that the trial judge "in substance" applied the substantial risk test when he held that the cricket ground was "large enough to be safe for all practical purposes"—and, although the case was "not far from the borderline," he agreed with that conclusion. Lord Reid emphasized, however, that he would have decided differently "if I had thought that the risk here had been other than extremely small, because I do not think that a reasonable man considering the matter from the point of view of safety would or should disregard any risk unless it is extremely small." *Id.* at 867–68.

the case. Consequently, the difficulty of remedial measures is irrelevant in this case, but not necessarily in other contexts. According to this interpretation, then, Lord Reid was not suggesting an across-the-board rule forbidding cost-benefit balancing in negligence cases. Instead, like Jenkins in the Court of Appeal, Lord Reid simply included the feasible precaution "playing cricket elsewhere" within the inquiry, and placed a heavy thumb on the scales in favor of safety, as the disproportionate-cost approach requires.

Although I once subscribed to this alternative interpretation, I now think Professors Weinrib and Wright are correct that Lord Reid intended to rule out balancing above the threshold of substantial risk.[145] In the end, the resemblance between Lord Reid's judgment and Jenkins's makes the crucial point of difference between them all the sharper.[146] Precisely because Jenkins was explicit in requiring "all reasonably practicable steps," it is reasonable to infer that Lord Reid's omission of that crucial language was deliberate. In effect, Lord Reid substituted "practicable" for "reasonably practicable."

(iv). A Positive Critique of Lord Reid's Substantial Risk Approach

Having concluded that Lord Reid did indeed mean to stake out a substantial foreseeable risk approach to at least some important category of negligence cases, I now want to suggest that his approach was legally and functionally problematic for several reasons. These criticisms, I should emphasize, are not normative. I am not concerned here with whether Lord Reid's approach is an attractive conception of negligence from, say, the standpoint of corrective justice or economic efficiency. Rather, assuming Lord Reid hoped his substantial risk approach would supplant the emerging balancing approach in whole or in part, my point is that he faced a number of difficulties.[147]

145. As noted below, in *Wagon Mound No. 2*, some fifteen years later, he added the qualification that balancing would be appropriate *below* that threshold, provided the risk was "real" rather than far-fetched. *See infra* pp. 559–62. Perhaps that was his thought at the time of *Bolton*, but if so he certainly did not express it.

146. Of course, this inference is only part of the evidence in favor of the Weinrib/Wright interpretation. That interpretation finds strong support both in the ordinary meaning of the language Lord Reid used, and in his occasional references to substantial foreseeable risk in later cases.

147. In addition to the difficulties noted in the text, the substantial foreseeable risk approach seems unworkable in some contexts. For example, one wonders how Lord Reid would have avoided the conclusion that persons should not drive, because the risk to others associated with driving (even careful driving) is substantial (if that means more than "extremely small"). It is no answer to say that the relevant risk is the risk to the individual potential

First, Lord Reid cited no precedent for the substantial risk approach. He quoted language from a variety of earlier negligence cases directly supporting the proposition that actors may disregard risks that are not "likely," but none whatever supporting the proposition that they must take all possible precautions should the risk be "substantial." Indeed, one can say that the only authority to which he appealed was the reasonable man standard, from which he drew the subsidiary proposition that reasonable men try not to impose substantial risks on others. This resort to first principles was entirely proper. But it meant that any judge who held a different view of how reasonable people behave in the face of substantial risks to others would feel free to disagree.

Second, none of the other Law Lords expressed agreement with Lord Reid's substantial risk dictum.[148] Standing alone, this is far from a decisive objection. In English no less than in American law, a strong judgment may be influential with later judges even if it stands alone at the time.[149] But here Lord Reid was not only floating his own substantial risk idea. He was also staking out a much broader understanding of reasonable foreseeability than Lords Porter, Oaksey, and Normand. As we shall see, Lord Reid's position on foreseeability eventually made a good deal of headway. At the time, however, one could have said with some justice that Lord Reid's judgment would hold some defendants to a standard of all possible care (because they had created foreseeable risks that were not "extremely small"), while the majority's approach would dismiss the claims against those very defendants on the ground that the risk was not "likely" to result in injury.[150]

plaintiff, and that a driver does not pose a substantial risk to any individual on the road, but only to other persons in the aggregate. If *that* were the way to look at risk, the risk to Ms. Stone would seem utterly remote, rather than a "borderline" case as Lord Reid describes it. Of course, other principles, such as reciprocal risk-imposition, might be invoked to narrow the domain within which the substantial foreseeable risk approach applies. *See generally* George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

148. Because *Bolton* did not involve a substantial risk, Lord Reid's contention that the burden of precautionary measures is irrelevant if the risk is substantial was technically dictum.

149. Lord Atkin's judgment in *Coltness Iron Co. v. Sharp*, [1938] A.C. 90 (1937) (appeal taken from Scot.), is a good example.

150. As articulated in *Bolton*, Lord Reid's approach creates a sharp disparity between the treatment of defendants who fall just above and below the "substantial risk" threshold: defendants who created a substantial risk are liable even if avoidance would have been exceedingly costly, while defendants who fall just below that threshold are apparently not liable even if avoidance would have been easy. Lord Reid's later judgment in *Wagon Mound No. 2* reduces this disparity by holding defendants liable even for foreseeable risks that are not substantial if avoidance would have been easy.

Third, Lord Reid's approach was not sufficiently spelled out to preclude reassimilation into the reasonably-practicable camp.[151] Indeed, Denning put that interpretation on it soon after *Bolton* was decided. As I have already explained, this was probably a misreading of Lord Reid's judgment—but it was also a quite plausible one.

Fourth, there is a real tension between Lord Reid's approach and the conventional understanding of the reasonably prudent person standard, which requires the plaintiff to identify some precaution that a reasonable person allegedly would have taken (but that the defendant failed to take) and that would have avoided the accident.[152] Recall that the substantial risk approach holds that reasonable persons must do everything possible—including curtailing their activities—to avoid creating substantial risks of harm to others. One would therefore expect plaintiffs, under that approach, routinely to argue that the defendant should simply have refrained from engaging in whatever activity occasioned the accident. But while such arguments are sometimes made, plaintiffs normally try to identify some precaution the defendant could have taken while engaging in the same underlying activity. Why go to all that trouble, if the substantial risk approach is good law? It would be much simpler just to point out that the defendant could have avoided the underlying activity. Thus, the way in which the untaken-precaution framework is normally employed implies that the standard for breach does not focus solely on foreseeable substantial risk (or danger).[153]

These difficulties—as well as the fact that some judges plainly favored a balancing interpretation of reasonable care—may explain why the English judiciary did not rally to Lord Reid's approach. Moreover, as we shall soon see, even if Lord Reid in *Bolton* objected to the balancing approach in its entirety, he did not adhere to that position. Indeed, he went on to play a major role in developing the balancing approach in English negligence law. Thus, in the final analysis, Lord Reid's judgment in *Bolton* does not seem to have

151. Lord Reid also failed to explain whether the substantial foreseeable risk test applied to all negligence cases, or only to cases involving what he had termed "the nature and extent of the duty of a person who promotes on his land operations which may cause damage to persons on an adjoining highway." *Bolton*, [1951] A.C. at 864.

152. *See* Mark F. Grady, *Untaken Precautions*, 18 J. LEGAL STUD. 139 (1989).

153. Such a standard emphatically need *not* be a balancing standard. For example, it could be custom, or the reasonable person standard. What it cannot be, however, is a standard that makes defendants automatically liable whenever they create a substantial, reasonably foreseeable risk.

halted or shifted the gradual development of a balancing approach in the run of negligence cases.

But where did matters stand with regard to the balancing approach to negligence in the immediate aftermath of *Bolton v. Stone*? I think the best answer is, "up in the air." In the employment context, the widely used statutory provisos requiring all "reasonably practicable" precautions had been interpreted to require disproportionate-cost balancing, and a majority of the judgments in the House of Lords in *Paris* employed or referred approvingly to balancing the costs of precautions against the risk. In the non-employment context of *Bolton*, each judge in the Court of Appeal had balanced precaution costs against the small risk, and Jenkins had indicated his belief that the common law test was equivalent to whether all reasonably practicable precautions had been taken. But in the House of Lords, although Lord Radcliffe had arguably engaged in balancing, Lord Reid had apparently rejected balancing, and the other Law Lords had bypassed that issue and dealt solely with reasonable foreseeability. There was little other authority on point, and it was similarly inconclusive.[154]

III. POST-*BOLTON V. STONE*: THE TURN TO COST-BENEFIT BALANCING

A. McCarthy v. Coldair

In the decade after *Bolton*, the balancing approach became increasingly influential, especially—but not only—in the workplace-safety context. The first important post-*Bolton* case was *McCarthy v.*

154. Lord Greene, M.R., had seemed unreceptive to cost-benefit balancing in *Morris v. Luton*, [1946] 1 All E.R. 1 (C.A.), although his reasoning was arguably consistent with the disproportionate-cost approach. *See id.* at 4 ("The idea that the duties of a local authority in regard to safety on the roads are to be affected by matters of expense (speaking always within reasonable limits) is one which does not appeal to me."). On the other hand, in *Daborn v. Bath Tramways Motor Co.*, [1946] 2 All E.R. 333, 336 (C.A.), Asquith, L.J., had endorsed a version of cost-benefit analysis:

> In determining whether a party is negligent, the standard of reasonable care is that which is reasonably to be demanded in the circumstances. A relevant circumstance to take into account may be the importance of the end to be served by behaving in this way or in that. As has often been pointed out, if all the trains in this country were restricted to a speed of 5 miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down. The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk.

Id.

Coldair.[155] The plaintiff in *McCarthy* was an electrician sent by his employer to repair wiring at the top of a paint booth in the defendant's factory. He was injured when a ten-foot ladder he was climbing to reach the wires slipped. He sued the defendants for negligence at common law and also for breach of duty under the Factories Act, 1937, which required "safe access" to factory workplaces, subject to the usual "so far as reasonably practicable" proviso.[156]

Relying on *Edwards*, Denning, L.J., took the standard to be "what is reasonably practicable having regard to the degree of risk and the steps necessary to eliminate the risk." He then said:

> This method of approach is similar to the approach sanctioned by the House of Lords in the cricket ball case, Bolton v. Stone, in cases of negligence. It was quite foreseeable that a ball might be hit out of the cricket ground there; nevertheless, the risk was so slight that a reasonable man would not have felt himself called upon either to abandon the use of the ground for cricket or to increase the height of his surrounding fences. In that case the risk was weighed against the measures necessary to eliminate it. That is the same test as is imported under section 26 (1) by the words "as far as is reasonably practicable."[157]

Now, Denning's language in this passage plainly refers to (indeed, it paraphrases) Lord Radcliffe's judgment in *Bolton*, which Denning takes to have "weighed" the risk against the precautions needed to eliminate it. But in his application of the reasonably practicable test, Denning also made use of Lord Reid's "substantial risk" formulation. He first rejected the suggestion that there should be "a man at the foot of every ladder, however short," because that would "put an added burden on industry disproportionate to the risk involved."[158] In this case, however, the evidence showed that the floor was a semi-glazed surface on which a ladder might easily slip. Thus, Denning said, the trial judge had properly found "that there was not merely a slight, but a *substantial* risk of the ladder slipping, and that measures should have been taken to prevent it."[159] Denning

155. 50 L.G.R. 85 (C.A. 1951).

156. *Id.* at 86.

157. *Id.* at 87 (citations omitted).

158. *Id.*

159. *Id.* at 88 (emphasis added). It is interesting to compare Denning's judgment with that of Hodson, L.J., on this point. Hodson said the defendants could prevail on the statutory "reasonably practicable" defense "by showing that, the risk being slight, the measures necessary to counteract the risk are out of all proportion." He then quoted Tucker, L.J., in *Edwards* on the general need for weighing risk against precaution costs, subject to the qualification that "the

did not, however, conclude that the defendant was liable without more (as the "substantial foreseeable risk" approach would require). Instead, he concluded that the defendant was liable because it would have been "reasonably practicable" to avoid this substantial risk by putting a man at the foot of the ladder or bracing it with a heavy object.[160]

Of course, one can argue about whether Denning rightly understood the judgments of Lord Radcliffe and Lord Reid. Nonetheless, Denning's judgment shows that Lord Radcliffe's judgment is amenable to a balancing interpretation, and that even Lord Reid's judgment can be given a "reasonably practicable" gloss. More importantly, Denning's approach—which combined a low threshold for reasonable foreseeability with a balancing test for avoidability—foreshadowed the subsequent development of English negligence law.

B. Christmas v. General Cleaning Contractors

Any suggestion that Denning was trying to evade the relative strictness of Lord Reid's approach in *Bolton* is rebutted by the next case in our sequence. In *Christmas v. General Cleaning Contractors*,[161] which the Court of Appeal decided just a few weeks after *McCarthy*, Denning employed the balancing approach to reach a result that was too stringent for the House of Lords, including Lord Reid.

In *Christmas*, the plaintiff, an experienced window cleaner, was injured when he fell twenty-seven feet from the sill of a window he was cleaning at the Caledonian Club. The window in question was a double-sash window; the plaintiff was cleaning the outside panes while standing on the six-and-one-quarter-inch-wide sill. The only thing preventing him from falling was his handhold on the bottom of

greater the risk . . . the less will be the weight given to the factor of cost." *Id.* at 89. This can be seen as a continuous version of what Lord Reid's substantial risk approach makes dichotomous.

160. It should be added that Denning did not unqualifiedly equate the common-law duty of reasonable care with the statutory duty to ensure safe access so far as reasonably practicable. *See id.* at 87 ("It may therefore be that the subsection does not add much to the common-law duty to take reasonable care at any rate in cases between master and servant. But it is a valuable aid to an invitee who may be defeated at common law by his knowledge of the risk, see Horton v. London Graving Dock [1951] A.C. 737, but would not be defeated by such knowledge in a claim under section 26 (1)."). On the core issue of the standard of care, however, he treated the common law standard of reasonable care as identical to the statutory standard of reasonable practicability.

161. [1952] 1 KB 141 (C.A. 1951).

the upper (outer) sash. He lost that handhold and fell when the lower (inner) sash, which he had left open a few inches, suddenly closed and knocked his fingers loose. The plaintiff sued the cleaning contractors for whom he worked.[162] Their principal defense was that he (and they) had simply followed the "common practice" in the window cleaning business.[163]

In language that plainly echoes Lord Reid's admonition in *Bolton* that cricket should not be played where it poses a substantial risk, Denning agreed with the trial judge that the plaintiff's employers had failed to adopt a reasonably safe method of doing the work:

> The employers should have taken proper steps to protect him from the dangers. They should have laid out the work more carefully. One way would have been to do the cleaning from a ladder instead of from a sill. Another way would have been to ask the householder to allow the firm to insert hooks into the brickwork so as to attach a safety belt. It is said by the employers that these suggestions are not practicable; and that it is the usual thing for the men to clean windows by standing on the sill. That answer does not satisfy me. If employers employ men on this dangerous work for their own profit, they must take proper steps to protect them, even if they are expensive. *If they cannot afford to provide adequate safeguards, then they should not ask them to do it at all. It is not worth the risk.*[164]

Explicit in Denning's reasoning, however, is the judgment that the serious risk of falls outweighs the considerable expense of taking these precautions—and even outweighs the burden (on all concerned) of ceasing to clean this sort of window altogether. To be sure, Lord Reid in *Bolton* probably did not intend his admonition to depend on a balancing judgment of this kind. But as we have already seen, the judgment of Jenkins, L.J., in the Court of Appeal in *Bolton*, which in this respect closely tracks Lord Reid's, did argue that it was reasonably practicable to cease playing cricket at that ground. One can fairly conclude, then, that the contemporaneous interpretation of Lord Reid's judgment in *Bolton* was that an actor must do everything "reasonably practicable"—including, if appropriate, abandoning or relocating the activity in question—to avoid creating a "substantial

162. *Id.* at 142–43. The plaintiff also sued the Caledonian Club, against whom he prevailed at trial (because the weights holding the window sashes were poorly balanced). This judgment was overturned in the Court of Appeal on the grounds that it was the responsibility of the window cleaner and his employers to determine whether a window was safe to clean, not the responsibility of the occupier. *See id.* at 148.

163. *Id.* at 151 (Hodson, L.J.).

164. *Id.* at 149 (emphasis added).

risk" of harm to others. In any event, the subsequent decision of the House of Lords upholding the result in *Christmas*—but on much narrower grounds than those adopted by Denning—shows strong support (including Lord Reid's) for the "reasonably practicable" interpretation of the duty of care in negligence.[165]

It seems clear that the risk in *Christmas* was a substantial one: as Lord Reid put it, "the window sill method is often dangerous if no precautions are taken, and in this case no precautions were taken."[166] At the same time, the evidence was that window cleaners did not customarily take any precautions (other than holding on to the sill) when cleaning ordinary two-sash windows. Lord Reid suggested that the plaintiff bore "a heavy onus" in thus seeking to "have condemned as unsafe a system of work which has been generally used for a long time in an important trade."[167] And, in an implicit rejection of Denning's analysis, he suggested that the evidence was "quite inadequate to establish" that "the ladder method or the safety belt method are as a general rule reasonably practicable alternatives."[168]

This disagreement, however, should not obscure the fact that both Denning and Lord Reid were using the "reasonably practicable" standard to evaluate a common-law negligence claim, not an alleged breach of a safety statute. The difference lay in their assessments of the risks as compared to the difficulty of the precautions in question. Denning had suggested that the risks were so great that ladders or hooks were reasonably practicable, even if expensive (or, failing that, that window cleaning should be suspended). Lord Reid acknowledged that "it would have been practicable and reasonably safe" to use the ladder method to clean the first-floor window where the plaintiff's accident happened.[169] But there was no evidence that this method was generally applicable, and it was "fairly obvious that it would not be practicable in a large number of cases." Moreover, even where practicable, "it takes longer and is more expensive to clean windows in this way."[170] As for hooks, very few buildings had them, window cleaners often neglected to use safety belts even where

165. Gen. Cleaning Contractors v. Christmas, [1953] A.C. 180 (1952) (appeal taken from Eng.).

166. *Id.* at 192.

167. *Id.* As counsel for the employers noted at oral argument, *Christmas* was a "test case" in which the Law Lords were essentially being asked to set safety standards for the window-washing trade. *Id.* at 183.

168. *Id.*

169. *Id.* at 191.

170. *Id.* at 192.

hooks were available, the hooks had to be affixed through the wall to the interior of the building ("an operation which could not be carried out by a window cleaner") and "vast numbers of these hooks would be needed" if this were to become the standard precaution.[171]

Why then did Lord Reid agree with Denning that the window-washing contractor was negligent? There are two parts to the answer. First, because

> [t]he need to provide against the danger of a sash moving unexpectedly appears to me to be so obvious that, even if it were proved that it is the general practice to neglect this danger, I would hold that it ought not to be neglected and that precautions should be taken.[172]

Now, if Lord Reid were adhering to the "substantial foreseeable risk" approach, this conclusion should have been the end of the matter. Instead, he treated this as the preliminary hurdle (establishing a duty to guard against the risk) and went on to the second step in the analysis: whether there were any "reasonably practicable" and "effective precautions."[173] Despite reservations about the plaintiff's failure to offer evidence on this point,[174] and despite the further objection that "[g]enerally the plaintiff ought to put forward some method which can be tested by evidence," Lord Reid ruled in the plaintiff's favor.[175] He did so because he concluded, on the basis of common sense and inferences from the pleadings and the evidence, that "a simple test would show whether a sash is loose or not and that if it moved at all easily it could be wedged or something could be placed across the window sill which would prevent the sash from closing fully."[176] In other words, the employers were negligent because an easy, inexpensive inspection, coupled with an easy, inexpensive wedging device, would have removed the obvious danger of falling sashes attendant on the customary system of cleaning windows.[177]

171. *Id.*

172. *Id.* at 193.

173. *Id.* at 193.

174. Indeed, given the plaintiff's failure to put in evidence of precautions that could have prevented sashes from closing, Lord Reid thought it would not be "proper or fair to the appellants to consider this case were it not for the fact that the appellants' counsel in effect asked us to treat the case as a test case and enlighten employers in the trade as to their duty." *Id.*

175. *Id.*

176. *Id.*

177. The plaintiff had not pleaded that the employers should have provided wedges along with instructions about when to use them. Indeed, wedges entered the case in the employers' answer, in which they suggested that the plaintiff was negligent for failing to inspect the sash

Although there were the usual nuances of difference, the other Law Lords generally agreed with both the rationale and the result adopted by Lord Reid. Lord Tucker followed Lord Reid's "reasonably practicable" usage, which he too took to encompass considerations of cost and difficulty. For example, he concluded that the plaintiff had failed to prove that ladders were reasonably practicable because "the comparative safety and cost of the different methods was never investigated."[178] Earl Jowitt and Lord Oaksey phrased the issue in terms of whether the employer's system of work was "reasonably safe"[179] (rather than using the term "reasonably practicable"), but nothing in their opinions indicates that this reflected a substantive disagreement about the meaning of negligence. Like Lord Reid, they were of the view that the employers should have instructed their workers to test the sashes and provided them with wedges to prevent the windows from closing.[180]

Christmas, then, shows the power of a simple, commonsensical precaution to trump even an established custom under the "reasonably practicable" version of a balancing approach. It also shows that Lord Reid was willing to balance costs and benefits in a common-law negligence case in which the risk appears to have been quite "substantial," and certainly far greater than the risk in *Bolton*.[181]

and brace it with a wedge. *See id.* (Lord Reid). At argument in the Court of Appeal, Hodson, L.J., asked, "ought not the contractors to see that the lower window is always propped by a block of wood—a simple precaution?" Christmas v. Gen. Cleaning Contractors, [1952] 1 K.B. 141, 144 (C.A. 1951). In his judgment, Lloyd-Jacob, J., seemed to adopt that suggestion. *See* Gen. Cleaning Contractors v. Christmas, [1953] A.C. 180, 188 (1952) (appeal taken from Eng.) ("[I]t would appear to be incumbent upon the employer to ensure that the involuntary closure of the lower sash during the cleaning operation was impossible."). Denning considered and rejected the argument that the plaintiff was contributorily negligent for not using a wedge, but did not discuss the possibility that the employer should have provided wedges and required their use.

178. *Christmas*, [1953] A.C. at 196. Lord Tucker was even more troubled than Lord Reid by the plaintiff's failure to identify a reasonably practicable untaken precaution. *Id.* at 198 ("It is true that in some cases there may be precautions which are so obvious that no evidence is required on the subject, but in a case like the present it is eminently desirable before condemning a system in general use that it should be clearly established by evidence that some other and safer system is reasonably practicable and that its adoption would have obviated the particular accident which has occasioned damage to the plaintiff.").

179. *Id.* at 189 (Earl Jowitt); *id.* at 190 (Lord Oaksey).

180. *Id.* at 189–90.

181. One could argue that the substantial risk approach is appropriate in noncontractual or nonconsensual settings, and the balancing approach appropriate in contractual and consensual ones. Whatever the merits of this normative position, I have found no evidence that Lord Reid subscribed to it.

C. Latimer v. A.E.C.

By adopting a narrower solution to the window-washing problem in *Christmas* (using wedges), the House of Lords bypassed Denning's more radical suggestion that window washing should be suspended if no safer method was practicable. Less than a year later, the issue of drastic steps such as terminating or suspending work resurfaced in *Latimer v. A.E.C.*[182] The prevailing view in the Court of Appeal and in the House of Lords was that balancing of risks and disadvantages should determine whether these kinds of burdensome steps must be taken.

The accident in *Latimer* happened in the aftermath of an exceptionally heavy rainstorm that caused extensive flooding at the defendants' huge factory works, which covered some fifteen acres and employed four thousand workers. The floodwater became mixed with an oily liquid known as "mystic," which was used as a cooling agent for various machines, and which normally collected in channels in the floor of the building. When the water drained away after the storm, it left a slippery, oily film on the floor. Between the day and night shifts the defendants employed teams of workers to spread their entire supply of sawdust (some three tons) to dry the floor and reduce its slipperiness. But there was not enough sawdust to cover all areas of the floor. The defendant, a night-shift employee working in an area that had not been spread with sawdust, suffered a crushed ankle when he slipped and fell while loading a barrel onto a trolley.[183]

In the trial court, the plaintiff raised several allegations of negligence, including that the drainage system was inadequate and that the defendants should have obtained more sawdust. The trial judge (Pilcher, J.) rejected each of these allegations, finding that the defendants had done everything they reasonably could to clean up the factory before the night shift. Nevertheless, he held that the defendants were negligent because they did not close down the factory (or the part of the factory where the accident happened) before the start of the night shift.[184] The suggestion that all or part of the factory should have been closed was first raised by the trial judge after the close of evidence, during the arguments of counsel, and not surprisingly was adopted by counsel for the plaintiff.[185]

182. [1953] A.C. 643 (appeal taken from Eng.).
183. *Id.* at 645–46.
184. *Id.* at 659 (Lord Tucker).
185. Latimer v. A.E.C., [1952] 2 Q.B. 701, 706 (C.A.) (Singleton, L.J.).

The Court of Appeal (Singleton, L.J., Denning, L.J., and Hodson L.J.J.) unanimously reversed.[186] Denning's judgment, with which Hodson agreed,[187] applied the balancing approach and rejected the foreseeable-risk approach:

> It seems to me that [the trial judge] has fallen into error by assuming it would be sufficient to constitute negligence that there was a foreseeable risk which the defendants could have avoided by some measure or other, however extreme. That is not the law. It is always necessary to consider what measures the defendant ought to have taken, and to say whether they could reasonably be expected of him. . . . So here the employers knew that the floor was slippery and that there was some risk in letting the men work on it; but, still, they could not reasonably be expected to shut down the whole works and send all the men home. In every case of foreseeable risk, it is a matter of balancing the risk against the measures necessary to eliminate it.[188]

The third judge of the Court of Appeal, Singleton, also engaged in balancing. He agreed that if the danger were great enough (for example, if there were a fire on the premises) the employer would be obliged to shut down the factory, but thought the risk from this slippery floor did not rise to that level.[189] No other worker had been injured or even complained, and the plaintiff had failed to offer any evidence about the consequences of shutting down the factory, such as how many night shift employees would have been thrown out of work.[190]

With the exception of Lord Oaksey, who wrote an old-fashioned judgment exonerating the defendants for an arguable "error of judgment in circumstances of difficulty,"[191] the judgments in the House of Lords also employed a balancing approach. In addition, the Law Lords sent a strong signal that a plaintiff who relies on an

186. [1952] 2 Q.B. at 701.

187. Hodson's judgment, which follows Denning's, reads in its entirety "I agree." *Id.* at 712. Nothing turns on whether this refers to Singleton's judgment as well.

188. *Id.* at 711.

189. *Id.* at 707.

190. *Id.* at 709. In addition to the effects on workers, Singleton was concerned about the possible effects on the employer and society as well. *See id.* ("No question was asked as to the nature of the work which was being done in this factory, or in this particular part of the factory; there is nothing to show whether it was work of national importance, as it may have been; not a single question was asked to show what it would have meant to close down this factory, or some part of this factory.").

191. Latimer v. A.E.C., [1953] A.C. 643, 655–56 (appeal taken from Eng.) (holding that such an error does not amount to negligence). Interestingly, Lord Oaksey suggested that if a jury had found the defendants negligent the Court of Appeal could not properly have set aside their verdict, "[b]ut no doubt a judge's finding is not entitled to the same finality." *Id.* at 655.

untaken precaution must offer evidence about the pros and cons of taking it.

Lord Porter found that the plaintiff had failed to prove that a reasonably careful employer would have "taken the drastic step of closing the factory."[192] In addition to the risk that a worker would fall, "[t]he seriousness of shutting down the works and sending the night shift home and the importance of carrying on the work upon which the factory was engaged are all additional elements for consideration."[193] The record lacked "adequate information on these matters," as well as on "whether a partial closing of the factory was possible or the extent to which the cessation of the respondents' activities would have retarded the whole of the work being carried on."[194]

Lord Asquith of Bishopstone was even more explicit about the need to consider the burden of shutting down. He too stressed that "no evidence was directed to the question, which on this issue was fundamental, what degree of dislocation or complication a complete stoppage would have entailed."[195] The limited evidence at trial indicated to him that "the degree of risk was too small to justify, let alone require, closing down."[196] The risk was "inconsiderable" and the evidence on "the onerousness of the suggested remedial measure[] was non-existent."[197]

Lord Tucker, whose judgment Lord Reid adopted as his own on the common-law part of the case,[198] plainly rejected the foreseeable-risk approach. Referring to closing down the factory, he said:

> I do not question that such a drastic step may be required on the part of a reasonably prudent employer if the peril to his employees is sufficiently grave, and to this extent it must always be a question of degree, but in my view there was no evidence in the present case which could justify a finding of negligence for failure on the part of the respondents to take this step. . . . The learned judge seems to have accepted the reasoning of counsel for the plaintiff to the effect that the floor was slippery, that slipperiness is a potential danger,

192. *Id.* at 653.
193. *Id.*
194. *Id.*
195. *Id.* at 662.
196. *Id.*
197. *Id.* at 663.
198. *See id.* at 658 (Lord Reid) ("The appellant also alleges breach of the respondents' duty to him at common law. On that part of the case I agree entirely with the speech which my noble and learned friend, Lord Tucker, is about to deliver and which I have had an opportunity of reading.").

> that the defendants must be taken to have been aware of this, that in the circumstances nothing could have been done to remedy the slipperiness, that the defendants allowed work to proceed, that an accident due to slipperiness occurred, and that the defendants are therefore liable.
>
> This is not the correct approach. The problem is perfectly simple. The only question was: Has it been proved that the floor was so slippery that, remedial steps not being possible, a reasonably prudent employer would have closed down the factory rather than allow his employees to run the risks involved in continuing work? . . .
>
> The absence of any evidence that anyone in the factory during the afternoon or night shift, other than the plaintiff, slipped or experienced any difficulty or that any complaint was made by or on behalf of the workers all points to the conclusion that the danger was in fact not such as to impose upon a reasonable employer the obligation [to shut down].[199]

As this passage shows, Lord Tucker (and Lord Reid) believed that the "drastic step" of temporarily shutting down the factory would be appropriate only if the danger to workers was "sufficiently grave," and that on the facts of *Latimer* this test was not met. But did they also mean to suggest that the risk is to be balanced against the burden of shutting down, or alternatively that if the risk is deemed "substantial," shutting down is ipso facto required? For several reasons, I think the balancing interpretation is correct. If Lord Tucker meant to invoke Lord Reid's "substantial risk" distinction, it is odd that he did not say so; and Lord Tucker's actual language, referring as it does to "grave" perils, "drastic" precautions, and "question[s] of degree,"[200] is more evocative of balancing than of a categorical rule. In addition, both Lord Tucker and Lord Reid had only recently (in *Christmas*)—and in the same context of employee safety—asked whether untaken precautions were "reasonably practicable," and included expense and difficulty in that inquiry.[201] Finally, Lord Tucker began his judgment by expressing his "complete agreement" with Singleton's "application of the standard required to the facts,"[202] which we have already seen involved balancing.[203]

199. *Id.* at 659–60.

200. *Id.*

201. *See supra* Section III.B.

202. [1953] A.C. at 658.

203. I am not arguing that by joining Lord Tucker's judgment Lord Reid was repudiating what he had said in *Bolton*, nor that he did not mean what he appeared to say in *Bolton*. Lord Reid may have believed that a substantial risk approach was appropriate in cases like *Bolton* but not in workplace cases; or he may have believed that the threshold for "substantial" risk should be higher in the workplace setting; or he may simply have believed that the risk in *Latimer* was not substantial.

In any event, Lord Tucker's judgment unquestionably did not *repudiate* balancing, while the judgments of Lords Porter and Asquith overtly employed balancing. *Latimer*, like *Christmas*, represented another victory for the balancing approach in the employment setting.

The litigation in *Latimer* also resembled *Christmas* in another way: in both cases, there were lurking issues about the extent to which the advantages and disadvantages of particular untaken precautions had to be pleaded and proved—rather than simply noticed by the judge or asserted by counsel. Again, the fact that these issues were unsettled suggests that the practice in negligence cases was changing. Formerly, a plaintiff could get away with a simple allegation that there was some precaution the defendant could have taken, coupled with a conclusory argument that a reasonable person would have done just that. The argument might not prevail, but it was legally sufficient in the sense that a judge or jury, guided solely by their undifferentiated sense of what a reasonable person would have done, could find in the plaintiff's favor. Now, as the balancing approach grew increasingly influential, and as appellate judges grew more practiced at issues of "reasonable practicability," they began signaling litigants to develop the evidence about untaken precautions in more depth. As Lord Tucker put it in *Christmas*:

> What precisely should [the defendants] have done and where was the evidence about it? These cases must be decided upon evidence and the evidence should be confined to the specific allegations in the pleadings so that defendants can know what is the case with which they have to deal before their system is condemned.[204]

D. Marshall v. Gotham Co. *(1954)*

Marshall v. Gotham Co.[205] returns us to the realm of safety statutes that require defendants to take all "reasonably practicable" precautions. We saw in *Edwards* that the Court of Appeal adopted the disproportionate-cost approach in such cases. In *Marshall*, the House of Lords followed suit.

Like *Edwards*, *Marshall* involved a mining accident caused by an unusual geological condition. In *Marshall*, a gypsum miner was killed when a large piece of the mine's marl roof fell on him. The

204. Gen. Cleaning Contractors v. Christmas, [1953] A.C. 180, 197 (1952) (appeal taken from Eng.).

205. [1953] 1 Q.B. 167 (C.A. 1952); [1954] A.C. 360 (appeal taken from Eng.).

normal—and ordinarily very effective—method of guarding against falling roof was to inspect each area for visible faults, and then to tap the roof with a long-handled hammer; if the noise indicated that the roof was unsound, the unsound portion was brought down before the mining proceeded. But the fall that killed the plaintiff was not detectable by this or any other means. As Lord Reid explained, in these "very rare" cases of "slickenside,"[206]

> it was impossible to detect discontinuity of that kind before the piece actually fell because, owing to there being no gap between it and the other part of the marl above it, the discontinuity was not disclosed by tapping the roof, and there appeared to be no known way of discovering its existence.[207]

Consequently, the only way to make a roof safe from slickenside was to shore it up, and since the condition was undetectable, every roof in the mine would have to be shored up. "There was evidence that that was never done in gypsum mines, and that in this mine the cost of doing so would have been so great as to make the carrying on of the mine impossible."[208] However, the evidence also showed that after the accident, additional precautions were taken in the area near the accident: a hydraulic prop was used unless the roof was thought to be thin, in which event that area was bypassed.[209] The plaintiff argued that it would have been reasonably practicable for the defendants to use props (as they did after the accident). The trial judge found no negligence at common law, but ruled in the plaintiff's favor on the statutory claim, reasoning that hydraulic props should have been used before as well as after the accident.

The Court of Appeal unanimously reversed, on the ground that because the risk was not reasonably foreseeable it was not reasonably practicable to guard against it. As Jenkins, L.J., explained, "it cannot fairly be said to be 'reasonably practicable' to guard against a contingency that could not reasonably have been foreseen, inasmuch as its occurrence would be contrary to all previous experience."[210] Thus, although Jenkins mentioned Asquith's disproportionate-cost test, he and the other judges in the Court of Appeal had no occasion to apply it.

206. *Marshall*, [1954] A.C. at 362.
207. *Id.*
208. *Id.*
209. *Id.* at 362–63.
210. [1953] 1 Q.B. 167, 178 (C.A. 1952).

In the House of Lords, by contrast, it was the issue of precaution costs on which the case turned. Rather than focusing on reasonable foreseeability, Lord Oaksey invoked Lord Atkin's disproportionate-cost test:

> [W]hat is "reasonably practicable" depends upon a consideration whether the time, trouble and expense of the precautions suggested are disproportionate to the risk involved. It is conceded in the present case that it was not reasonably practicable to make the roof secure by timbering, and to have attempted to make it secure by pneumatic props in some places and by leaving it unmined in others when no slickenside had ever occurred for a period of 20 years was not, in my judgment, reasonably practicable.[211]

Similarly, Lord Reid endorsed Asquith's disproportionate-cost test in *Edwards*,[212] and his application of that test leaves no doubt that he agreed that the high cost of a precaution could sometimes make it not reasonably practicable:

> Slickenside was a known danger, but there was no more reason to anticipate it or provide against it at the place of the accident than elsewhere in the mine, and a finding that precautions ought to have been adopted at the place of the accident would imply that they ought also to have been adopted generally. I am of opinion that this was not reasonably practicable, and I base my opinion on these factors. The danger was a very rare one. The trouble and expense involved in the use of the precautions, while not prohibitive, would have been considerable. The precautions would not have afforded anything like complete protection against the danger, and their adoption would have had the disadvantage of giving a false sense of security.[213]

Lord Tucker, with whom Lord Cohen agreed, also approached the hydraulic prop issue by "weighing the suggested precautionary measures against the risk."[214] Like Lord Reid, he thought the precautions should not have been taken because the risk was "very remote," the precautions were "of an elaborate nature," and there was no assurance that they would have prevented the accident.[215]

Lord Keith concurred in the result on the unforeseeable-risk ground on which the Court of Appeal had relied, but dissented from the Law Lords' use of cost-benefit balancing: "I could not, as at

211. *Id.* at 370.

212. *Id.* at 373 ("[I]n my judgment, there may well be precautions which it is 'practicable' but not 'reasonably practicable' to take, and I think that that follows from the decision of the Court of Appeal in *Edwards v. National Coal Board*. I agree with what was said in that case by Asquith L.J. (as he then was). . . .").

213. *Id.*

214. *Id.* at 376.

215. *Id.*

present advised, accept it that the measure of an employer's liability can satisfactorily be determined by having regard solely to the proportion which the risk to be apprehended bears to the sacrifice in money, time or trouble involved in meeting the risk."[216]

Notwithstanding Lord Keith's protest, *Marshall* reveals both continued support for cost-benefit balancing and considerable sophistication in analyzing the pros and cons of precautions. Especially in the judgments of Lords Reid and Tucker, one sees a deft assessment of why the marginal gain from the precaution would have been small (imperfect effectiveness plus some offsetting new dangers). And all the Law Lords except Lord Keith weighed precaution costs as a factor in the balance.

E. Morris v. West Hartlepool Steam Navigation Co.

Any lingering doubts about Lord Reid's commitment to balancing risks against precaution costs at common law (at least in the employment context) are laid to rest by his judgment in *Morris v. West Hartlepool Steam Navigation Co.*[217] *Morris* also provided an occasion for the House of Lords to revisit the relationship between custom and reasonable care that had surfaced in *Paris* and *Christmas.*

In *Morris*, a young seaman was badly injured when he fell through an open hatch in the 'tween deck of a cargo vessel during a transatlantic journey. The plaintiff had been sent 'tween decks with two other sailors to get a piece of timber that was needed for repairs to one of the holds. Although the weather at the time was fair, it appeared that the plaintiff probably lost his balance and fell due to the rolling of the ship. The hatch through which he fell some forty feet to the hold below was guarded only by a ten-inch coaming. When the ship was in port, regulations required that a guardrail (consisting of stanchions and a wire rope) be placed around open hatches, and the ship accordingly carried a supply of removable guardrails. The plaintiff conceded that it had been necessary to remove the guardrail earlier in the voyage in order to repair and clean the hold, but argued that after that work was completed the guardrail could and should have been reinstalled. The defendant's main response was that it was the established custom not to fence the

216. *Id.* at 378.
217. [1956] A.C. 552 (appeal taken from Eng.).

'tween deck hatches while at sea, because there was ordinarily no occasion for anyone to go 'tween decks then.[218]

The trial judge (Streatfeild, J.) held for the plaintiff in a striking example of the offensive use of cost-benefit balancing to attack an established custom. Given that if a fall occurred it would lead to grave injury, "there was a duty on the employers, even though it was said that it was not usually done, to take just that reasonable care, which would have been so simple in this case."[219]

1. The Court of Appeal

A divided Court of Appeal (Denning, L.J., and Parker, L.J.J, Morris, L.J., dissenting) reversed.[220] To place the judgments in perspective, a brief digression on the role of custom is necessary. In *Paris*, Lord Normand had quoted Lord Dunedin's statement in *Morton v. William Dixon, Ltd.*, that a plaintiff who asserts that an employer negligently omitted a precaution must either show that the untaken precaution was customary, or that "'it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it.'"[221] Lord Normand then glossed that formulation as follows: "[T]he test is whether the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it."[222] As Parker said, in the years since *Paris*, these passages had come to be "constantly relied on by defendants, who seek to read 'folly' in the sense of 'ridiculous.'"[223]

Although none of the judges of the Court of Appeal accepted that pro-defendant interpretation, custom does appear to have been dispositive for Denning. He suggested that in order to "overcome the weight of this general practice" the plaintiff had to show "an obvious danger or a proved danger."[224] Prior to the accident, these tests were not satisfied: no one had heard of such an accident occurring; "it was only on rare occasions that anyone would have to go near the unfenced hold; and the task of putting up a guard-rail might well be

218. Morris v. W. Hartlepool Steam Navigation Co., Ltd., [1954] 2 Lloyd's Rep. 507, 509 (C.A.).

219. *Id.*

220. *Id.* at 519.

221. Lord Normand, in *Paris v. Stepney Borough Council*, [1951] A.C. 367, 382 (1950) (appeal taken from Eng.) (quoting Morton v. William Dixon, Ltd., [1909] Sess. Cas. 807, 809.)

222. *Id.*

223. *Morris*, [1954] 2 Lloyd's Rep. at 518.

224. *Id.* at 510.

fraught with as much danger as the fetching of a piece of timber."[225] These considerations, he thought, made it reasonable to follow the existing custom, even though "[o]ne can see now that it would be better to put up a guard-rail."[226]

Parker similarly suggested that "the word 'folly' in these passages means no more than 'imprudent' or 'unreasonable.'"[227] But that still implied that the plaintiff had to show that the precaution was "so obvious" that it was imprudent to omit it.[228] On the facts in *Morris*, he suggested that the reasonably prudent employer is "(1) bound to take into consideration the degree of injury likely to result; (2) bound to take into consideration the degree of risk of accident; (3) entitled to take into consideration the degree of risk, if any, involved in taking precautionary measures."[229] "Balancing these considerations," he concluded that the plaintiff had failed to prove that it was unreasonable not to put up the guardrail.[230]

In dissent, Morris argued that a guardrail would have "involved no cost and little time."[231] Hence the open hatch "was an unnecessary risk, for it could so easily have been eliminated and no sort of advantage resulted from its existence."[232] He also argued, contrary to Denning that the evidence indicated that erecting the guardrail once the cleaning and repair work was completed would have posed no significant risk.[233]

The centerpiece of Morris's dissent, however, was a powerful argument that custom carries weight only if the circumstances are those to which the custom applies:[234]

> But even if the general practice is accepted as a pattern of what is reasonable, it must be considered whether the circumstances on the

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* Parker omitted the expense of taking precautions, I believe, because that would have been a *de minimis* consideration in the circumstances of this case.

230. *Id.*

231. *Id.* at 511. As Morris pointed out, the trial judge had found that "[i]t only required a few stanchions put in and one wire rope threaded through the top of them, the work of only half an hour in the opinion of one witness, and only a quarter of an hour in the opinion of another." *Id.* at 512.

232. *Id.* at 516.

233. *Id.* at 515.

234. Morris accepted that, in line with the Dunedin/Normand test, "the allegation of a negligent omission not being supported by proof of some usual practice in like circumstances, the case had to be proved by showing that a reasonable and prudent man would think that the precaution of guarding the open hatch was obviously necessary." *Id.*

> plaintiff's ship were the same as those to which the general practice is referable. If no one goes to the 'tween deck then there is no occasion to provide a guard. That may well be the general state of affairs. But the construction of different ships may vary as also, maybe, the mode of procedure on them. If, however, men have frequent occasion to go to the 'tween deck, then, in my judgment, common prudence and reasonable foresight would call for the erection of a guard. . . . In the present case the evidence was that men "often" had to go to the 'tween deck.[235]

2. The House of Lords

The House of Lords was sharply divided in *Morris*, but the point of disagreement concerned the *interplay* between custom and balancing—not whether balancing was appropriate. Lord Morton of Henryton, who insisted that the "folly" test should not be watered down, argued that the plaintiff had not met the heavy burden of showing that the customary omission of guardrails around the hatches was negligent.[236] Lord Porter, who agreed that the plaintiff should not recover, linked deference to custom with the view he had expressed in *Bolton v. Stone*, that defendants are in a stronger position if they never considered a risk than if they considered it but decided to ignore it:

> Men do not stop to consider whether each step they take is safe. They act upon what is generally regarded as a safe course until some untoward event shows that they may have been mistaken, and then, as Lord Thankerton pointed out in *Glasgow Corporation v. Muir*, one must be careful not to impute negligence from ex post facto events.[237]

Lord Porter's argument can be recast as a claim that reasonable people do not balance costs and benefits with regard to "each step they take." Instead, reasonable people rely on practices that are generally regarded as safe. (Of course, that would still leave a role for balancing in cases not controlled by an established practice). Here (as in Lord Reid's judgment in *Bolton*) we can see how the reasonable person standard serves as an authority to which a judge can appeal, and from which he can claim to derive subsidiary doctrines to guide the determination of negligence.

235. *Morris*, [1954] 2 Lloyd's Rep. at 516.

236. Morris v. W. Hartlepool Steam Navigation Co., [1956] A.C. 552, 558 (appeal taken from Eng.) (citations omitted).

237. *Id.* at 568 (citing Glasgow Corp. v. Muir, [1943] A.C. 448, 455 (appeal taken from Scot.)).

In addition to this argument, however, Lord Porter also engaged in balancing. He agreed with Parker that the same witnesses who "said that the guard-rail could have been put up without danger in a very few minutes" also "took the view that there was equally no danger in walking along the gangway."[238] In other words, he thought reliance on the existing custom was reasonable, because the danger was just as negligible as the cost of precautions.

Lord Reid, who was in the majority for the plaintiff, began by noting that a ship owner is under a duty to "eliminate unnecessary risks so far as that is reasonable and practicable."[239] This "reasonable and practicable" formulation sounds deliberately similar to the "reasonably practicable" test in *Edwards*, *Marshall*, and the other breach-of-statutory-duty cases. Moreover, Lord Reid's judgment in *Morris*, like his judgment in *Marshall*, explicitly balances risk against precaution costs. It would seem, then, that Lord Reid believed that the common-law negligence standard closely resembled the statutory "reasonably practicable" test.[240]

Lord Reid next established that the risk was reasonably foreseeable because an open hatch is obviously dangerous and there are "many ways in which a man may slip or lose his balance without that being solely due to his negligence."[241] He then turned to the issue of custom. Like Morris in the court below, he accepted that a reasonable man would adhere to a long-established custom, but only if the custom "has been followed without mishap sufficiently widely in circumstances similar to those in his own case in all material respects."[242] Here the defense broke down because the evidence suggested that it was not the practice in other ships to send seamen to the 'tween decks after cleaning and repairing was finished, while it was "'quite usual' in this ship."[243] The defendants therefore could not rely on custom.

Lord Reid then explained how, with custom inapplicable, the balancing approach should be used to determine negligence:

238. *Id.* at 569.

239. *Id.*

240. In *Marshall*, Lord Reid had said, "I do not find it helpful to consider whether this statutory duty [to take "reasonably practicable" precautions] is in every case the same as an employer's common law duty." Marshall v. Gotham Co., [1954] A.C. 360, 373 (appeal taken from Eng.). That statement, however, is not inconsistent with (indeed, it implies) that the two duties *are* the same in the run of cases.

241. *Morris*, [1956] A.C. at 570.

242. *Id.* at 574.

243. *Id.*

> Apart from cases where he may be able to rely on an existing practice, it is the duty of an employer, in considering whether some precaution should be taken against a foreseeable risk, to weigh, on the one hand, the magnitude of the risk, the likelihood of an accident happening and the possible seriousness of the consequences if an accident does happen, and, on the other hand, the difficulty and expense and any other disadvantage of taking the precaution.[244]

Finally, he applied that approach to the facts:

> Here the likelihood of an accident may have been small, but at least it was sufficient to prevent the respondents from maintaining that the accident could not have happened without the appellant being negligent. And the consequences of any accident were almost certain to be serious. On the other hand, there was very little difficulty, no expense and no other disadvantage in taking an effective precaution. Once it is established that danger was foreseeable and, therefore, that the matter should have been considered before the accident, it appears to me that a reasonable man weighing these matters would have said that the precaution clearly ought to be taken.[245]

As these passages confirm, Lord Reid believed that a reasonable employer balances costs and benefits. But what of the disproportion test? He makes no mention of a requirement that the costs be disproportionate. On the other hand, even in *Marshall*—where he endorsed Asquith's judgment setting out the disproportionate-cost test—Lord Reid did not actually recite the disproportionate-cost language. Instead, in what I believe was meant to be a "translation" of that test, he stated: "I think it enough to say that if a precaution is practicable it must be taken unless in the whole circumstances that would be unreasonable. And as men's lives may be at stake it should not lightly be held that to take a practicable precaution is unreasonable."[246] That statement about the statutory "reasonably practicable" defense seems quite consistent with the general tenor of Lord Reid's common-law balancing in *Morris*.

Like Lord Reid, Lord Tucker stressed that the evidence of custom was of little value insofar as it concerned ships in general, because on most ships crewmembers had no occasion to go 'tween decks.[247] Lord Tucker also signaled, however, that he was prepared to use balancing aggressively to challenge customs.[248] Insofar as the

244. *Id.*
245. *Id.* at 575.
246. Marshall v. Gotham Co., [1954] A.C. 360, 373 (appeal taken from Eng.).
247. *Morris*, [1956] A.C. at 576.
248. *Id.*

evidence suggested that guardrails were not used even on ships where seamen would be passing by the hatches, he thought the custom was plainly unreasonable: the risk "was obvious, its consequences were likely to be calamitous, and the remedy was simple and available."[249]

Lord Cohen also engaged in cost-benefit balancing. His statement of the facts is noteworthy because it displays such a sharp eye for factual nuances that have a bearing on the factors in the Hand Formula:

> [A]s they strike me, the salient admitted facts appear to be, on the one hand, the size of the gaping hole in the 'tween decks when the hatch is opened, the risk of anyone in the vicinity falling down if he loses his balance, the obvious gravity of the injuries which were likely to be done to anyone who fell through that hole, the easiness of taking the precaution of fixing the stanchion and wire rope fence around the open hatch and the fact that the saving of time in not erecting it was negligible; on the other hand, the width of the passage, some 12 feet, between the stack of dunnage and the open hatch, the fact that only seamen would be passing along that passage, the fact that, according to the evidence, it was not the practice aboard grain ships to fence in open 'tween deck hatches or cover them up after the holds had been made ready for reloading, and the fact that no evidence was given of any occurrence of a similar accident by any of the witnesses, one of whose experience went back some 40 years. There was one disputed fact to which some importance attaches, and that is the frequency with which it was necessary for members of the crew to have access to the 'tween decks after the holds had been made ready. On that point I think it is clear that the learned judge accepted the evidence of the boatswain, Mr. Barker, to the effect that men were often sent down 'tween decks to collect pieces of timber for use in connexion with repair work, and I am not prepared to differ from him on that point.[250]

Lord Cohen was willing to assume *arguendo* that the circumstances on board the ships as to which evidence of practice was given were like those prevailing on board the defendants' vessel.[251] Nevertheless he concluded that the defendants were negligent. He agreed with Parker's summary of the considerations a reasonable employer would balance (the degree of injury, the likelihood of an accident, and the disadvantages of precautionary measures),[252] but reached the opposite conclusion in applying that test to the facts:

249. *Id.*

250. *Id.* at 578. Interestingly, in Lord Cohen's analysis the frequency with which seamen pass by the open hatch on errands is relevant because it affects the probability of an accident, rather than because it makes the customary practice inapplicable.

251. *Id.* at 579.

252. *Id.*

> There was an obvious risk in being near to the open hatch: it was one to which the plaintiff became exposed in carrying out the duty assigned to him; the consequences of an accident would obviously be very serious; the risk was an unnecessary risk in that it could easily have been avoided and no sort of advantage resulted from its existence.[253]

Morris confirms that the Law Lords accepted a balancing approach to negligence. It also shows that the Law Lords were increasingly fluent and adept at engaging in qualitative cost-benefit analysis within the constraints of a common-law system.

F. Carmarthenshire County Council v. Lewis

Clear as *Morris* is in embracing a balancing approach to negligence, one could reasonably wonder whether that approach is confined to employment or workplace cases. *Carmarthenshire County Council v. Lewis*,[254] which was decided roughly a year before *Morris*, shows that the balancing approach is applicable even as between strangers. And the judge who goes out of his way to balance—rather than solving the case by resort to res ipsa loquitur—is Lord Reid.

In *Carmarthenshire*, a truck driver was killed when he swerved into a telephone pole in order to avoid hitting a four-year old boy who ran into the road in front of him. The boy had wandered away from his nursery school classroom, crossed the school's playground, gone through a latched (but not locked) gate into a lane and down the lane about one hundred yards to the street. He was able to wander away because his teacher, who was about to take him for a walk into town, had left the classroom for a moment, during which time she discovered that another child had fallen and cut himself. She stopped to wash and bandage the cut, which took some ten minutes, and then decided to take the injured child to the headmistress' room to see whether a doctor should be called. When she returned to the classroom the boy was gone.[255]

The deceased's widow sued the local education authority. The two main grounds for negligence were that the boy's teacher had negligently left him unattended too long, and that the school had failed to keep the gate to the lane locked.[256]

253. *Id.* at 579–80.
254. [1955] A.C. 549 (appeal taken from Eng.).
255. *Id.* at 550–51.
256. *Id.* at 556–57.

1. Lord Reid

Lord Reid found it a close question whether the teacher had negligently failed to check on the boy who was waiting for her when she found she needed to attend to a hurt child.[257] He thought it clear, however, that the education authority was negligent for failing to anticipate and guard against this kind of occurrence. In reaching this conclusion, Lord Reid balanced the risk against the burden of precautions:

> However careful the mistresses might be, minor emergencies and distractions were almost certain to occur from time to time so that some child or children would be left alone without supervision for an appreciable time. The actions of a child of this age are unpredictable, and I think that it ought to have been anticipated by the appellants or their responsible officers that in such a case a child might well try to get out onto the street and that if it did a traffic accident was far from improbable. And it would have been very easy to prevent this, and either to lock the gates or, if that was thought undesirable, to make them sufficiently difficult to open to ensure that they could not be opened by a child so young that it could not be trusted alone on the street. The classroom door was not an obstacle, and no doubt it was convenient that the children should be able to open this door themselves, but that meant that the way to the street was open unless the outer gate was so fastened or constructed as to be an obstacle to them.[258]

The defendants also made a no-duty argument, asserting that they owed a duty of care to the child in their care, but not to persons who might be endangered by the child's presence in the road. Lord Reid's explanation of why this argument failed indicates that he viewed the duty of reasonable care as basically equivalent to the duty to take reasonably practicable precautions:

> The appellants say that . . . if such a duty is held to exist it will put an impossible burden on harassed mothers who will have to keep a constant watch on their young children. I do not think so. There is no absolute duty; there is only a duty not to be negligent, and a mother is not negligent unless she fails to do something which a prudent or reasonable mother in her position would have been able to do and would have done. Even a housewife who has young children cannot be in two places at once and no one would suggest that she must neglect her other duties, or that a young child must always be kept cooped up. But I think that all but the most careless mothers do take many precautions for their children's safety and the same precautions serve to protect others. I cannot see how any

257. *Id.* at 564.
258. *Id.* at 563–64.

> person in charge of a child could be held to have been negligent in a question with a third party injured in a road accident unless he or she had failed to take reasonable and practicable precaution for the safety of the child.
>
> What precautions would have been practicable and what precautions would have been reasonable in any particular case must depend on a great variety of circumstances. But in this case it was not impracticable for the appellants to have their gate so made or fastened that a young child could not open it, and, in my opinion, that was a proper and reasonable precaution for them to take.[259]

The other Law Lords in the majority, while not rejecting balancing, relied primarily on the imaginative use of the reasonable person standard and on res ipsa-style inferences. Thus, Lord Goddard approached the teacher's negligence by asking how a "careful parent" would behave in analogous circumstances.[260] He thought the teacher had acted "just as one would expect her to do, that is to attend to the injured child first, never thinking that the one waiting for her would go off on his own."[261] But while the teacher's absence explained how the child could have gotten out of the classroom, it did not explain the child's presence in the street, which gave rise to an inference of negligence the defendants had failed to dispel.[262] Lord Tucker similarly argued that the accident "prima facie indicates negligence on the part of those in charge of the child."[263] As Lord Keith of Avonholm put it, one can infer from the presence of a toddler in a busy street that "someone has been thoughtless, or careless, or negligent of their safety."[264]

Lord Oaksey dissented. He thought that the precaution of keeping the gates locked had not been raised at trial, and that therefore the case should be decided based on whether or not the teacher had been negligent to leave the two children unattended.[265] In his judgment, because the teacher knew the boy who was waiting for her was well behaved, and was waiting to be taken out for a treat, it was reasonable for her to behave as she had when faced with

259. *Id.* at 566.

260. *Id.* at 561.

261. *Id.* at 562.

262. *Id.*

263. *Id.* at 568.

264. *Id.* at 570. Because the defendants failed to overcome this presumption of negligence, Lord Keith thought it unnecessary to decide what the defendants should have done differently. *See id.* at 571. This illustrates the way in which res ipsa substitutes for the plaintiff's normal obligation to identify an untaken precaution the defendant should have taken. *See* Mark F. Grady, *Res Ipsa Loquitur and Compliance Error*, 142 U. PA. L. REV. 887, 912–13 (1994).

265. *Carmarthenshire*, [1955] A.C. at 559.

another child with a possibly severe cut.[266] In other words, Lord Oaksey arrived at his contrary judgment by balancing the risk (which the teacher reasonably believed negligible) against the importance of the business that detained her.

The judgments in *Carmarthenshire* are a good reminder that cost-benefit balancing is merely one important tool for deciding negligence cases. In addition to relying on res ipsa inferences, the judgments reflect considerable use of the reasonable person standard as an imaginative device. That is, the judges ask—as jurors might—how a reasonable teacher would have behaved, and they approach that inquiry by putting themselves in the teacher's position. Yet the fact remains that *Carmarthenshire*, and particularly Lord Reid's judgment, also deploys cost-benefit balancing in this non-employment setting. *Carmarthenshire* thus attests to the general availability of cost-benefit balancing in negligence cases.

G. Haley v. London Electricity Board

Haley[267] was decided just two years prior to *Wagon Mound No. 2*. It falls within the same broad category of stranger cases as *Bolton v. Stone*, *Carmarthenshire*, and *Wagon Mound No. 2*, and it seemingly involved a risk that was substantial as well as foreseeable. Yet the Law Lords, including Lord Reid, balanced the foreseeable risk against the burden of precautionary measures to hold the defendants liable.

The plaintiff in *Haley* was a blind telephone operator who routinely walked along a footpath in London from his home to the bus stop where he caught the bus to work. He used a white stick to help guide him as he walked, and he knew this route thoroughly. The defendants, the London Electricity Board, dug a narrow trench sixty feet long lengthwise along the pavement. At each end of the trench they placed signs stating that there were street works ahead. In addition, at one end of the trench they placed a punner-hammer (a hammer with a long handle like a broom) across the pavement at an angle, with its handle resting on some railings; at the other they made a similar barricade using a pick and shovel. The plaintiff, walking along unaware of the street work, missed the punner-hammer with his

266. *Id.* at 558–59.

267. Haley v. London Elec. Bd., [1965] A.C. 778 (1964) (appeal taken from Eng.).

stick, tripped over it and fell, and as a result became almost totally deaf.[268]

In the House of Lords, the defendants' main contention was that reasonable care should be determined based on reasonably foreseeable risks to ordinary, sighted persons, excluding consideration of the blind.[269] The Law Lords unanimously rejected that argument and ruled that it was negligent not to have guarded the trench with a barricade such as a light fence that would have alerted a careful blind person that there was an obstruction.

Lord Reid suggested that there were two "well recognised grounds of defence" potentially available to the defendants:

> that it was not reasonably foreseeable that a blind person might pass along that pavement on that day; or that, although foreseeable, the chance of a blind man coming there was so small and the difficulty of affording protection to him so great that it would have been in the circumstances unreasonable to afford that protection.[270]

The first defense, lack of reasonable foreseeability, failed because it was a matter of "common knowledge" that there were many blind people who lived in London and walked its streets alone with the aid of sticks.[271] The second defense, that avoidance would have been unreasonably burdensome, also failed:

> No question can arise in this case of any great difficulty in affording adequate protection for the blind. In considering what is adequate protection again one must have regard to common knowledge. One is entitled to expect of a blind person a high degree of skill and care because none but the most foolhardy would venture to go out alone without having that skill and exercising that care. We know that in fact blind people do safely avoid all ordinary obstacles on pavements; there can be no question of padding lamp posts as was suggested in one case. But a moment's reflection shows that a low obstacle in an unusual place is a grave danger: on the other hand, it is clear from the evidence in this case and also, I think, from common knowledge that quite a light fence some two feet high is an adequate warning. There would have been no difficulty in providing such a fence here. The evidence is that the Post Office always provide one, and that the respondents have similar fences which are often used. Indeed the evidence suggests that the only reason there was no fence here was that the accident occurred before the necessary fences had arrived.[272]

268. *Id.* at 779.
269. *See id.* at 790.
270. *Id.* at 791.
271. *Id.*
272. *Id.* at 791–92.

If Lord Reid thought the risk in *Haley* was real but not substantial, he did not say so. Instead, he simply balanced the reasonably foreseeable "grave danger" against the minimal difficulty involved in providing a light fence.[273]

The other Law Lords reasoned along similar lines. Lord Morton of Henryton emphasized that the decision in the plaintiff's favor would not "make it necessary for persons working in any public place to take elaborate and extreme precautions,"[274] because workers would be entitled to assume that blind persons would take reasonable care, including avoiding locations that would be dangerous for them. Lord Evershed, too, stressed that onerous precautions were not required. He rejected Lord Denning's assertion in the Court of Appeal that "'[i]t would be too great a tax on the ordinary business of life if special precautions had to be taken to protect the blind.'"[275] Rather, he suggested, light barriers would normally suffice to indicate to a blind person that there was an obstruction,[276] and "guards of an elaborate or expensive character" would not be required.[277]

In Lord Hodson's view, the risk was foreseeable, and balancing favored additional care. In his analysis one can see once again how "reasonably practicable" serves as a shorthand for the balancing test at common law:

> Neither can it fairly be said that such extravagant precautions would be required in order to be useful for their purpose that they cannot be reasonably practicable. Bearing in mind that blind persons to be contemplated are those who behave reasonably and proceed on their way mindful of their own infirmity, and using such means as are available to them to avoid running into obstacles, it is unnecessary to provide special protection for them in the case of all obstacles which stand in their way.[278]

Finally, Lord Guest's judgment illustrates how the fact that others have taken a precaution with good results is evidence that it would be reasonable and practicable to do so. He stressed that the Post Office used a simple wooden "horse" in such situations, that in their experience this gave the blind effective warning, and that the plaintiff himself "had come across such fences in his journeys along the street and he had been adequately warned by their presence of

273. *Id.*
274. *Id.* at 795.
275. *Id.* at 797 (quoting Haley v. London Elec. Bd., [1964] 2 Q.B. 121, 129 (C.A. 1963)).
276. *Id.* at 800.
277. *Id.* at 799.
278. *Id.* at 805–06.

any excavation."[279] This judgment, too, reveals close attention to the costs and benefits of untaken precautions.

IV. *WAGON MOUND NO. 2* AND BEYOND

The last case in our sequence, *Wagon Mound No. 2*,[280] is also the first in which there is only a single appellate judgment—in this instance, written by Lord Reid but joined as well by the other members of the Privy Council. *Wagon Mound No. 2* is Exhibit B for the substantial foreseeable risk approach. I will argue, however, that although Lord Reid's formulations—when read with great care—do indeed renew his attempt in *Bolton* to make that approach part of English negligence law, he was no more successful the second time than the first. This is not to say that *Wagon Mound No. 2* makes no difference. On the contrary: it was a major victory for Lord Reid's broader approach to reasonable foreseeability—but it also helped routinize the use of cost-benefit balancing in a variety of contexts.[281]

A. *Lord Reid's Judgment in* Wagon Mound No. 2

In *Wagon Mound No. 2*, the plaintiffs' ships were undergoing repairs at a wharf in Sydney Harbor. The repairs, performed by the owners of the wharf, involved welding work that tended to cause pieces of hot metal to fly off and fall into the ocean. The defendant was the charterer of the ship Wagon Mound, which had been taking on furnace oil from a nearby wharf. Due to the carelessness of the Wagon Mound's engineers, a large quantity of the oil overflowed from the Wagon Mound, accumulated on the surface of the water, and drifted around the wharf at which the plaintiffs' vessels were being repaired. Two days later the floating oil was set alight, and the ensuing fire caused extensive damage to the wharf and to the plaintiffs' ships.[282]

The trial judge found that the most likely cause of the fire was that a hot piece of metal fell on some object supporting a piece of inflammable material in the oil-covered water, which ignited. He

279. *Id.* at 808.

280. Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co., [1967] A.C. 617 (P.C. 1966).

281. These two developments are intertwined: as the class of reasonably foreseeable risks expands to include increasingly remote risks, the percentage of foreseeable-risk cases in which avoidance would have been disproportionately costly should likewise increase.

282. *Id.* at 633.

further found that the Wagon Mound's officers could not reasonably have foreseen the fire. In light of the difficulty of igniting furnace oil on water, a reasonable person would have regarded the risk as "a possibility, but one which could become an actuality only in very exceptional circumstances."[283]

Lord Reid delivered the judgment of the Privy Council,[284] reversing the trial judge and holding the defendants negligent. Because the judge had found that a reasonable man in the defendants' position would have recognized "some risk of fire," the issue was, "what is the precise meaning to be attached in this context to the words 'foreseeable' and 'reasonably foreseeable.'"[285]

In answering this question, Lord Reid treated *Bolton v. Stone* as a watershed. Before *Bolton*, he argued, the decisions had fallen into two categories: cases in which a reasonable man would have disregarded the risk because it was "unreal" or "farfetched," and cases in which "there was a real and substantial risk or chance that something like the event which happens might occur, and then the reasonable man would have taken the steps necessary to eliminate the risk."[286] *Bolton* fell into a new third category. The risk there was not a farfetched or fantastic possibility, indeed it was "plainly foreseeable."[287] Yet the House of Lords "held that the risk was so small that in the circumstances a reasonable man would have been justified in disregarding it and taking no steps to eliminate it."[288]

It was in this third category, which he termed cases of "real risk,"[289] that Lord Reid placed the risk of fire in *Wagon Mound No. 2*. As he had in *Bolton*, Lord Reid's key move was to make a claim about the behavior of a reasonable man. In *Bolton*, he postulated that reasonable men do not impose substantial foreseeable risks on others. In *Wagon Mound No. 2*, his submission was that a reasonable man would not neglect even "a risk of such a small magnitude" unless "he had some valid reason for doing so, e.g., that it would involve considerable expense to eliminate the risk. He would weigh the risk

283. *Id.*

284. Lord Reid, Lord Morris of Borth-Y-Gest, Lord Pearce, Lord Wilberforce, and Lord Pearson.

285. *Overseas Tankship (U.K.)*, [1967] A.C. at 641.

286. *Id.* at 641–42.

287. *Id.* at 642.

288. *Id.*

289. *Id.* at 642–43.

against the difficulty of eliminating it."[290] On the facts of *Wagon Mound No. 2*, that calculation was straightforward: there was "no question of balancing the advantages and disadvantages," because discharging the oil was unlawful and "involved considerable loss financially" to the defendants.[291]

That left only what Lord Reid described as the trial judge's holding that "if a real risk can properly be described as remote it must then be held to be not reasonably foreseeable."[292] Although he acknowledged that this was "a possible interpretation of some of the authorities," Lord Reid rejected this view:

> If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage, and required no expense.[293]

So far, one would think *Wagon Mound No. 2* was a victory for the balancing conception of negligence. And indeed it was, as compared to Lord Reid's judgment in *Bolton*. Recall that there he seemed to leave no room for balancing: either a risk was substantial, in which case the defendant was liable if the risk could possibly have been avoided, or it was not, in which case the defendant was not liable. *Wagon Mound No. 2* now reinterpreted *Bolton* as a case in which the risk had been balanced against the difficulty of precautions and found too small to justify them:

> In their Lordships' judgment *Bolton v. Stone* did not alter the general principle that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man. What that decision did was to recognise and give effect to the qualification that it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it.[294]

Now, on its face this passage says that the reasonable person balances risks and precaution costs when deciding whether to take steps to guard against a small but real risk. It also says that the reasonable person will "take steps to eliminate a risk" that is real and *not* small.

290. *Id.* at 642.
291. *Id.* at 642.
292. *Id.* at 643.
293. *Id.* at 643–44.
294. *Id.* at 642–43.

But the crucial question is, to what lengths must the reasonable person go in taking steps to eliminate a substantial risk? On that point, I agree with Professors Weinrib and Wright that Lord Reid's judgment, carefully parsed, rejects the balancing approach—because it suggests that a reasonable person must do more than merely what is *reasonably* practicable to eliminate substantial risks.[295] The key evidence for that conclusion is his statement, already quoted above, that even before *Bolton* the rule was that if there was "a real and substantial risk or chance that something like the event which happens might occur . . . *then the reasonable man would have taken the steps necessary to eliminate the risk.*"[296] Read in light of Lord Reid's claim in *Bolton* that reasonable persons do everything possible to avoid creating substantial risks, this sentence implicitly asserts that English law employs the substantial foreseeable-risk approach.

I doubt, however, that the other judges in *Wagon Mound No. 2* had any idea that Lord Reid was attempting to clothe his "substantial risk" dictum in *Bolton* in the authority of the Privy Council. The point on which the attention of the other members of the Privy Council *would* have focused, and for which *Wagon Mound No. 2* is therefore strong authority, is that even a remote risk can be reasonably foreseeable. *Wagon Mound No. 2* thus gave Lord Reid a long-delayed victory over his colleagues in *Bolton*, who had insisted that the remote risk there was not reasonably foreseeable because it was unlikely (though familiar). At the same time, however, *Wagon Mound No. 2* explicitly employed balancing and explained *Bolton* as a decision turning on balancing. As we shall see next, these signals were heeded, but Lord Reid's artful, subtle language seeking to limit the availability of balancing was not.

295. In my view, the result is not an unlimited obligation. Rather, the actor must do everything *practicable*—that is, everything that is practically possible, including, if necessary, refraining from the activity in question—to eliminate substantial risks. This interpretation is buttressed by Lord Reid's judgment in *Brown v. National Coal Board*, [1962] A.C. 574. *Brown* involved a statutory provision that obliged the employer to "take the necessary steps" to keep the mine roofs secure. *Id.* As Lord Reid interpreted it, that language did not imply an absolute obligation. Rather, it entailed an obligation to take all practicable steps against all foreseeable risks to the security of the roof. *See id.* at 588. Lord Reid's phraseology in *Wagon Mound No. 2*—that the reasonable man would "take[] the steps necessary to eliminate the [substantial] risk"—is strikingly similar to this statutory wording. *Overseas Tankship (U.K.)*, [1967] A.C. at 642.

296. *Overseas Tankship (U.K.)*, [1967] A.C. at 641–42 (emphasis added).

B. *A Critique of Ernest Weinrib's Claim That* Wagon Mound No. 2 *Establishes the Substantial Risk Approach*

As noted in Part I, Ernest Weinrib distills from *Bolton* and *Wagon Mound No. 2*—which he takes to be the "leading cases" on the English standard of care—the proposition that "the English and Commonwealth approach to reasonable care ignores B almost completely and focuses narrowly on the risk, consisting in the combination of P and L."[297] There is no balancing in cases of unforeseeable risk, and no balancing in cases of foreseeable risks that are "substantial." Only in the narrow category of cases involving risks that are "real" but "very small" is balancing allowed under *Wagon Mound No. 2.* Cost-benefit analysis is thus relegated to a "modest role" as an exception to the dominant English approach, which evaluates the reasonableness of a risk based on "a casuistic judgment concerning the magnitude of the risk" rather than "a comparison with the cost of taking precautions."[298]

Although I generally agree with Weinrib's interpretation of Lord Reid's judgments, his argument that *Bolton* and *Wagon Mound No. 2* authoritatively establish the substantial foreseeable risk approach is unpersuasive for several reasons. By Lord Reid's own account, both *Bolton* and *Wagon Mound No. 2* involve very small risks, not substantial ones. Consequently, his suggestions that precaution costs are irrelevant in cases of substantial risk are dicta. In neither case was it necessary to decide whether an actor subject to a duty of reasonable care may ever justify his failure to eliminate a substantial foreseeable risk of harm to others.

Nor is it accurate to claim, as Weinrib does, that *Bolton* and *Wagon Mound No. 2* are "the leading cases" on the standard of care in English and Commonwealth law.[299] As we have seen, Lord Reid's judgment in *Bolton* diverged from the positions taken by the other Law Lords, and had no apparent impact on the subsequent cases discussed in Part III. And while it is fair to say that *Wagon Mound No. 2* is a leading case, it enjoys that distinction principally because of its influence on the meaning of reasonable foreseeability, rather than on the meaning of the standard of care.

297. WEINRIB, *supra* note 22, at 148.
298. *Id.* at 150–51.
299. *Id.* at 148 n.2.

To be sure, a number of later English cases have relied on Lord Reid's discussion of the standard of care in *Wagon Mound No. 2*. But the propositions about the standard of care for which *Wagon Mound No. 2* is most often cited are (1) that a reasonable person does not neglect a small foreseeable risk if there is no good reason for neglecting it, and (2) that a reasonable person balances the risk against the disadvantages of avoiding it.[300] Remarkably, I have found no English case relying on *Wagon Mound No. 2* for the proposition that a reasonable person does not balance risks and precaution costs if the risk is "substantial."[301]

This lack of authority is quite revealing.[302] If it were true that defendants must eliminate all substantial risks, one would expect plaintiffs in many cases to argue that the risk was substantial and was caused by the defendant's conduct. But that is not what plaintiffs do. Rather, they argue that the risk was reasonably foreseeable, and they identify specific precautions the defendant could feasibly (often, easily) have taken to eliminate it. Similarly, there are many English cases in which a defendant has attacked a plaintiff's untaken precaution on the grounds that it is unduly burdensome. But there are none in which the plaintiff has replied "but this case involves a substantial

300. Thus Wright asserts that "Wagon Mound No. 2 is sometimes misread as abandoning *Bolton v. Stone*'s substantial risk criterion and replacing it with the risk-utility formula." Wright, *The Standards of Care in Negligence Law*, *supra* note 30, at 262.

301. I searched the English reports available on Westlaw and Lexis using the following searches: (1) substantial /s risk & Bolton /s Stone; (2) substantial /s risk & Wagon /s Mound. Search (1) yielded thirteen cases on Westlaw, and thirty-seven cases on Lexis. Search (2) yielded twenty-one cases on Westlaw, and fifty-two cases on Lexis. None of those cases contains a statement that precaution costs are irrelevant if the risk is substantial. To be sure, I have also found no English case that explicitly affirms the contrary proposition—that the reasonable person balances risks and precaution costs even when the risk is substantial. But unless the term "substantial risk" really means "a very large risk" (rather than, as Lord Reid suggested, any risk that is not "extremely small"), the evidence presented in Parts II through IV of this Article suffices to show that English courts have frequently balanced costs and benefits in applying the negligence standard to defendants whose conduct created a substantial foreseeable risk of harm to others.

302. It is true, of course, that there are many cases in which a judge has noted that a risk was "small" and gone on to balance B against PL. But it is perfectly natural for judges to make statements of that kind as part of the balancing process itself. Indeed, ex ante even many risks that are paradigmatic of negligence are small. Expressed as a percentage, the chances that a drunk driver will injure another person are surely small—though dramatically higher than the chances that a sober driver will cause injury. (I invite skeptical readers to compare the number of times they have observed someone driving erratically with the number of drunk-driving accidents they have observed. Or, for those who occasionally overindulged in their youth, compare the number of times you would have failed a breathalyzer test with the number of automobile accidents you caused while legally intoxicated.) One therefore cannot infer from such references to small risks that the judge would refuse to balance if he or she thought the risk was substantial.

risk, so burdensomeness is irrelevant." For its part, if the court concludes that the risk is reasonably foreseeable, it does not go on to ask whether the risk was substantial. Instead it proceeds to balance the costs and benefits of avoidance.[303] These practices seem quite inconsistent with a legal rule that forbids balancing in cases of substantial risk.[304]

Moreover, if the substantial risk approach really defined the standard of care, one would expect the definition of "substantial risk" to be the subject of recurring litigation. The various adjectives used by Lord Reid in *Bolton* and *Wagon Mound No. 2* would permit a judge to rule that a risk is substantial unless it is "infinitesimal," unless it is "extremely small," or unless it is "small." Which is it, and why? If there really were an established rule that balancing is allowed for small risks but forbidden for substantial risks, plaintiffs would fight for the "infinitesimal" standard while defendants would advocate the "small" one.[305] Yet in the more than thirty years since *Wagon Mound No. 2* there are no English cases joining issue on this point.[306]

Perhaps, on reflection, this should not be especially surprising. In *Wagon Mound No. 2*, Lord Reid did not dwell on the point that the difficulty of eliminating a risk is irrelevant if the risk is substantial. His statement that if there was "a real and substantial risk," the reasonable person would "take[] the steps necessary to eliminate the

303. *See, e.g.*, Solloway v. Hampshire County Council, [1981] E.G.D. 904 (C.A.) (Dunn, L.J.) ("I would hold that it was no more than a vague possibility, not a 'real risk,' in the words of Lord Reid in the Wagon Mound (No. 2), but assuming that there was a real risk or chance, I would say that it was an outside chance and that outside chance has to be balanced against the practical steps which could reasonably have been taken by the defendants to minimise the damage." (citations omitted)).

304. Weinrib says that the English and Commonwealth practice "is not as explicit as [his] description makes it," and that *Bolton* and *Wagon Mound No. 2* "are remarkable precisely because they show the courts reflecting on a process normally treated merely as a casuistic determination by the trier of fact." WEINRIB, *supra* note 22, at 148 n.2. But if, as Weinrib maintains, there are three categories (unforeseeable risks, small foreseeable risks, and substantial foreseeable risks), with a different legal rule governing each, one would expect the courts at least to be explicit about which category (and hence which rule) applies.

305. *Cf.* the recurring battles over the definition of "reasonably foreseeable" risk—battles that litigants have continued to fight even in the aftermath of *Wagon Mound No. 2*.

306. There are, to be sure, many cases in which the decisive issue is whether the risk was reasonably foreseeable, and in that sense English law does commonly involve "a casuistic judgment concerning the magnitude of the risk." WEINRIB, *supra* note 22, at 151. But these cases do not treat the cost of precautions as irrelevant to determining negligence. If the court finds that the risk was not reasonably foreseeable, it never reaches the question of precaution costs.

risk,"[307] was made in passing, and rejects the relevance of precaution costs only by implication. Whatever the normative merits of the substantial foreseeable risk approach, in proposing it as a general standard for negligence Lord Reid was innovating.[308] An innovative approach, however, is unlikely to make headway unless its rationale and advantages are asserted far more boldly and explicitly than they were in *Wagon Mound No. 2.*

C. *A Critique of Richard Wright's Descriptive Challenge to Cost-Benefit Balancing*

Like Weinrib, Professor Richard Wright believes that a Kantian conception of negligence law is normatively preferable.[309] On the descriptive side, however, Wright differs markedly from Weinrib. Whereas Weinrib thinks Hand Formula negligence is dominant in the United States but only minimally influential in English law,[310] Wright thinks the actual legal influence of the Hand Formula on both English and American law has been greatly exaggerated. In his aptly titled

307. Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co., [1967] 1 A.C. 617, 641–42 (P.C. 1966).

308. *See* WEINRIB, *supra* note 22, at 148. Professor Weinrib also cites the Australian decision in *Wyong Shire Council v. Shirt*, 146 C.L.R. 40 (H.C. 1980). WEINRIB, *supra* note 22, at 148 n.2. Because my focus is on English rather than Commonwealth cases, I have not examined other Australian precedents. *Wyong Shire*, however, clearly supports the cost-benefit balancing approach, not the substantial foreseeable risk approach. The main point for which *Wyong Shire* stands is that "[a] risk of injury which is quite unlikely to occur, such as that which happened in *Bolton v. Stone*, may nevertheless be plainly foreseeable." 146 C.L.R. at 47 (Mason, J., joined by Stephen and Aickin, J.J.); *see also* 146 C.L.R. at 49 ("There is no requirement that the harm-causing event must be foreseeable as 'likely to happen' or 'not unlikely to happen.'") (Murphy, J.). In arriving at that conclusion, the majority opinion of the High Court endorses and quotes extensively from Lord Reid's judgment in *Wagon Mound No. 2.* Yet the majority makes no mention of Lord Reid's "substantial risk" dictum, and goes on to formulate the standard of care in balancing terms:

> In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. *The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.* It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.

146 C.L.R. at 47–48 (emphasis added).

309. *See* Richard Wright, *Right, Justice and Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 30, at 159.

310. WEINRIB, *supra* note 22, at 148.

article *The Standards of Care in Negligence Law*,[311] Wright argues that "the courts rarely use the aggregate risk-utility formula or any other uniform definition of reasonableness."[312] Instead, the courts use different criteria of reasonableness that are "distinguished primarily by who put whom at risk for whose benefit and by whether the person put at risk consented to such risk exposure."[313] These varying criteria, he suggests, are consistent with the Kantian ideal of equal freedom, but often inconsistent with a utilitarian balancing approach.

Wright distinguishes eight major "contexts," of which the first five deal with defendants, and the last three with plaintiffs. For present purposes, the defendant-related categories will suffice. They are "(1) defendants' treating others as means, (2) defendants engaged in socially essential activities, (3) defendant occupiers' on-premises risks, (4) defendants' activities involving participatory plaintiffs, [and] (5) paternalistic defendants."[314] Category (1), which includes *Bolton* and *Wagon Mound No. 2*, consists of cases in which the defendant put the plaintiff at risk for the defendant's own benefit.[315] The "actual test of negligence" in these cases, Wright maintains, is whether the defendant created "a significant, foreseeable, and unaccepted risk to the person or property of others."[316]

Category (2) includes risks that are "unavoidable aspects of activities essential or important to all persons in the society," including "those posed by properly constructed, maintained, and operated electrical generation and transmission facilities, dams, trains, automobiles, and planes."[317] In these cases, Wright says, persons are deemed to have consented to "reasonable"—meaning "unavoidable"—risks, a standard that requires defendants to act in "'the most careful manner,'" and to impose risks only if they are "greatly (not merely marginally) outweighed by the activity's social utility."[318] Although Wright cites no English authority for this category, the standard he invokes here obviously resembles the English disproportionate-cost approach.

311. Wright, *The Standards of Care in Negligence Law*, *supra* note 30.
312. *Id.* at 260.
313. *Id.* at 261.
314. *Id.*
315. *Id.* at 261–63.
316. *Id.* at 261.
317. *Id.* at 264.
318. *Id.* at 264.

Category (3) encompasses risks to persons on the defendant's property from activities or conditions on the property. Here, Wright points out, the standard of care varies depending on the relationship between defendant and plaintiff, with the highest standard applying to business invitees, and the lowest to adult trespassers.[319] As an example of "equal-freedom reasoning" in this category, he cites Lord Reid's judgment in the trespasser case of *British Railways Board v. Herrington*, in which he said:

> If a person chooses to assume a relationship with members of the public, say by setting out to drive a car or to erect a building fronting a highway, the law requires him to conduct himself as a reasonable man with adequate skill, knowledge and resources would do. . . . If he cannot attain that standard he ought not to assume the responsibility which that relationship involves. But an occupier does not voluntarily assume a relationship with trespassers. By trespassing they force a 'neighbour' relationship on him. When they do so he must act in a humane manner—that is not asking too much of him—but I do not see why he should be required to do more.[320]

Category (4) includes situations in which the plaintiff sought to benefit from the defendant's risky activity, as customer of, participant in, or spectator of that activity.[321] In this context, for which Wright takes product liability as paradigmatic, he accepts that "a type of risk-utility test is proper," albeit one focusing "solely on the risks and benefits to the typical consumer."[322]

Finally, category (5) consists of situations in which the defendant—without the plaintiff's consent—put the plaintiff at risk for what the defendant regarded as the plaintiff's benefit.[323] In this category, which is dominated by medical-treatment cases, "defendants generally are not allowed to do this without the plaintiff's consent, even if the expected benefits allegedly greatly outweigh the risks."[324] Wright acknowledges that the House of Lords' decision in *Sidaway v. Board of Governors of the Bethlem Royal Hospital*[325] is in tension with this description, because the majority adopted a "physician-centered medical-practice standard" that takes a "more

319. *Id.* at 265.
320. British Rys. Bd. v. Herrington, [1972] A.C. 877, 898–99 (appeal taken from Eng.).
321. Wright, *The Standards of Care in Negligence Law*, *supra* note 30, at 267.
322. *Id.*
323. *Id.* at 268.
324. *Id.*
325. [1985] A.C. 871.

paternalistic approach to doctor-patient relations."[326] He concludes, however, that the majority made major concessions to nonutilitarian value of patient autonomy, effectively requiring disclosure if the patient asks about risks or if there is a "'substantial risk of grave adverse consequences.'"[327]

Although Wright's account is far more nuanced than Weinrib's, his overarching claim that English courts "rarely" engage in cost-benefit balancing[328] is plainly incorrect. Indeed, quite apart from the evidence presented in this Article, a careful parsing of Wright's own categories establishes as much. The *only* category in which Wright attempts to show that cost-benefit balancing is flatly ruled out is his category (1)—situations in which defendants impose risk on stranger-plaintiffs. (And even as to that category, there is no such categorical prohibition on balancing.)[329] Of course, for normative purposes, this is an important category. But its *practical* significance is relatively minor, particularly after we remove activities such as driving and railroading, which end up in Wright's category (2). By contrast, according to Wright's own account, one version or another of cost-benefit analysis is used both for pervasive, socially important activities such as transportation, and for cases in which the plaintiff seeks to benefit from the defendant's risky activity—including both products liability and (in England) employment accidents.[330] These categories comprise a large percentage, probably a majority, of English tort litigation.

On the other hand, there is at least some truth in Wright's contention that English courts apply the negligence standard differently depending on the relationship between plaintiff and defendant, and in particular depending on who is seen as creating the risk and benefiting from it.[331] But there is no inconsistency between varying the

326. Wright, *The Standards of Care in Negligence Law*, *supra* note 30, at 268.

327. *Id.* at 269 (quoting *Sidaway*, [1985] A.C. at 900 (Lord Bridge)).

328. Wright, *The Standards of Care in Negligence* Law, *supra* note 30, at 260. Wright also places undue reliance on Lord Reid's judgment in *Wagon Mound No. 2.* When he claims that Lord Reid there "reiterated, if the risk were real and substantial, it would be unreasonable not to take steps to eliminate it, regardless of the utility of the risk or the burden of eliminating it," *id.* at 262, Wright is converting a subtle if definite implication into a clear, explicit, and unqualified rule.

329. *See, e.g.*, *infra* Subsection IV.D.4 (discussing English stranger cases employing balancing).

330. *See* Wright, *The Standards of Care in Negligence Law*, *supra* note 30, at 264, 267.

331. I have not investigated this issue in depth. However, in addition to the *Herrington* case, which strongly supports Wright's position, it seems fair to say that English judges have been more attracted to the substantial risk approach in stranger cases than in employment or other consensual settings.

severity of the duty of reasonable care and using cost-benefit balancing (suitably tailored) to implement these varying standards. Again, consider Wright's own account, according to which courts use a very stringent cost-benefit test in essential-activities cases, and a marginal-benefit test in product liability cases.[332] Lord Reid's judgment in *Herrington*[333] provides another example. In announcing the limited duty to "act in a humane manner" toward trespassers quoted above, Lord Reid used cost-benefit analysis to define the content of that duty:

> [The occupier] might often reasonably think, weighing the seriousness of the danger and the degree of likelihood of trespassers coming against the burden he would have to incur in preventing their entry or making his premises safe, or curtailing his own activities on his land, that he could not fairly be expected to do anything. But if he could at small trouble and expense take some effective action, again I think that most people would think it inhumane and culpable not to do that.[334]

In short, a system in which the stringency of the standard of care varies based on the relationship between defendant and plaintiff is entirely consistent with cost-benefit balancing.

As for Wright's discussion of the English position on informed consent, the fundamental point is that English law *delegates* to the medical profession the authority to decide which risks should be disclosed to patients. It would be surprising if cost-benefit balancing played no (or only a minor) role in the norms of the English medical profession, but that is an empirical inquiry for another occasion. In any event, the qualification of this position in *Sidaway*—that patients should presumably be told of substantial risks of grave harm, regardless of medical custom—can readily be defended as a cost-benefit judgment made at a higher level of generality.

Above and beyond these particular points, there is a more fundamental problem with Wright's approach. It lies in what we might call the doctrinal thinness of negligence law. The cases are silent or ambiguous with regard to many of the theoretically motivated distinctions Wright invokes. For example, Wright's focus on whether the plaintiff in some sense "consented" to the risk is rarely alluded to

332. *See* Wright, *The Standards of Care in Negligence Law*, *supra* note 30, at 264, 267.

333. [1972] A.C. 877.

334. *Id.* at 899. In effect, this is a reverse disproportionate-cost test: there is no liability unless the benefits of precautions are disproportionately greater than the burdens.

in the English cases[335]—and is never, to my knowledge, the subject of a systematic exposition along the lines Wright provides.[336]

D. *A Brief Survey of the Standard(s) of Care in Post-*Wagon Mound No. 2 *Cases*

A full treatment of the standard of care in English negligence law since *Wagon Mound No. 2* deserves an article of its own.[337] I present instead a brief survey that confirms that cost-benefit balancing continues to be used in a wide variety of accident cases, without reference to (or litigation over) whether the risk was "substantial."

As we saw in Part II, most of the formative cases establishing cost-benefit balancing as part of English negligence law involved workplace injuries to employees who then sue their employers. But are there categories of negligence cases in which balancing is forbidden? And does cost-benefit balancing play a comparably important role in other areas of negligence law? The first question is

335. Blackburn's famous judgment in *Fletcher v. Rylands*, L.R. 1 Ex. 265, (1866), is the only instance I know of in which an English judge used the idea of implied consent by potential victims as the basis for adopting a particular liability rule. Blackburn argued that all the cases in which plaintiffs were required to prove "want of care or skill occasioning the accident"—that is, negligence—"can be explained on the same principle, viz., that the circumstances were such as to show that the plaintiff had taken that risk upon himself." *Id.* at 287. Lord Reid's judgment in *Herrington*, [1972] A.C. 877, can be seen as a parallel attempt to use the idea of consent by potential *injurers* to entering into a "neighbour" relationship with persons exposed to risk by their activities—and hence, to a relatively demanding duty of reasonable care.

336. As I discuss in the Conclusion, the problem of doctrinal thinness complicates and to some extent frustrates my own descriptive project as well.

337. In the years since *Wagon Mound (No. 2)*, the House of Lords has decided many questions concerning the tort of negligence. But the vast majority of those decisions have involved elements of the tort other than breach. *See, e.g.*, McFarlane v. Tayside Health Bd., [2000] 2 A.C. 59 (involving whether negligent medical treatment resulting in the birth of a healthy child gives rise to an action for personal injury); Jolley v. London Borough of Sutton [2000] 2 Lloyd's Rep. 65 (H.L.) (involving whether, given that defendants were negligent, the type of accident that occurred was reasonably foreseeable); Home Office v. Dorset Yacht Co. Ltd., [1970] A.C. 1004 (involving whether Borstal officers owe a duty of care to members of the public to prevent trainees under their supervision from injuring them). Even those decisions that have addressed issues pertaining to breach have not focused on the standard of care or the exact status of cost-benefit balancing. For that reason, I have not thought it necessary to enlarge this already long article with an extended discussion of the post-*Wagon Mound (No. 2)* decisions in the House of Lords. I do want, however, to emphasize three points about those decisions. First, approving references to (and incidental use of) cost-benefit balancing have continued apace. *See, e.g.*, Barrett v. Enfield London Borough Council, [2001] 2 A.C. 550, 572 (Lord Slynn of Hadley); Smith v. Littlewoods Org. Ltd., [1987] A.C. 241, 268–69 (Lord Mackay of Clashfern). Second, the decisions in *Bolton v. Stone* and *Wagon Mound No. 2* are taken to rest on cost-benefit balancing. *See Jolley*, 2 Lloyd's Rep. at 72 (Lord Hoffman). Third, the determination of whether there is a duty of care also entails balancing costs and benefits, albeit at a higher level of generality. *See Barrett*, [2001] 2 A.C. at 559–60 (H.L.) (Lord Browne-Wilkinson).

easier to answer than the second. I have found *no* context in which there is strong, settled authority ruling out the balancing approach to negligence. At most, one can argue that in true *Bolton* cases—that is, cases in which an activity on the defendant's land causes harm to persons on the highway, or on adjacent property—there is some tendency to employ the substantial risk approach, though even here the evidence is mixed.[338]

As for the second question, my impression is that cost-benefit balancing is more often a central feature of the court's analysis in workplace cases than elsewhere in English negligence law. Confident judgments about this issue, however, must await a much more in-depth look at other categories of cases. Consider, for example, automobile accident cases. It is clear that courts sometimes engage in cost-benefit balancing in these cases.[339] But they also look to everyday intuitions about how a reasonable driver would be expected to behave.[340] To get a good sense for the relative importance of these two modes of judgment, one would need to examine a large number of automobile cases. Thus, while I can say with confidence that cost-benefit balancing is *permitted* in English automobile-accident negligence cases, I make no claim about just how often courts actually make it a central feature of their decisions.

1. Employment Cases

In sharp contrast to the United States, where the exclusive remedy provisions of workers' compensation laws bar negligence suits by employees against their employers, such actions constitute a significant fraction of reported English negligence cases.[341] As Part II demonstrated, it was in these cases that cost-benefit balancing first established itself in English negligence law. Cost-benefit balancing

338. *See infra*, Subsection IV.D.5.

339. *See infra* nn. 371–77 and accompanying text.

340. *See, e.g.,* Hill v. Bruce, [1995] P.I.Q.R. 300, 301 (Q.B.) (framing the question in terms of whether a "reasonable and prudent driver" would have reacted in time to avoid a collision). In addition, of course, judges also look to safety statutes and customary norms in deciding automobile negligence cases. But as Kenneth Abraham has argued, reliance on these pre-existing norms should be distinguished from cases in which the decision maker must independently determine the content of the negligence standard. *See* Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187 (2001).

341. The English workman's compensation statutes require injured employees to elect between compensation under the statute—which, as in the United States, does not require proof of negligence by the employer—and damages for negligence at common law. John Munkman, EMPLOYER'S LIABILITY AT COMMON LAW, 15–16 (5th ed. 1962).

has continued to play a central role in contemporary employment cases. Lord Reid's formulation in *Morris* has often been quoted and applied. Yet I have not come across a single employment case in which a judge has suggested that *Morris* only applies to risks that are not substantial.[342] That issue is simply not litigated.

Probably the leading case since *Morris* is *Stokes v. Guest, Keen & Nettlefold (Bolts and Nuts) Ltd.*, in which Swanwick, J., held an employer negligent for failing to provide regular medical examinations of workers exposed to the risk of scrotal cancer and for failing to warn them of the risk and symptoms of this disease.[343] His formulation of the employer's duty to keep abreast of information about workplace-related risks, and to balance precaution costs against those risks,[344] has been applied by other judges in a variety of industrial settings, ranging from shipyard workers with mesothelioma[345] to crane operators with "white finger."[346] Some of these cases are decided on unforeseeable-risk grounds, but in most the decisive question is whether there were "reasonably practicable" precautions the defendant could have taken to avoid the risk.[347]

342. It is true that Lord Reid in *Morris* said that the likelihood of an accident there was "small," [1956] A.C. 552, 575 (appeal taken from Eng.), and I suppose that would allow him to have argued in *Wagon Mound No. 2*, had he been forced to address the matter, that *Morris* falls within the category of non-substantial risks. But this would have been a considerable stretch, because the point he was making in the relevant passage in *Morris* is that the risk was small, but not all *that* small. *See* Morris v. W. Hartlepool Steam Navigation Co., Ltd., [1956] A.C. 552, 575. There was a significant risk of a serious accident.

343. [1968] 1 W.L.R. 1776.

344. Swanwick, J., wrote:

> [T]he overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probably [sic] effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent.

[1968] 1 W.L.R. at 1783.

345. Bryce v. Swan Hunter Group Plc., [1987] 2 Lloyd's Rep. 426 (Q.B.D.).

346. Heyes v. Pilkington Glass Ltd., [1998] P.I.Q.R. P303 (C.A.).

347. *See, e.g.*, *Bryce*, 2 Lloyd's Rep. at 432 ("The duty was, in essence, a duty to take such steps as were reasonably practicable to provide a working environment that was safe, and I consider that this duty was owed to all who the defendants should reasonably have foreseen would be subjected to that environment.").

2. Product Design Cases

Although product liability cases seem less prominent in England than in the United States, they clearly have become an important subset of tort litigation in the years since *Donoghue v. Stevenson*.[348] English courts sometimes engage in cost-benefit balancing, particularly in design defect cases, even where the risk is clearly substantial. For example, in *Norbury v. Stone and British Lely*[349] an elevator caused a fatal fire during a hay baling operation.[350] The judge accepted expert evidence that the manufacturer knew the elevator would be used for straw bales and that "with 15,000 of these machines working at harvest time, in hot, dry conditions, it was only a matter of time before a conflagration occurred."[351] But he did not hold that the manufacturer was ipso facto negligent. Instead, he held the manufacturer negligent because "it is further agreed by the experts that a shield or umbrella could, without great difficulty or expense, have been designed to cover the hot parts of the engine and to minimise, to negligible proportions, the risk of straw getting in."[352]

Adams v. Rhymney Valley District Council[353] illustrates the use of balancing in the somewhat different setting of *building* design. The plaintiffs were injured (and their children killed) when their house caught fire while they were sleeping. Their escape was hindered because their bedroom windows were locked with removable keys that they had left in the kitchen. The plaintiffs claimed that the use of this window design in the terraced houses owned by the defendant council constituted negligence, and argued that push-button locks should have been used instead. A divided Court of Appeal rejected their claim, but the judges all agreed that the reasonableness of the design involved balancing the risks of fire (as to which push-button locks were safer) against the risks of children falling out of windows and thieves breaking in (as to which removable keys were safer).[354]

348. [1932] A.C. 562 (appeal taken from Scot.).

349. [1985] E.C.C. 289 (Q.B.D.).

350. *Id.*

351. *Id.* at 294.

352. *Id.* at 293.

353. [2000] 3 E.G.L.R. 25 (C.A.), *available at* 2000 WL 989356.

354. *Id.* *Adams* also involved other interesting questions I cannot deal with here, in particular whether the plaintiff could prove negligence by showing that if the defendants had considered the risk of fire, they probably would have substituted a push-button lock system. [2000] 3 E.G.L.R. at 27–30. This issue, of course, is reminiscent of the discussion in *Bolton* about whether a defendant's failure to *consider* steps to avoid a risk can constitute negligence.

3. Other Contractual or Consensual Settings

In addition to employment and product-liability cases, modern English courts have employed cost-benefit balancing in a wide range of other contractual or consensual settings. Here are a few illustrative examples:

In *Crown River Cruises Ltd. v. Kimbolton Fireworks Ltd.*, the plaintiff claimed that the defendant firefighters were negligent for failing to thoroughly extinguish a fire on a barge, which smoldered and later spread to their vessels.[355] The plaintiff claimed that in light of the characteristics of the barge's timber ceiling, which made it difficult to ensure that there were no smoldering pockets of fire, the defendants should have pumped in water sufficient to cover the ceiling, thereby ensuring that any remaining fire was extinguished.[356] The defendants responded that this was "overkill" and that flooding a vessel is "a last resort."[357] The judge found for the plaintiff because (1) the observable condition of the barge's ceiling suggested a heightened danger of smoldering, (2) the flooding would not have caused significant damage to the barge, (3) the flooding would not have taken very long to achieve, and (4) pumping the water out would not have been expensive or troublesome for the barge's owners.[358]

In *Maguire v. Fermanagh District Council*,[359] the plaintiff suffered serious injuries when he slipped while diving into the shallow end of a public swimming pool operated by the defendants.[360] In giving judgment for the plaintiff, McCollum, J., reasoned that the danger was serious and reasonably foreseeable.[361] He then turned to "the question as to the practicality or expense of enforcing a prohibition against diving at the shallow end," and concluded that the cost would have been minimal:

> [F]irm, but friendly, insistence on a policy of no diving at the shallow end, accompanied by appropriate notices, could have been implemented and was very likely to be successful. No one's

See Bolton v. Stone, [1951] A.C. 850, 862 (appeal taken from Eng.); Stone v. Bolton [1950] 1 K.B. 201, 207. In *Adams*, Sedley, L.J., argued that it could. [2000] 3 E.G.L.R. at 27–28.

355. [1996] 2 Lloyd's Rep. 533 (Q.B.D. Comm. Ct.).

356. *Id.* at 536, 548.

357. *Id.* at 548.

358. *Id.*

359. [1996] N.I. 110 (C.A.).

360. *Id.* at 112.

361. *Id.* at 137–38.

> enjoyment of the swimming facility would have been greatly diminished because diving would still have been permitted at the deep end.[362]

British Road Services, Ltd. v. Arthur Crutchley & Co.,[363] illustrates the use of cost-benefit balancing in the context of a bailment relationship. The plaintiffs sued the defendant warehouse after thieves broke in through a skylight and drove off with a truckload of the plaintiffs' whisky.[364] Although he recognized that a truckload of whisky was highly attractive to thieves, and might therefore require extra precautions, the trial judge ruled for the defendants.[365] He stressed that

> [i]t has to be remembered that every addition to safety costs money and in the interests of his customers as well as his own interests the person whose business includes the safeguarding of goods has to draw a reasonable balance between the degree of risk and the cost of reducing it.[366]

In light of "the great difficulty of access to the skylight and the high cost of installing any really efficient alarm system to guard it," he concluded that the defendants had taken reasonable care.[367] The Court of Appeal reversed, but there was no suggestion that the trial judge had erred in employing a balancing approach.[368] Rather, as Lord Pearson put it, "the deterrent effect of additional precautions was not sufficiently taken into account in this case."[369] Taking additional precautions would "present the thieves with additional problems to be dealt with, so that they have more things to do, more things that may go wrong, greater expenditure of time, more risk of detection and more risk of pursuit and capture."[370]

362. *Id.* at 138. McCollum's language immediately preceding the quoted passage ("there is no reason to suppose that firm, but friendly, insistence . . .") appears to have erroneously inverted his actual meaning. But it seems clear from the context that the portion quoted accurately reflects what he intended to say.

Hutton, C.J., thought the case fell squarely within the dictum in *Wagon Mound No. 2* that a reasonable person would avoid even a small risk if it is real and if avoidance involved no difficulty or expense. *See id.* at 123. Girvan, J., dissented. *See id.* at 142–56.

363. [1968] 1 Lloyd's Rep. 271 (C.A. 1967).

364. *Id.* at 279.

365. *Id.* at 274–75.

366. *Id.* at 274 (quoting judgment of Cairns, J.).

367. *Id.* at 275.

368. *Id.* at 279, 283.

369. *Id.* at 283.

370. *Id.*

4. Non-consensual Cases

The balancing approach is not confined to settings in which the parties are in some sort of prior relationship from which contract or consent can be inferred.[371] One important illustration of this is automobile accidents in which courts are called on to determine what precautions a reasonable driver would have taken in the circumstances. I have not read enough automobile cases to be able to assert that English judges routinely engage in cost-benefit analysis in this context. That they sometimes do, and that the blackletter law authorizes it, is clear. The fullest statement I have found is in the judgment of Stephenson, L.J., in *McLoughlin v. O'Brian*:[372]

> There is, of course, an element of almost outrageous unreality in applying to such a case as this the conception of risks weighed and balanced against proportionate precautions, which is stated, for instance, by Lord Reid in [*Morris v West Hartlepool* and *Wagon Mound No. 2*]. A driver of a motor car does not, before deciding to overtake another vehicle or to break a speed limit, weigh up the risk of injuring or maiming other persons on the road, let alone the risk of some near relation of the persons he may injure suffering consequential injury by shock miles away—though if even a few drivers made that calculation the roads might be much safer and motor insurance cover much less expensive. Nevertheless that is the calculation which the hypothetical observer would have to make in the case of an industrial accident when considering whether it resulted from a breach of an employer's or occupier's duty to persons to whom a duty is admittedly owed. *A driver who owes a duty to drive with such reasonable care as will avoid the risk of injury to such persons as he can reasonably foresee might be in-*

371. Apart from the escaping-ball cases, which I discuss in the next subsection, *see infra* pp. 579–582, I found only one stranger case in which a court refused to balance. In *H. & A. Scott v. J. Mackenzie Stewart Co.*, 1972 S.L.T. (Notes) 69, the defendant stored jute in its warehouse without leaving space between the jute bales and supporting pillars. *Id.* As a result of a fire in the warehouse, the jute expanded, causing structural damage to the warehouse that temporarily forced the plaintiffs to shut down their next-door jute mill. *Id.* In holding that the defendants were liable in negligence, the trial judge (Lord Robertson) said:

> It was submitted on behalf of the defenders that on the evidence the risk was minimal and that they were therefore entitled to balance other considerations, such as economic advantage. I consider, however, on the evidence that the risk was not minimal, but obvious, and that the precaution was both proper and obvious. The economic disadvantage to the defenders was not, in my opinion, established in relation to the pillars. In any event, the defenders were not entitled to put their neighbours at risk because of an economic disadvantage.

Id.

372. [1981] 1 Q.B. 599. The House of Lords reversed the decision on other grounds having to do with the limits on recovery of damages for nervous shock. *See* McLoughlin v. O'Brian, [1983] 1 A.C. 410 (appeal taken from Eng.).

> *jured by failure to exercise such reasonable care, must be assumed to conduct the same sort of balancing operation. . . .*[373]

The cases bear out Stephenson's description. For example, in *B (A Child) v. Wynn* a truck hit a boy who ran out in front of a bus.[374] The trial court found the defendant liable on the ground that he should have blown his horn before passing the bus. The Court of Appeal reversed, reasoning that this precaution was too burdensome on drivers.[375] The trial judge in *Saleem v. Drake*[376] had reached the same conclusion a few years earlier in a case in which a child ran in front of a passing car: "if a driver of a car was expected to sound his horn every time there was a child of this sort of age on the pavement, a driver in a residential area will be sounding his horn nearly all the time."[377]

Similarly, in several cases judges have relied on balancing to reject claims that the defendant should have avoided the accident by driving at a slower speed.[378] In *Moore v. Poyner*,[379] for example, the plaintiff claimed that the defendant should have slowed down to 5 m.p.h. because he was aware that children played in the area in which he was driving. Had the defendant reduced his speed to that extent, he could have avoided hitting the plaintiff, who ran out into the road in front of a bus. In the Court of Appeal, Buckley, L.J., said:

> It seems to me that this is a case in which there was an appreciable risk that a child might be masked by the coach and that he might run into the path of the defendant's car; but the likelihood of that happening at the precise moment at which he was passing the coach was so slight that it is not a matter which the defendant ought to have considered to require him to slow down to the extent that I have indicated.[380]

373. Id. at 610 (emphasis added).

374. No. B3/2000/3695, 2001 WL 542213 (C.A. May 11, 2001).

375. *Id.*

376. [1993] P.I.Q.R 129 (C.A.).

377. *Id.* at 133.

378. *See also* Barnes v. Flucker Thomson, 1985 S.L.T. 142, 145 (O.H.) ("It is, no doubt, true, as counsel for the pursuers submitted, that if the defender had been travelling more slowly, the risk of an accident would have been reduced. That is a truism and provides no criterion as to whether, having regard to the duty to exercise reasonable care, the defender drove at a speed which was excessive in the circumstances. . . . In my opinion the pursuers have failed to prove that the defender drove other than at a reasonable speed. Accepting, as counsel submitted that I should, the defender's view that a safe speed at the locus was 20–25 m.p.h., I have reached the conclusion that there is no reliable evidence that she was travelling in excess of that speed."). The speed limit on the road in question was 30 m.p.h. Notice that the plaintiff conceded that 20–25 m.p.h. was reasonable.

379. [1975] R.T.R. 127 (C.A.).

380. *Id.* at 133.

5. *Bolton v. Stone* Cases

The final category of decisions I will discuss involves facts closely resembling those of *Bolton v. Stone*. This small but fascinating group of escaping-balls cases includes, in chronological order, *Hilder v. Associated Portland Cement Manufacturers, Ltd.*,[381] *Lamond v. Glasgow Corp.*,[382] *Miller v. Jackson*,[383] and *Whitefield v. Barton*.[384]

In *Hilder*, the defendants owned a field near a road and permitted boys to play football there. A boy kicked the football over the defendants' wall into the road, where it hit a motorcyclist who was killed in the resulting accident. The trial judge (Ashworth, J.) found for the plaintiff, as follows:

> Although the difficulty of remedial measures was said by LORD REID in *Bolton v. Stone* to be irrelevant on the issue of liability, it is, perhaps, worth stating that, in the present case, it would have been a simple matter to fix wire netting along the low wall separating the Green from King Edward Road, so as to prevent a football from going over the wall unless it was kicked with quite exceptional force. As an alternative, it occurred to me during the trial that the boys might well have been told to kick in the opposite direction; that is to say, away from the road and not towards it. My impression of the two boys, McVeigh and Wood, is that, if any such instructions had been given, they would have complied with them.[385]

In *Lamond*, a golf ball seriously injured a pedestrian who was walking along a public lane bordering a golf course.[386] This was the first actual injury in forty years, but there had been a number of near escapes, and pedestrian traffic on the lane was steady. The trial judge relied on *Bolton* and *Wagon Mound No. 2*, but he did not invoke the "substantial risk" approach, even though the risk was far higher than the risk in *Bolton*. Instead, he proceeded to balance this "real" risk against the difficulty of eliminating it:

> I envisage some ten to fifteen golf balls a day, sometimes more sometimes less on the basis of 200 to 300 potentially dangerous shots being played at the hole each day, being struck out of bounds, over or on to the lane. To my mind such a picture involves a real risk of injury to users of the lane and, in my opinion, it is a real risk which the defenders ought to have had regard to and taken steps to obviate or at least minimise. I accept it that as a matter of law the

381. [1961] 3 All E.R. 709, [1961] 1 W.L.R. 1434 (Q.B.).
382. 1968 S.L.T. 291 (O.H.) (Lord Thompson).
383. [1977] 1 Q.B. 966 (C.A.).
384. [1987] S.C.L.R. 259 (Sheriff Ct.).
385. [1961] 3 All E.R. at 711.
386. 1968 S.L.T. at 291.

> difficulty and expense of dealing with the risk are factors to be taken into account when considering whether the defenders were negligent in not taking precautions against it—*The Wagon Mound No. 2*, per Lord Reid. The pursuer desiderates either a high fence—12 feet was suggested in evidence—or a rearrangement of the course so that players would not normally be required to play on a line so close to the lane. The cost of such a fence would be about £1,300 or thereby. I do not consider such expenditure and the resultant maintenance charges would be an excessive price reasonably to be paid to reduce the risk of balls crossing onto the lane in the circumstances of this case.[387]

In *Whitefield*, a golfer sliced his tee shot into the road, hitting and damaging the plaintiff's car. The plaintiff sued the golf course. The trial court found for the defendant:

> In my opinion, the evidence in this case does not demonstrate, on the balance of probabilities, that the risk of damage or injury was material. In that respect, I find support from what was said by Lord Reid in the case of Bolton v Stone at p 867. It seems to me that to require the second defenders to erect at considerable expense a fence such as exists at the "Road Hole" at St Andrews or to redesign the hole (which would not, on the evidence, be possible), is to require of them a standard which the law does not demand.[388]

On appeal, the principal sheriff reversed. After discussing *Bolton* and *Wagon Mound No. 2*, he concluded that the defendants were liable because there was a "real" risk in this case. Although he made no finding that the risk was substantial, in substance he appeared to employ the substantial risk approach, and plainly refused to balance:

> If, as appears to be the case, the cost of erecting a wire fence along the length of the fourth fairway would be prohibitive, and it is thought to be too difficult to alter the layout of the hole, then I should have thought that the second defender could insure against the risk of a similar accident occurring in the future for a comparatively small sum.[389]

I have left the most important case for last. In *Miller v. Jackson*, a divided Court of Appeal denied the plaintiffs' request for an injunction ordering the Lintz Cricket Club to cease playing cricket on its pitch adjacent to their house. The plaintiffs had purchased their house two years before the litigation from a developer who had recently built a number of houses next to the cricket field. Cricket balls had repeatedly hit their house and entered their garden. The

387. *Id.* at 293.
388. Whitefield v. Barton, [1987] S.C.L.R. 259 (Sheriff Ct.).
389. *Id.*

defendants, who had played cricket at this location for some seventy years, had erected a 16-foot high fence since the plaintiffs moved in, which the defendants claimed minimized the problem, and in addition offered to pay for any damages to the plaintiffs' property that might occasionally occur.[390]

On these facts, Geoffrey Lane, L.J., and Cumming-Bruce, L.J., concluded that the defendants were negligent, while Lord Denning argued that they were not. But Cumming-Bruce agreed with Lord Denning that it would be inequitable to enjoin the cricket club from playing cricket, and therefore the Court of Appeal ruled in the defendants' favor. Superficially, Geoffrey Lane accepted that "the risk must be balanced against the measures which are necessary to eliminate it and against what the defendants can do to prevent accidents from happening."[391] But his judgment seems in spirit quite close to the substantial risk approach. As he put it, in addition to being reasonably foreseeable, "[t]he risk of injury to person and property is so great that on each occasion when a ball comes over the fence and causes damage to the plaintiffs, the defendants are guilty of negligence."[392]

Remarkably, only Lord Denning discussed what he termed "the dictum of Lord Reid" in *Bolton* that "'[i]f cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all.'"[393] Denning "would agree with that saying if the houses or road was there first," but not "when the cricket ground has been there for 70 years and the houses are newly built at the very edge of it."[394] He stressed how difficult it would be for the cricket club to move,[395] and stressed the "*public* interest . . . in protecting the environment by preserving our playing fields in the face of mounting development, and . . . enabling our youth to enjoy all the benefits of outdoor games, such as cricket and football."[396]

What is one to make of these cases? It seems clear that substantial risk intuitions are appealing to some judges in escaping-ball cases. But it is also clear that other judges balance even in this context. Perhaps most revealingly, even the judges who seem inclined to apply

390. [1977] 1 Q.B. 966, 968–70 (C.A.).
391. *Id.* at 985.
392. *Id.*
393. *Id.* at 977.
394. *Id.* at 977–78.
395. *Id.* at 981.
396. *Id.* at 981–82.

the substantial risk approach in this context do not see in *Bolton* a clear rule of law authorizing them to do so. In other words, Lord Reid's substantial risk dictum is not settled law even in cases that are factually indistinguishable from *Bolton*.

* * *

The overall impression I am left with is that the cost-benefit balancing approach—in one of its various manifestations—applies across a very wide field of English negligence cases, including those (such as the duty of an occupier to trespassers) in which the standard of care is modified for equitable reasons. Colman, J.'s formulation in *Walker v. Northumberland County Council*[397] is unusual—but I think accurate—in describing the balancing test in terms that have *universal* application to negligence cases:

> It is reasonably clear from the authorities that once a duty of care has been established the standard of care required for the performance of that duty must be measured against the yardstick of reasonable conduct on the part of a person in the position of that person who owes the duty. The law does not impose upon him the duty of an insurer against all injury or damage caused by him, however unlikely or unexpected and whatever the practical difficulties of guarding against it. It calls for no more than a reasonable response, what is reasonable being measured by the nature of the neighbourhood relationship, the magnitude of the risk of injury which was reasonably foreseeable, the seriousness of the consequence for the person to whom the duty is owed of the risk eventuating and the cost and practicability of preventing the risk.[398]

CONCLUSION

Let me conclude by summarizing both the findings I believe this study of English negligence law warrants, and some of the related questions that remain unanswered (and in some instances perhaps unanswerable). Assuming the defendant owed the plaintiff a duty of reasonable care, the first question is whether the risk was reasonably foreseeable. Here the broader version of reasonable foreseeability championed by Lord Reid is frequently used. Yet one occasionally encounters cases in which judges choose to apply the older judgments

397. [1995] P.I.Q.R. P521 (Q.B.D.). The facts of *Walker* involved a social worker who had suffered two work-related nervous breakdowns. The judge found in his favor.

398. *Id.* at P533. This formulation suggests that the way in which the Hand Formula balance is struck depends on the nature of the relationship between injurer and victim. It thus confirms that (as Professor Wright argues) the nature of the relationship is a factor in the application of the negligence standard. Yet it also illustrates, contra Wright, how the relational focus complements balancing rather than supplanting it.

suggesting that only likely risks are reasonably foreseeable.[399] Overall, however, the not-reasonably-foreseeable defense, while hardly moribund, enables only a small percentage of defendants to evade scrutiny of whether they took reasonable care.[400]

If the risk is reasonably foreseeable, then the question of avoidability—that is, whether the risk was avoidable by reasonable care—becomes decisive. Here, as in American negligence law, the reasonable person standard is the first-cut source of content for the duty of reasonable care. Consequently, notwithstanding its practical and doctrinal importance, the balancing of costs and benefits is in an important sense a *derivative* norm in English negligence law. Specifically, it derives from the reasonable person standard: reasonable persons, the argument goes, consider the burdens and disadvantages of precautions when deciding how far to go in eliminating foreseeable risks to others.

Precisely because it is derivative, the balancing approach can be bypassed by a judicial finding that is couched directly in terms of what a reasonable person would or would not have done.[401] The upshot is that cost-benefit balancing coexists—on the whole, remarkably peacefully—in English negligence law with what one might call the "imaginative" use of the reasonable person as a device for determining how the defendant ought to have behaved in the circumstances. English judges who favor balancing are free to balance, and English judges who distrust balancing are free simply to ask whether a reasonably careful person would have avoided the risk.[402]

Thus, Landes and Posner are wrong insofar as they suggest that cost-benefit balancing has simply supplanted the reasonable person—or, alternatively, that when judges (or juries) apply the reason-

399. *See, e.g.*, Champion v. London Fire and Civil Def. Auth., (C.A. 1991) (relying on *Muir* and *Bolton* in finding that a risk was not reasonably foreseeable) (Transcript: Association, Nov. 22, 1991, available on Lexis in UK Cases, Combined Courts database).

400. *See, e.g.*, Foster v. Maguire, [2001] E.W.C.A. 273 (C.A.) (reversing trial judge's finding that the risk created by defendant's conduct in parking a van on a cycleway was not reasonably foreseeable).

401. *See* Wooldridge v. Sumner, [1963] 2 Q.B. 43, 66–67 (C.A. 1962) (Diplock, L.J.) ("What is reasonable care in a particular circumstance is a jury question and where, as in a case like this, there is no direct guidance or hindrance from authority it may be answered by inquiring whether the ordinary reasonable man would say that in all the circumstances the defendant's conduct was blameworthy.").

402. To be sure, imaginative use of the reasonable person standard is not inherently inconsistent with balancing—most obviously because fact finders may imagine a reasonable person who is a balancer. *See* Gilles, *supra* note 1, at 1039–41. But the subset of judges who distrust balancing are more likely to imagine a reasonable person who does everything practicable to avoid creating substantial risks of harm to others.

able person standard, they should be presumed to engage in implicit cost-benefit analysis.[403] Conversely, however, Weinrib and Wright are wrong to treat cost-benefit balancing as an exceptional and marginal feature of English negligence law. Cost-benefit balancing is far more widespread and important than the substantial risk approach Weinrib and (to a lesser extent) Wright endorse.

Indeed, in the context of workplace accidents, cost-benefit balancing has become the normal method of applying the reasonable person standard. In other types of accident cases, judges seem comparatively more likely to evaluate untaken precautions by simply imagining what a reasonable person would have done. Yet as the cases presented in Part IV attest, English judges have employed cost-benefit balancing in a wide range of contexts. And I have found *no* context in which cost-benefit balancing is forbidden.

In making regular, and in some contexts routine, use of cost-benefit balancing, however, the English judges have not adopted a Posnerian interpretation of the Hand Formula as calling for razor's-edge balancing of costs and benefits. Under the English balancing approach, actors must take all "reasonably practicable" precautions to guard against reasonably foreseeable risks.[404] What is reasonably practicable depends on balancing the severity of the risk (PL) against the burden of avoiding it (B). But in conducting that balancing, there is no rule that the judge is to decide for the defendant if the costs of avoidance are found to be even a tiny bit larger than its benefits. Indeed, I have yet to come across a judicial statement to that effect. The "mood" in which English judges balance seems more akin to the

403. *See* LANDES & POSNER, *supra* note 20, at 96 (asserting that the meaning of negligence is "epitomized by the Hand Formula").

404. Many cases essentially equate the common law duty to take reasonable care with the duty to take reasonably practicable precautions. In addition to the cases discussed in Parts II & III, see, for example, *Hughes v. Lord Advocate*, [1963] A.C. 837, 848 (appeal taken from Scot.) (Lord Jenkins) (stating that defendants owed a common-law "duty to see that . . . 'neighbours,' in the language of *Donoghue v. Stevenson*, were so far as reasonably practicable protected"); *Gibson v. British Insulated Callenders Constr. Corp.*, 1973 S.L.T. 2, 7 (H.L. 1972) (Lord Diplock) (arguing that the statutory duty to keep the workplace safe so far as reasonably practicable "[i]n substance . . . does no more than provide a penal sanction for a breach of what would have been the employer's duty at common law"); and *Ogwo v. Taylor*, [1988] 1 A.C. 431, 445 (Lord Bridge) (arguing that the negligent defendant should have foreseen that "firemen would use their skills to do whatever was both necessary and reasonably practicable to extinguish the fire").

404. *See, e.g.*, Hawkes v. London Borough of Southwark (C.A. 1998) (Aldous, L.J.) (applying the disproportionate-cost test) (Transcript: Smith Bernal, Feb. 20, 1998, available on Lexis in UK Cases, Combined Courts database).

disproportionate-cost test that continues to be used to implement the statutory "reasonably practicable" defense.[405]

Yet it would be an exaggeration to claim that English judges routinely make explicit use of the disproportionate-cost test in negligence cases at common law. One occasionally encounters disproportionate-cost language in a common-law negligence case,[406] but for the most part the judges simply speak of balancing in general and qualitative terms. The point is further muddied by the fact that the defendant bears the burden of proof on the statutory "reasonably practicable" defense,[407] whereas the plaintiff bears the burden of proving negligence at common law. Perhaps most puzzling of all, there is no debate on the subject, indeed no recognition that there is even an unsettled question here.

How can this be, and what does it mean? I am inclined to infer that there just isn't that much at stake. Because it requires that the risk be "insignificant" as compared to the "sacrifice," defendants are somewhat less likely to prevail under the disproportionate-cost test than under a razor's-edge balancing test. But given that the balancing is being done intuitively and qualitatively, the difference may not be all that significant.[408]

English cost-benefit balancing also departs from the Posnerian model in another way. Whereas for Posner the Hand Formula factors are to be quantified in terms of willingness-to-pay, there is no indication that English judges are thinking along those lines. Again, however, it is not as if there is an explicit consensus in favor of some other approach to the evaluation of costs and benefits. Judges occasionally refer to social costs, and they occasionally refer to social norms, such as that pecuniary costs are of relatively little weight when

405. In this connection, it may be also appropriate to give some weight to the inference that, because "reasonably practicable" means "not disproportionately costly" in safety statutes, it should have the same meaning when used (as it not infrequently is) as a shorthand for the duty of reasonable care at common law.

406. *See, e.g.*, Solloway v. Hampshire County Council, [1981] E.G.D. 904 (C.A.) (Sir David Cairns) ("If, however, it could be said to be a reasonably foreseeable risk . . . the cost and inconvenience of taking any effective steps to remove it or reduce it would be quite out of proportion to that risk."); Hurley v. J. Sanders & Co., [1955] 1 Lloyd's Rep. 199, 204 (Liverpool Assizes) (finding defendant employer negligent at common law because evidence did not show that "the extra cost was out of proportion to the risk").

407. *See, e.g.*, Austin Rover Group Ltd. v. Her Majesty's Inspector of Factories [1990] 1 A.C. 619, 625 (1989) (appeal taken from Eng.) (Lord Goff).

408. The same cannot be said about the difference between balancing approaches and the substantial risk approach because that difference should be outcome-determinative in a significant number of cases.

compared to the risk of serious injury or death.[409] But I have found no self-conscious discussion of how judges should go about balancing costs and benefits.

Moreover, English lawyers do not offer—and English judges do not invite—*evidence* about how valuable the competing interests in negligence cases are. Although the question certainly deserves further study, English judges seem just as reluctant as their American counterparts to make the evaluative dimension of balancing explicit. Their value judgments—and the process whereby they arrive at them—typically remain implicit in informal, qualitative assessments of the costs and benefits of untaken precautions.[410] Because the English negligence standard is applied by judges who give reasons for their decisions, one at least gets a comparatively good look at how they find, structure, and analyze the facts. But when it comes to the values that determine whether the facts amount to negligence, the judges' motto might almost be "the less said, the better." Thus, although the English have taken the jury out of the courtroom in negligence cases, they have not taken (and perhaps they do not want to take) the juror out of the judge. Cost-benefit balancing has emerged as a major feature of English negligence law, and there is no indication that this development is an impermanent one. But cost-benefit balancing has also remained an informal—one is tempted to say rudimentary—technique; and that too may be a permanent condition.

409. See, for example, *Watt v. Hertfordshire County Council*, [1954] 2 All E.R. 368 (C.A.), in which Denning, L.J., having once again endorsed balancing in sweeping terms, said:

> If this accident had occurred in a commercial enterprise without any emergency, there could be no doubt that the servant would succeed. But the commercial end to make profit is very different from the human end to save life or limb. The saving of life or limb justifies taking considerable risk. . . .

Id. at 371.

410. Often, the application of the balancing approach manages to avoid actually balancing the costs and benefits of untaken precautions. Because judges have the option of using the balancing approach, plaintiffs avoid reliance on precautions that are very expensive or have other large disadvantages. In turn, when the plaintiff commits to a particular untaken precaution, defendants try to identify *all* the disadvantages of the plaintiff's chosen solution: sometimes the focus is on the direct expense of taking the precaution in all similar situations, but defendants also routinely argue that the precaution is ineffective (it wouldn't avoid accidents like this one), and that it is counterproductive (it creates new accident risks).